

**SUPREME COURT OF NIGERIA**  
FRIDAY 26TH APRIL, 2002. SC. 248/2000  
**CORAM:- A. B. WALI, M. E. OGUNDARE, S. U. ONU,**  
**U. A. KALGO, E. O. AYOOLA, JJSC**

1. MAERSK LINE  
2. MAERSK NIGERIA LTD. .... APPELLANTS  
AND  
1. ADDIDE INVESTMENTS LTD.  
2. ABEX TRADING LIMITED ..... RESPONDENTS

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ACTIONS - Juristic personality - Amendment of writ - Trial court wrongly exercised its power under O. 32 - Because plaintiffs did not apply for amendment - Even after objection was raised to 1<sup>st</sup> defendant being sued in the name of a non juristic person (H1)

COURTS - Writ - Amendment suo motu by court - Must be exercised judicially and judiciously - And must not be exercised in vacuo - But be based on relevant materials placed before court by parties (H2)

COURTS - Writ - Amendment - Limit - Although the court is empowered by FHC Rules O. 32 to amend suo motu - Yet such is rarely exercised - And court is not to force unsolicited amendments upon parties (H3)

EVIDENCE - Uncontroverted evidence - Effect - Proceedings of 29/01/96 is deemed to have been taken in chambers - As plaintiffs did not dispute same - And being an invalid one - Order made thereat is null and void (H4)

**FACTS**

Addide Investment Ltd plaintiff/1<sup>st</sup> respondent commenced this action at the Federal High Court against defendants/appellants, claiming inter alia the sum of 80,000 US dollars being the value of 400 bags of gum Arabic that were destroyed due to appellants' negligence. It also claimed for 50,000 US dollars being damages for appellants' breach of the contract by failure to keep to the terms

therein. On being served with the writ of summons, appellants moved the court for an order striking out the name of 1<sup>st</sup> appellant from the suit on the ground that the said party being not a juristic person lacks the capacity to sue or be sued.

In his ruling, the learned trial Chief Judge Belgore C. J. held he did not find that the name “Maersk Line” is not a juristic name and that appellants were not misled by 1<sup>st</sup> respondent’s usage of the name (being a trade name) which appellant is known in his business. The learned Chief Judge proceeded to suo motu order that 1<sup>st</sup> respondent should change 1<sup>st</sup> appellant’s trade name to its real name, pursuant to his (the C. J.’s) power under O. 32 of the Federal High Court Rules 1976. Dissatisfied, appellants appealed against the order of the trial court amending the name of 1<sup>st</sup> appellant to its real name and also contended that the trial court sat in chambers when the ruling was given. In its judgment, the court disagreed with the trial court that a trade name can be used to sue and be sued as a juristic person. The court however held that the trial court properly exercised its powers under the aforementioned Rules. The court also held that appellants did not adduce evidence to show that the trial court sat in chambers. The appeal was therefore dismissed. Aggrieved further, appellants lodged appeal in Supreme Court.

### **ISSUES FOR DETERMINATION**

*“1. Whether the Court of Appeal, having held that the lower court ought to have upheld the objection of the appellants being a non juristic person lacks capacity to sue or be sued, was right to have further held that the provisions of Order 32 of the Federal High Court (Civil Procedure) Rules permits the court to make an amendment suo motu.*

*2. Whether upon a proper interpretation of the provisions of Order 32 of the Federal High Court (Civil Procedures) Rules, 1976, the provisions of the said order can be resorted to in justifying the amendment of a writ by substituting a juristic person for a non-juristic person improperly sued as a party to suit.*

*3. Whether evidence of the fact that the proceedings of the 29th January, 1996, wherein a motion on notice for joinder was heard and granted in chambers in the absence of the appellants and their counsel was not borne out by the record of appeal.”*

**HELD** (Allowing the appeal per majority judgment of **OGUNDARE JSC**, **AYOOLA JSC** dissenting)

*ACTIONS - Juristic personality - Amendment of writ*

**1. The plaintiffs did not apply for amendment even after counsel for the defendants had raised objection to the 1st defendant being sued in the name of a trade mark. Rather, in their counter affidavit they insisted that the 1st defendant was rightly sued. They did not admit there was a misnomer. It was in these circumstances that the learned trial Chief Judge, suo motu, made an order directing the plaintiffs to amend the name of the 1st defendant “to its real name”. And what that “real name” is does not appear in the ruling of the learned Chief Judge. I think this is a wrong exercise of the power, under order 32, to amend suo motu. (p. 2809 C)**

*COURTS - Writ - Amendment suo motu by court*

**2. The power to amend, like all other judicial powers, must be exercised judicially and judiciously. The power must not be exercised in vacuo but based on relevant materials placed before the court by the parties. In this case, the learned Chief Judge had ruled, though erroneously, that the 1st defendant was a juristic person. Why then the order to amend? (p. 2809 F)**

*COURTS - Writ - Amendment - Limit*

**3. True enough, order 32 empowers the trial court to order an amendment to be made of its own motion. This, however, is a power that is very rarely exercised. In this country, as in England, the function of a court in a civil case, is not inquisitorial. The court’s function is to act as a kind of umpire. And it is not the duty of the court to force upon the parties amendments for which they do not ask.**

**What the learned Chief Judge, with respect to him, appeared to have done in this case was to force an order of amendment on the parties who did not ask for it. And the order is inconsistent with the learned Chief Judge’s finding that the 1st de-**

**fendant was a juristic person. On the authorities, an order of amendment is not just made; reasonable excuse must be given by the offending party why the error was made in the first instance. No such excuse was given in this case and could not have been given having regard to the stance of the plaintiffs.**

**B** (pp. 2809 G/2810 B)

*Uncontroverted evidence - Effect*

**4. The plaintiffs did not at any time controvert the allegation in all these documents that the proceedings of 29th January, 1996 in the Federal High Court were taken in chambers. That allegation being of fact, must be taken as undisputed.**

**D** **That the proceedings of 29th January, 1996 were taken in chambers is a material fact upon which the success of the appeal against the decision taken that day is hinged. That fact was averred in an affidavit before the trial court and in another affidavit filed in the court below. The allegation was also made in the defendants' appellants' brief. The plaintiffs did not controvert the allegation. The allegation must be deemed to have been accepted by them as correct. What further evidential support is the court below looking for?**

**F** **Even at this later stage, the plaintiffs still did not controvert the fact alleged by the defendants that the proceedings of 29th January, 1996 were in chambers. That must be because they knew that the said proceedings were in fact, and in truth, taken in chambers. I think on the materials before it the court below ought to have proceeded on the basis that the proceedings for 29th January, 1996 were taken in chambers. And that being so, the proceedings were clearly invalid. The order made thereat is equally null and void.** (pp. 2812 F/2813 C)

## NOTABLE POINTS OF INTEREST

**H** **AYOOLA JSC** (Dissenting)

**1. Issue of trade name was not introduced by the Chief Judge**

In the leading judgment emphasis was placed on the description of MAESRK LINE as a trade mark without adverting to its description as a trade name as well. As a result, the fact was completely ignored that

a trade mark can also be a trade name. Nothing prevents a business from making its trade name its trademark or vice-versa. It is not correct as stated in the leading judgment that “it was the learned trial Chief Judge that introduced trade name into the matter.” It is fair to the learned trial Chief Judge to point out and emphasise that paragraph 10 of the affidavit sworn by Toyin Akinsanya did introduce trade name into the matter. B

On this appeal nowhere did the appellants challenge the view of the Chief Judge that

“(i) *there is no misconception as to the ‘identity of the defendant;’*” C

“(ii) *from the beginning of the transaction and action the identity of the defendant was known.*”

Let me pause to observe that the identity of a person may be known whereas there is no such certainty about that person’s name. D Misnomer is all about mistake as to name and not mistake about identity. The Chief Judge was therefore on the right track when he stated that there was no mistake as to identity. So the question was: what was the name of the carrier whose identity was known and about whose identity there was no dispute? E

What was the “real name” of the carrier? The Chief Judge did not expressly state it in his order but the parties were at the time he made the order no longer in any doubt as to the “real name” of the carrier. (p. 2818 A) F

## ***2. Supreme Court should avoid technicalities while considering decisions of lower courts***

On these facts, for the reasons which I shall presently fully state I am unable to agree with the conclusion of my learned brothers that the trial Chief Judge and the court below were wrong. When it comes to matters such as this, where the conclusion of the trial Judge and the court below reflected the justice of the matter, well and sufficiently manifested by incontrovertible facts, I think a court such as ours, the supreme appellate court, should be wary of giving even the slightest impression of enthroning superficiality at the expense of real justice. H I venture to suggest that the role which will suit this court in situations such as this is, rather than enlarge what may be conceived to be counsel’s inadequacies in failing to apply for leave to amend, is the

role dictated by the facts when no miscarriage of justice is thereby occasioned. We should turn away from abstractions and insufficiencies and be empirical in our approach to such matters as this where the rules and the inherent powers of the court permit the court to exercise its discretion even on its own. (p. 2819 G)

B

***3. Court has unlimited power of amendment under the FHC Rules O. 32***

In the following pages I intend to show how, the facts and the law, as I understand them, do not support the conclusion that the appeal should be allowed. In so far as there may be the slightest suggestion in the opinion of my learned brothers that the appeal turned on the fact that an application for amendment of the name was not made by the respondents (plaintiffs), I say straightaway that such reasoning is not in consonance with the powers granted to the trial court to amend proceedings suo motu where it deems fit. It is an obvious contradiction to argue that a court cannot exercise its powers of amendment suo motu (where such power is granted) without an application for such relief by a party. That a court may exercise specified powers suo motu in itself implies that neither of the parties has sought the exercise of that power. In this case I do not at all share the view that Or.32 contains any limitation on the power of the court to exercise its discretion on its own other than the limitation that may be dictated by fairness and justice. Or.32 empowers the court to order any proceeding to be amended so as to correct any defect or error. Misnomer is an error

F

However, that a person sued is not a legal person does not preclude the court from amending the title of the action to show the correct name of the party sued if it is shown to the satisfaction of the court that it was a case of misnomer. Such power of amendment is covered by the provisions of Or. 32 and such like enactment. The existence of such power of amendment has been acknowledged in several cases. (pp. 2820 B/2828 D)

H

***4. Appellate court must not ascribe relevance to every document in its record***

All these authorities do not, in my opinion, lead to a proposition that an appellate court should ascribe relevance or materiality to every

document included in a record of appeal merely because they are so included. A test of the relevance and materiality of such material as the affidavit relied on by the appellant in this appeal is whether it was evidence admitted in and relevant to the proceedings in the trial court. Although civil appeals to the Court of Appeal are by way of re-hearing by virtue of Or.3 r 2 of the Court of Appeal Rules, and the Court of Appeal is thereby entitled to re-examine the whole evidence tendered in the trial and also the whole course of the trial as compiled in the record of appeal, materials which have been placed before the trial court but which have not been received as evidence, or rejected, as the case may be, cannot properly be regarded as materials which the appellate court should take cognizance of as evidence. Where, also, a document included in a record of appeal has no bearing on the course of the proceedings which are on appeal before the appellate court, that court will be entitled to ignore it. (p. 2824 G)

### ***5. Court of Appeal does not compile record of appeal***

As to the first reason, when an appellate court grants departure from the rules to enable a party to compile the record of appeal, all that connotes is that the participation of the registrar as prescribed in the rules in the preparation of record of appeal is dispensed with. It does not imply that the Court of Appeal has assumed the function of settling the record so as to determine which documents to include as relevant or material or which to exclude as irrelevant or immaterial. (p. 2825 F)

### ***6. Appellate court does not determine merit of appeal at interlocutory stage***

The second reason, no reasonable tribunal will proceed to determine issues of fact on which a party claims the merit of his appeal depends at the leave stage. It is therefore fruitless and not to be expected that the other party will enter into combat as to facts at that stage. I venture to think that it is on the appeal that the court will have to examine whether there is or there is not evidence on which the parties rely in the appeal. Where a party appreciates that there is no such evidence he can seek leave to adduce it by way of additional evidence in support of a ground of appeal. It will be a dangerous precedent to

hold that an appellate court should in all cases wade through all affidavits filed in interlocutory proceedings to discover evidence on the merits of an appeal. (p. 2825 H)

**7. Court is not bound to uphold an issue merely because same was not challenged**

In my opinion, it is a misconception to hold that because the question whether Belgore, C.J., sat in chambers or not is a question of fact, the question whether what was relied on as evidence of that fact was in law acceptable as such evidence was also a question of fact. In my opinion when the issue is substantially one of law, the appellate court should not decline to consider and pronounce on the correctness of the contention raised by a party merely because the other party who should have responded to the issue had failed to do so. In *Okafor v. Nnaife* (supra) notwithstanding that the respondent did not file a brief at all, this court dismissed the appeal on the appellant's brief alone. Such is a common place occurrence. I hold that there is no general proposition of law that in all cases where one party fails to respond to an issue raised by the other party, the court is bound to uphold the contention of the party who raised the issue, regardless of whether such issue is one of law or not. Each case must depend on its circumstances. (p. 2827 A)

**8. Only legal persons can sue and be sued**

This is an area of our procedural law in which the principles seem well settled. A person who is made a party to an action either as a plaintiff or as a defendant must be a legal person or, if not, a body vested by law with power to sue or be sued.

In *Okechukwu & Sons v. Ndah* (1967) NMLR 368, 370 it was held that "If it is successfully shown that a party to an action is not a legal person, that party should be struck out of the suit, and if such party was expressed to be the plaintiff the action should be struck out." (p. 2828 B)

H

**9. "Trade mark" & "Trade name" – Definitions of**

I think that the point needs be made that there is a distinction between a "trade mark" and a "trade name". Although the learned Chief Judge was clearly in error when he said that "I find it hard to

accept that a trade mark is not a juristic entity”, his opinion cannot be faulted when he said that “name normally includes any designation and if anybody trades by such name and he is known by it, he puts himself out by that name, it cannot be heard if that name was used to describe, to say that name is not his.” While a “trade mark” is a term identifying and distinguishing a business products, a “trade name” is a description of a manufacturer or dealer and applies to business and its good will. A trade name is the “name or title lawfully adopted and used by a particular organization engaged in commerce.” For these definitions see Black’s Law Dictionary (6th Edition) p 14. A trade name attaches to an entity. In this case ‘MAERSK LINE’ attached to a known entity. (p. 2832 D)

### **REPRESENTATION**

Babajide Koku, Esq., for the Appellants D  
Taiwo A. Alakoso, Esq. (Chief E. O. Idowu settled the Brief), for the Respondents

### **CASES REFERRED TO**

Agbonmagbe Bank Ltd. v. General Manager G.B. Ollivant Ltd. (1961) E  
1 All NLR 116  
Emecheta v. Ogueri (1996) 5 NWLR (pt. 447) 227  
Olu of Warri v. Esi (1958) SCNLR 384  
Njemanze v. Shell BP Port Harcourt (1966) 1 ANLR 8  
Ode v. Regd. Trustees of Diocese of Ibadan (1966) 1 ANLR 287 F  
Emecheta v. Ogueri (1996) 5 NWLR (pt. 447) 227  
Fallon v. Calvert (1960) 1 All ER 281  
First African Trust Bank Ltd v. Ezegbu (1994) 9 NWLR (pt. 367) 149  
Okangwu v. NNPC (1989) 4 NWLR (pt. 115) 309 G  
Nig. Arab Bank Ltd. v. Barri Engineering Nig. Ltd (1995) 8 NWLR  
(pt. 413) 257  
Fawehinmi v. NBA (No.2) (1989) 2 NWLR (pt. 105) 558  
Ibodo v Enarofia (1980) 5 -7 SC 42  
Okafor v. Nnaife (1987) 4 NWLR (pt. 64) 129 H  
Chevron (Nig.) Ltd. v. Onwuegbula (1996) 3 NWLR (pt. 437) 404  
Ogele v. Nuhu (1997) 10 NWLR (pt. 523) 109

**STATUTES & RULES REFERRED TO**

Constitution of Federal Republic of Nigeria, s. 33(3)

Kwara State Area Courts Edict 1967, s. 29

Federal High Court Act Cap. 134, s. 9(2)

Federal High Court Rules Cap 134 LFN 1990, O. 32

B Court of Appeal Rules, O. 3 r. 2

**BOOK REFERRED TO**

Black's Law Dictionary 6th Ed. p 14

C

**LEAD JUDGMENT BY OGUNDARE JSC**

This appeal arose out of two interlocutory decisions of the Federal High Court. Addide Investments Ltd, as plaintiff, and is hereinafter referred to as plaintiff, had claimed from MAERSK LINE and D MAERSK NIGERIA LIMITED as defendants:

E “1. *The sum of 80,000 US dollars being the value of the 400 bags of Gum Arabic grade one, destroyed due to the defendants negligence in allowing water to soak the goods which had been loaded dry and sound, into the container numbered APMU2730074, “while being shipped on board the vessel MV “CHRISTIAN MAERSK 9506”, under a contract of carriage of goods by sea, evidenced by bill of lading No. LOSE 11576, issued and dated in Apapa, Lagos, on the 23rd of February, 1995.*

F “2. *The sum of 50,000 US dollars being the amount of damages claimed against the defendants for the latter’s breach of contract, by their failure to keep the terms of same, that is to say, that the goods be delivered in the same sound and merchantable condition in which they were loaded on board the vessel MV “CHRISTIAN MAERSK 9506”.*

G “3. *The cost borne by the plaintiff for the increased charges paid for the extra time it took to discharge the goods at the port of destination owing to their damaged state. The said sum amount to 92 US dollars.*

H “4. *The sum of 100,000 US dollars for the loss the plaintiff suffered in being deprived of the benefit that would have accrued to him had the goods been sold at the prevailing market rate of 5 US dollars per kilo. The total value of accruing profit that the plaintiff thereupon lost and which is thus claimed against the defendant is*

20,000 US dollars.

5. *Interest at the rate of 6% per annum from the date of default in delivery of the said goods in a sound and merchantable condition, till the date of judgment and thereafter 8% per annum, till the whole sum is fully liquidated or repaid.*

6. *The sum of 100,000 US dollars as general damages.*” B

On being served with the writ of summons, the defendants through their counsel, moved the trial court for an order -

“striking out the name of the 1st defendant from the suit and for such further order or orders as this honourable court may deem just or appropriate AND TAKE FURTHER NOTICE that the ground for this application is that the 1st defendant, Maersk Line being not a juristic entity lacks the capacity to sue or be sued.” C

In the affidavit of Joseph Olawuyi in support of the motion, the deponent deposed, inter alia, as follows:

“4. That Maersk Line is not a juristic entity but a trademark. D

5. That the carrier is the Dampskibsselskabet of 1912, Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg as carrier which is the steamship company of 1912 and steamship company Svendborg. E

6. That attached and marked exhibit “JO1” is a copy of the bill of lading.

7. That I am advised by Babajide Koku and I verily believe that the 1st defendant lacks capacity to sue or be sued.” F

In a counter affidavit in opposition to the motion Toyin Akinsanya, a legal practitioner in the firm of legal practitioners acting for the plaintiff, deposed as hereunder:

“9. That the defendants have disclosed in their affidavit in support of the motion that the carrier is the Dampskibsselskabet Svendborg which is the steamship company of 1912 and steamship company Svendborg which is the owner of the trademark MAERSK. G

10. That the 1st defendant is a shipping company whose trade name and business contacts, subsidiaries and bill of lading bear the name MAERSK LINE with an international reputation and there could not (be) any misrepresentation as to who is the carrier of the Gum Arabic. Maersk Line is a notorious trade mark and trade under the Madrid Convention. H

11. That the bill of lading issued to the plaintiff in respect of

*this case bears the name MAERSK LINE and in fact the 1st defendant's London subsidiary letter head paper clearly shows that MAERSK LINE is its registered name. The copies of the said bill of lading and MAERSK LINE letter head paper are hereby attached and marked exhibit TA1.*

B 12. *That the prayer now being sought by the defendants/ap-  
plicant is clearly a delay tactic which is an attempt to set the hands of  
the clock backward and deny the plaintiffs the right to the expedi-  
tious hearing of the suit.*

C 15. *That the defendants application be struck out on the  
grounds that it is an abuse of the process of the court and lacks merit  
in its entirety*" (italics are mine for emphasis).

D There is a further affidavit by one Victor Omeike, an officer  
in the employment of the 2nd defendant. To this affidavit were an-  
nexed two documents in proof of the fact that MAERSK LINE and  
D LOGO is a trade mark.

There was a second motion filed by the plaintiffs seeking the  
following orders -

E "1. *An order of court for the joinder of the 3rd, 4th and 5th  
defendants as defendants in this suit.*

F 2. *An order of court granting leave to the plaintiffs/applicants  
to amend their particulars of claim and to deem as properly filed and  
served the amended particulars of claim annexed hereto and marked  
exhibit TA1.*

F 3. *An order deeming as properly filed and served all motions  
and court processes previously filed and served in this matter on the  
3rd, 4th and 5th defendants more particularly the motion dated 9th  
day of February, 1996."*

Upon the following grounds:

G "(a) *The defendant's counsel's contention that the 1st defen-  
dant MAERSK LINE, is not a juristic person.*

(b) *The 3rd, 4th and 5th defendants are necessary parties to  
whom the plaintiffs have claim.*

H (c) *That the matter before the court may not be successfully  
resolved without the 3rd, 4th and 5th defendants being made par-  
ties.*

(d) *The cause or matter is liable to be defeated by the non-  
joinder of the 3rd, 4th and 5th defendants.*

(e) *The 3rd, 4th and 5th defendants are parties who ought*

*to have been joined as parties in the first instance.*

*(f) The 3rd, 4th and 5th defendants are parties whose presence are necessary as parties to the action.*

*(g) The joinder of the 3rd, 4th and 5th defendants is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter.* B

*(h) That the joinder of the 3rd, 4th and 5th defendants will make them to be bound by the result of the suit."*

The 3 defendants sought to be joined are:

*"1. THE OWNERS OF THE VESSEL "CHRISTIAN MAERSK"* C

*2. THE MASTER OF THE VESSEL "CHRISTIAN MAERSK"*

*3. DAMPSKIBSELSSKABET AT 1912, AKTIESELSKAB AND AKTIESELSSKABET"*

In the supporting affidavit Toyin Akinsanya, a legal practitioner deposited thus: D

*"3. The plaintiffs instituted this action against the 1st and 2nd defendants in their registered name with which they carry on business and by which they are generally known and referred to by their business associates, partners and customers.* E

*4. That the plaintiffs/applicants brought a motion dated 9th February, 1996 for an order that the defendants/respondents furnish security/guarantee or alternatively that the caveat imposed on the plaintiffs at the instance of the defendants be lifted which was to come up for argument on 9th April, 1996.* F

*5. That surprisingly, counsel for the defendants filed and served on the plaintiff's counsel an application dated 4th day of April, 1996, asking for an order striking out the name of the first defendant from the suit on the ground that the said first defendant is not a juristic person.* G

*6. That because of this new development, it is now necessary that the 3rd, 4th and 5th defendants be joined as defendants from whom the plaintiffs can make claims.*

*7. That it is also necessary for the plaintiffs to amend their particulars of claim to conform with the new development.* H

*8. The amended particulars of claim is hereby, annexed and marked exhibit TA1.*

*9. That the first defendant, MAERSK Line is a liner company*

*that can sue and be sued and the 2nd defendant is a subsidiary/ associated company of the 1st defendant.*

10. That 1st defendant did not raise the issue of its status until a motion dated 9th February, 1996, was brought wherein the plaintiffs prayed this honourable court to order the 1st defendant to furnish a bank guarantee in the sum of USD 350,000.00 (Three hundred and fifty thousand U.S\$) or in the alternative, that an order of caveat imposed on the plaintiffs at the defendant's instance be lifted.

11. That the defendants have a company in the United Kingdom with its letter head called Maersk Line, a subsidiary of the 1st defendant (a copy of which is herein attached marked exhibit TA2).

12. That in order not to prolong the case, the plaintiffs have deemed it fit to join the 3rd, 4th and 5th defendants as parties to this suit with a view to putting an end to any and or all technicalities which the defendants may wish to employ in order to further delay the proceedings.

13. That the joinder of the 3rd, 4th and 5th defendants is necessary in order to enable the court effectually and completely adjudicate and settle all the questions involved in the suit.

14. That the joinder of the 3rd, 4th and 5th defendants will make them to be bound by the result of the suit.

15. That it is just and equitable to join the three (3) defendants." (italics are mine)

The two motions came up for hearing together before Belgore, CJ. In his ruling given on 27th September, 1996, the learned Chief Judge found:

"1. In his submission, counsel for the plaintiff stated that the defendants were not denying that the vessel that carried the relevant goods was not Maersk Line as shown in the Bill of Lading which they tendered as exh. JO1, and that they made anybody dealing with 1st defendant to believe that the vessel's name is Maersk Line. The defendant had given themselves out as such.

The trade mark as defined in law is a mark used for goods for the purpose of indicating a connection in the course of trade between the goods or chattel and some people having the right as proprietor or as a registered user to use the mark whether with or without any indication of the identity of that person. With this definition I

*find it hard to accept that a trade mark is not a juristic entity.”*

2. *“I do not find that the Maersk Line which the defendant used in the Bill of Lading - exh. JO1 is not a juristic name or that it does in anyway cause a doubt to whom it refers to than the defendant.”*

3. *“At any rate, leave to correct the name of a party can be sort (sic) and given in motion to amend pleadings under order 32 of the rules of this court. The effect of such an amendment might be to substitute a new party or new name once the court is satisfied that the mistake was genuine and was not misleading or such as to cause a reasonable doubt as to the identity of the person intended.”*

4. *“In this case, I find the defendant was not misled by the plaintiff using its trade name which the defendant is known in his business. Order 32 empowers the court upon his own motion to effect an amendment and I found this is a proper case to invoke the power.”*

On these findings he ordered “the plaintiff to change the plaintiff’s (sic) trade name to its real name.

On the second motion, the learned Chief Judge said:

*“The issue in this case is whether the new parties to be joined in this suit will lose their rights of limitation. This is the view in the case of Cospania Colombia de Seguros v. Pacific Steam Navigation Co. cited where cargo owner, therefore, wanted to sue the demise charterers, but the contract incorporated under Article III Rule 6 of the Hague Rules, which allowed one year from the date of delivery of the goods for an action to be brought. To join the demise charterers at this later stage would therefore deprive them of their time bar defence under the Hague Rules. It was held that cargo owners believed honestly and reasonably throughout the period that the ship owners were the people who accepted responsibility and therefore the demise charterers were allowed to be joined. Here in this case, there is no misconception as to the identity of the defendant. The name whether trade name or actual name was used and from the beginning of the transaction and action the identity of the defendant was known. I do not think the cases cited fall in all fours with the present case. This application is refused.”*

The defendants appealed against the order of the trial court amending the name of the 1st defendant “to its real name”.

Plaintiffs, however, did not appeal against the refusal of their own motion.

Earlier on 2nd January, 1996, the plaintiff had filed a motion on notice praying the court for -

B *“An order amending the particulars of claim to include Abex Trading Limited being the consignee as the 2nd plaintiff in this suit.”*

In the affidavit in support of the motion, Taiwo Afonja, a legal practitioner in the firm of solicitors appearing for the plaintiff deposed thus:

C *“3. That the plaintiffs/applicants have filed their particulars of claim in this honourable court.*

*4. That at the time of filing the said document, Abex Trading Limited was not included in the said document.*

D *5. That I am informed by Chief Idowu of counsel and I verify believe him, that it is necessary to include the said Abex Trading Limited as 2nd defendants/applicants in this matter.*

*6. That further to the above it is necessary to include the said Abex Trading in this matter as they are consignees of the goods which are the subject matter of this suit.*

E *7. That it is in the interest of justice that Abex Trading be included as 2nd plaintiff/applicants in this matter.”*

The court’s minutes of the proceedings of the hearing of this motion as on page 155 of the record of appeal before us and they read:

F *“BETWEEN:  
ADDIDE INVESTMENTS LTD.*

*vs.*

*1. MAERSK LINE*

G *2. MAERSK NIGERIA LTD.*

*Chief E. O. Idowu Esq. for the plaintiff.*

*Court: The defendants are absent and unrepresented.*

H *Idowu: I saw my learned friend Mr. Koku who told me that he would be engaged in another matter in another court today. He said he would not oppose the motion. The motion dated 21st December, 1995 is for amendment of particulars of claim as put in the motion.*

*Court: The application is granted. The particulars of claim is to be amended to include Abex Trading Ltd, the consignee as the 2nd plaintiff. “*

The defendants by a motion on notice moved the trial court for an order -

*“setting aside the order of this honourable court made on the 29th day of January 1996 for the joinder of Abex Limited as the 2nd plaintiff in this suit...”*

In the affidavit in support of this motion one Joseph Olawuyi B  
deposed as hereunder:

*“3. That on the 29th of January, 1996, this honourable court made an order for the joinder of Abex Trading Limited as plaintiff in this suit in the absence of the defendant and its counsel.*

*4. That I am informed by Mr. Quasim Odunmbaku of counsel C  
and I verily believe him that on the 26th of January, 1996 he was given the case file on this matter with instructions to attend to the same in court on the 29th of January, 1996 as leading counsel in the matter. Mr. Babajide Koku would otherwise be engaged in the Court D  
of Appeal, Lagos.*

*5. That this matter was hitherto on the 29th of January, 1996 listed before the Honourable Justice Aina, who did on the 4th of December, 1995, as a result of the non attendance of the plaintiff in court adjourned (sic) the same to the 31st of January, 1996 for mention E  
to enable the parties take dates for the completion of pleadings.*

*6. That subsequently, the defendant was served with a motion to join Abex Trading Limited as plaintiff in this action, which was to come up for mention on the 29th day of January, 1996.*

*7. That Mr. Quasim Odunmbaku informed me and I verily F  
believe him that on the 29th day of January, 1996, he was duly present at the Honourable Justice Aina’s court to oppose the motion on the instructions of the defendants herein.*

*8. That the said Mr. Quasim Odunmbaku informed me and G  
I verily believe him that on the said date, the matter was not listed before the Honourable Justice Aina’s court, and as a result of the delay in the production of the official cause list for the week, he could not ascertain to which court the matter had been transferred on time.*

*9. That consequently, by the time he discovered that the H  
matter was to come up before the Honourable Justice Belgore, the matter had in fact been heard and the order for joinder made in chambers, as the court room was on that date used by the Honourable Justice Bello and the Honourable Justice Belgore had to*

*sit in chambers.*

10. *That the defendants had every intention to oppose the application and had in fact briefed counsel to oppose same.*

11. *That it is in the interest of justice that this application be granted and that the order for joinder made on the 29th of January”*  
B *1996 be set aside.”*

There was a counter affidavit sworn to by one Bridget Gold in which she deposed, inter alia, as follows:

C *“3. I am informed by Chief E.O.A. Idowu and I verily believe him that prior to the filing of the motion, he had notified and discussed with Mr. Babajide Koku the issue of the joining of Abex Trading Limited as second plaintiff because they are the consignees of the damaged Gum Arabic. There were three discussions on the issue and the first of such discussion was in December at the National Judicial*  
D *Institute Workshop for Judges. The other two occasions were in Lagos.*

E *4. I am further informed by Chief E.O.A. Idowu and I verily believe him that Mr. Babajide Koku affirmed to Chief Idowu that Abex Trading Limited could be joined as second plaintiffs since the rules of court makes provisions for the amendment of particulars of claim and joinder of parties where the parties have the same interest.*

F *5. I am further informed by Chief E.O.A. Idowu and I verily believe him that he relied on Mr. Babajide Koku’s seemingly positive indication that there would be nothing to gain by opposing such motion for joinder.*

G *6. I am informed by Chief E.O.A. Idowu and I verily believe him that prior to the 29th of January, 1996, he had a telephone conversation with Mr. Babajide Koku wherein Mr. Koku was informed that as a result of the transfer of Dr. Justice Aina to Port-Harcourt the case had now been transferred to court no. 1.*

H *7. That on the 29th of January, 1996, when the motion came before the court, I was informed by Chief E.O.A. Idowu and I verily believe him that he informed this honourable court that Mr. Babajide Koku was not opposing the motion, and he honestly and innocently and faithfully believed that, that was the understanding reached between the parties as a result of their various discussions.*

*8. That I was informed by Chief E.O.A. Idowu and I verily believe him that pleadings have not been ordered in this suit and the defendants are not in any way prejudiced by the order of the court*

of 29th January, 1996.

9. That I was informed by Chief E.O.A. Idowu and I verily believe him that the defendants tactics in indicating an intention to oppose the application is an effort to delay the timeous trial of this case.

10. That I was informed by Chief E.O.A. Idowu and I verify<sup>B</sup> believe him that the joinder of Abex Trading Limited does not in any way affect the defendants' case.

11. That I was informed by Chief E.O.A. Idowu and I verily believe him that the defendants, not having furnished any security or<sup>C</sup> guarantee are interested in a prolonged trial. If the defendants application is granted it would entail getting a new date to move the motion for joinder, and with the attendant consequences, that the case will be delayed by at least another two to three months.

12. That I was informed by Chief E.O.A. Idowu and I verify<sup>D</sup> believe him that in answer to paragraphs 7 and 8 of the defendants affidavit, the defendant's counsel did not exercise sufficient diligence and skill on the 29th January 1996, because if he cared to check from the court list or from the registrar or at the registry, he would have been informed that the case had been transferred to court 1.<sup>E</sup> The counsel ought to have known that his case was not in Dr. Justice Aina's court, when he failed to see his clients name in the counsel signing register sheet which is available at every court in the Federal High Court. He did not make sufficient enquiry.

13. That I was informed by Chief E.O. A. Idowu and I verify<sup>F</sup> believe him that the defendants' counsel decided to oppose the motion because the first defendants are embittered that the motion was granted unopposed."

It does not appear from the records before us that this motion was ever taken by the trial court. The defendants, however, with leave, appealed to the Court of Appeal against the order joining the 2nd plaintiff. And the motion to set aside the order was, by order of the Court of Appeal, made part of the record of appeal before that court.<sup>H</sup>

The two appeals were by order of the Court of Appeal, consolidated. The parties filed and exchanged their respective written briefs of argument in respect of each appeal. And on 8th February, 2000, learned counsel for the parties proffered oral arguments.

In the lead judgment of Oguntade JCA (with which Galadima and Sanusi, JJ.CA agreed), the court found:

B “1. *With respect to the learned Chief Judge, I am satisfied that he was wrong in his conclusion that an action could be brought against a trade name. It is, I believe, a proposition that is as clear as daylight and now more or less immutable that only a juristic person can sue or be sued in court. There is a plethora of judicial authorities and I gratefully refer to those cited by appellants’ counsel- Abu v. Ogli (1995) 8 NWLR (Pt. 413) 353 at 372, Peat Marwick, Ani Ogunde & Co. v. Okike (1995) 1 NWLR (Pt. 169) 71 at 72”*

C 2. *“On principle it seems to me that only the registered proprietor of a ‘Trade Mark’ can sue or be sued. See section of Trade Mark Act, Cap. 436, 1990, Laws of the Federation. The lower court should therefore have upheld the objection of the defendants.”*

D 3. *“The provisions of the above order (Order 32 of the Federal High Court Rules Cap. 134, 1990, Laws of the Federation) permit the trial Judge to make any amendment suo motu as he did on this occasion. I do not therefore see that it is open to the appellant to complain against the exercise by the trial Judge of his powers derived from under Order XXXII above. The trial Judge had obviously been swayed by the fact that the mistake made by the plaintiffs was innocuous and could be corrected without causing any injustice to the appellants. The argument that the lower court has no jurisdiction on the ground that the 1st appellant was not a juristic person overlooks the fact that even if the name of the 1st appellant was struck out of the suit, the suit would still remain properly constituted since the surviving 2nd defendant/appellant and the plaintiffs are juristic persons. This matter did not therefore raise the issue of jurisdiction at all. This appeal would have succeeded, had not the lower court exercised its undoubted powers under Order XXXII of the Federal High Court Rules.”*

H 4. *“Even if the argument of the appellants’ counsel is sound and cannot be assailed for the principle the argument projected, regret to observe that the argument did not have my evidential support. From the record of proceedings, there was nowhere where it was shown that the lower court sat in chambers when it heard arguments and made a ruling on the motion for rejoinder. The drawn up order before us which is all we have before us does not indicate that*

*the order was made in chambers. Appellant's counsel never sought leave and was not granted one to call further evidence on appeal. Nowhere is the evidence upon which to decide the propriety of the order supposedly in chambers. This issue must therefore be decided against the appellant."*

On these findings the Court of Appeal dismissed the appeals of the defendants who have now further appealed to this court. B

Pursuant to the rules of this court the parties filed and exchanged their respective briefs of arguments and, at the oral hearing of the appeal, proffered arguments in expatiation of the submissions in their briefs. C

The defendants raise the following three issues as calling for determination in this appeal, to wit:

*"1. Whether the Court of Appeal, having held that the lower court ought to have upheld the objection of the appellants being a non juristic person lacks capacity to sue or be sued, was right to have further held that the provisions of Order 32 of the Federal High Court (Civil Procedure) Rules permits the court to make an amendment suo motu.*

*2. Whether upon a proper interpretation of the provisions of Order 32 of the Federal High Court (Civil Procedures) Rules, 1976, the provisions of the said order can be resorted to in justifying the amendment of a writ by substituting a juristic person for a non-juristic person improperly sued as a party to suit.*

*3. Whether evidence of the fact that the proceedings of the 29th January, 1996, wherein a motion on notice for joinder was heard and granted in chambers in the absence of the appellants and their counsel was not borne out by the record of appeal."* F

The plaintiffs, for their part, formulate five issues, that is to say: G

*"(a) Whether the description of the appellants on the writ of summons was a mere misnomer. In other words, 'was there a mistake in name, giving incorrect name to person in accusation, indictment, or a mis-description of an entity'?"* H

*Alternatively,*

*(b) Whether the name MAERSK LINE has any relationship to any other entity different from the owner (i.e., DAMPKIBSSELABET AT 1912, AKTIESELSKAB AND*

*AKTIESELSKABET DAMPSKIBSSELKABET*) as supplied by the appellants.

(c) If the answer to (a) or (b) is in the affirmative, can a Judge of the Federal High Court by virtue of the power conferred on him cause the misnomer to be corrected by a ruling made suo motu to that effect?

(d) Whether the grounds of appeal filed by the appellants are grounds of mixed law and facts? If they are, whether the proper leave had been sought and been granted?

(e) Whether issues for determination flowing from the grounds of appeal that had been struck out on 2/07/97 on grounds admitted by the appellants as being incompetent can become the subject matter for adjudication at the Court of Appeal and the Supreme Court without them having been resurrected?"

Having regard to the judgment appealed against and the grounds of appeal, the issues as formulated by the defendants are to be preferred. Issues (d) and (c) in the plaintiffs' brief do not arise out of any ground of appeal.

#### ISSUES 1 & 2

As these two issues relate to the propriety or otherwise of the exercise by the trial court, of the power of amendment given it by Order 32 of the Federal High Court (Civil Procedure) Rules, then in force, I consider it appropriate to take them together.

The defendants claimed that as MAERSK LINE is a trade mark, it is not a juristic person and was therefore, wrongly sued as 1st defendant in the suit. The plaintiffs did not deny that MAERSK LINE is a trade mark, but they contended that it was rightly sued as defendant. The learned trial Chief Judge defined what a trade mark is and went on to say that "with this definition I find it hard to accept that a trade mark is not a juristic entity." He specifically found:

*"I do not find that Maersk Line which the defendant used in Bill of Lading - exh. JO1 is not a juristic name or that it does in anyway cause a doubt to whom it refers to than the defendant."*

This finding, notwithstanding, the learned trial Chief Judge exercised suo motu the power to amend conferred on him by Order 32 of the Rules of Court. Order 32 provided:

*"The court may at any stage of the proceedings, either of its own motion or on the application of either party, order any proceed-*

*ing to be amended, whether the defect or error be that of the party applying to amend or not; and all such amendments as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice, embarrass, or delay the fair trial of the suit, and for the purpose of determining in the existing suit the real questions or question in controversy between the parties, shall be so made. Every such order shall be made upon such terms as to costs or otherwise as shall seem just."* B

In exercise of that power, he ordered -

*"...the plaintiff to change the plaintiffs (sic) trade name to its real name."* C

On appeal to the Court of Appeal, the defendants complained that that order was wrongly made in that it was not open to the court to substitute a juristic person for a non-juristic person. The Court of Appeal, per Oguntade, JCA, held, and quite rightly in my respectful view, that the trial court was wrong in its conclusion that an action could be brought against a trade name. D

I pause here to observe that it was the learned trial Chief Judge that introduced trade name into the matter. The case of the defendants which the plaintiffs seemed to agree with is that MAERSK LINE is a trade mark. Of course, if it is a trade mark, it cannot sue or be sued as it is not a juristic person. It is its proprietor that can sue or be sued. E

The Court of Appeal, per Oguntade, JCA, after holding that in principle only the registered proprietor can sue or be sued, held that the trial court should, therefore, have upheld the objection of the defendants. Rather than stop there and strike out the name of the 1st defendant, the learned Justice of the Court of Appeal went on to consider the propriety or otherwise of the order of amendment made by the trial court. He held the view that the learned trial Chief Judge exercised the powers conferred on him by order 32 correctly and concluded that the appeal would have succeeded had not the lower court exercised its undoubted powers under order 32. This is what is now on attack in this appeal. F G H

The argument of the defendants is to the effect that the Court of Appeal having held that the 1st appellant is not a juristic person ought to have struck out the name from the suit in that naming a non-juristic person as a party is not a misnomer and a writ cannot be

amended to substitute a juristic person. Learned counsel for the defendants relies on the following cases in support of his submissions - Agbonmagbe Bank Ltd. v. General Manager G.B. Ollivant Ltd. (1961) 1 All NLR 116; (1961) 2 SCNLR 317; Emecheta v. Ogueri (1996) 5 NWLR (Pt. 447) 227 at 231; Manager SCOA Benin City v. Momodu B (unreported) suit no. SC.23/1964. Learned counsel also argued that the learned trial Chief Judge was wrong to have made the order of amendment which was never asked for by any of the parties. In recognising the power of the court to amend proceedings suo motu C learned counsel submitted that order 32 envisaged the elimination of statements which might tend to prejudice, embarrass or delay the fair trial of a suit uncontroversial defects and not fundamental issues affecting the rights of the parties.

It is learned counsel's view that capacity is a fundamental D issue and, therefore, the court should not have exercised suo motu its power under order 32.

That a trial court could, under order 32, make an order of amendment suo motu is supported by a number of authorities and is not in dispute in this case. What is in dispute is the circumstance under E which the court would exercise that power suo motu. It is not in dispute that the order made by Belgore CJ was not asked for by either party. Was he right to have made the order suo motu? The court below, unfortunately, did not advert its mind to the circumstances of the case. It merely concluded that as order 32 allowed the F trial court to make an order of amendment suo motu, the order would not be disturbed.

I think the submission of learned counsel for the defendants that an amendment could not be made to substitute a juristic person G for non-juristic person is untenable, In Olu of Warri v. Chief Sam Warri Esi & Anor. 3 FSC 94 at 96; (1958) SCNLR 384 where in circumstances not too dissimilar to the present case, the trial Judge had struck out the case on the defendants' objection to the plaintiff being not a juristic person, the Federal Supreme Court (as this court H was then known), on appeal to it, held, per Ademola FCJ (as he then was):

*"When the objection was raised about a misnomer, he had the opportunity of asking the court for leave to amend, especially when the Judge ruled there was a misnomer.*

*The cases Establishment Baudelot v. R.S. Graham and Co. Ltd. (1953) 1 All E.R. 149 and Alexander Mountain and Co. v. Rumere Ltd. (1948) 2 All E.R. 483 cited by counsel are authorities to show that in a case of misnomer, if application is made to amend the writ by substituting the proper names, it should be granted."*

In the often quoted Agbonmagbe Bank Ltd. v. General Manager, G.B. Ollivant Ltd. (supra) Dixon J who decided the case, recognized that if application had been made for an amendment (as it was a case of misnomer) it would have been granted. But in that case, as in the case on hand, the plaintiff maintained that the 1st defendant, as sued, was a legal entity. And so he struck out the case against that defendant having held that he was not a legal entity. B  
C

The case of Njemanze v. Shell BP, Port Harcourt (1966) 1 ANLR 8 at 10-11 lays down the circumstances under which a court may grant an application for amendment in a case of misnomer. In that case the plaintiff had sued "The Shell BP Port Harcourt"; counsel for the defendant objected that "there is no company known as Shell BP Port-Harcourt", counsel for plaintiff asked for leave to amend, but the Judge refused leave and struck out the claim. On appeal, this court held that the plaintiff had a duty to show that there were reasonable grounds of excuse in his naming the defendant wrongly and that the misnomer could not have given rise to any reasonable doubt as to which company was being sued, but he did not do so. Bairamian, JSC giving the reasons for the court's decision dismissing the appeal said: D  
E  
F

*"This appeal illustrates the need for care in bringing an action. It is common knowledge, or ought to be, that a company is registered under the Companies Act and has a registered name s. 18(2). This can easily be found out; it has to be shown on a sign-board at its place of business pursuant to section 65(1); and it can be ascertained under s.23(5) of the Companies Act from the registrar. There is little excuse, if any, for a plaintiff who sues for wrongful dismissal not suing the company by its registered name. If there was any excuse for the mistake, no affidavit of the facts was prepared; the need for it would have been realised if the authorities had been looked up.*

*Learned counsel for the company referred to Alexander Mountain & Co. (suing as a firm) v. Rumere Ltd. (1948) 2 K.B. 436.*

*There the plaintiff was wrongly named. The plaintiffs' solicitors applied on an affidavit to amend in the High Court, but amendment was refused. They prepared an affidavit of more facts and put it in on appeal, presumably by leave. They were diligent in explaining the circumstances, and that case is useful on the need for diligence to explain... It was not enough to complain of the trial Judge's refusal to amend, it was necessary to show that there were reasonable grounds of excuse in naming the defendant wrongly and that the name of Shell BP could not have given rise to any reasonable doubt as to which company was being sued."*

See also *Ode & Ors. v. The Registered Trustees of the Diocese of Ibadan* (1966) 1 ANLR 287 where the defendants having lost at the trial objected, on appeal, that the plaintiff's had sued in the wrong name; the plaintiffs moved the Supreme Court to amend the title on the writ of summons with affidavits showing that the misnomer was due to a mistake on the part of their solicitor; and the defendants agreed that the amendment would not prejudice them. This court held that the misnomer was a bona fide mistake and could be corrected.

In *Emecheta v. Ogueri* (1996) 5 NWLR (Pt. 447) 227 at 240. Rowland, JCA, delivering the lead judgment of the Court of Appeal, with which Katsina-Alu, JCA as he then was and Okezie JCA agreed, had stated:

*"It was contested at the court below by the counsel for the 3rd respondent that the 3rd respondent is not a juristic person. The law is settled that a non-juristic person, generally, cannot sue or be sued. In Agbonmagbe Bank Ltd. v. General Manager G.B. Ollivant Ltd. & Ors. (1961) 1 All NLR 116; (1961) 2 SCNLR 317 it was held that "General Manager, G.B. Ollivant Ltd." is not descriptive of a juristic person. The defendant so named, was struck out of the action on a preliminary objection. It was further held, that naming a non-juristic person as a defendant is not a misnomer and cannot be amended to substitute a juristic person. See also Manager, SCOA Benin City v. Momodu (unreported) suit no. SC.23/1964 delivered on 17th November, 1964, it was held that a non-juristic person, cannot sue or be sued."*

Learned counsel for the defendants relied on this dictum in support of his submission that a juristic person cannot be substituted

for a non-juristic person. With respect to learned counsel, I think he read the dictum out of context. For the learned Justice of the Court of Appeal had earlier observed:

*“The capacity in which the 3rd respondent is sued, has been challenged, that is, that the 3rd respondent in this appeal is not a legal personality known in law. There was no application of amendment brought by the appellant before the lower court to insert the real name of the 3rd respondent. On the face of the record before the court below, the 3rd respondent is the assistant chief registrar, High Court, Aba.”*

Surely, if an application to amend had been brought and sufficient reasons given for naming the party wrongly, it might have been granted and there would have been no need for the dictum.

***The plaintiffs did not apply for amendment even after counsel for the defendants had raised objection to the 1st defendant being sued in the name of a trade mark. Rather, in their counter affidavit they insisted that the 1st defendant was rightly sued. They did not admit there was a misnomer. It was in these circumstances that the learned trial Chief Judge, suo motu, made an order directing the plaintiffs to amend the name of the 1st defendant “to its real name”. And what that “real name” is does not appear in the ruling of the learned Chief Judge. I think this is a wrong exercise of the power, under order 32, to amend suo motu. The power to amend, like all other judicial powers, must be exercised judicially and judiciously. The power must not be exercised in vacuo but based on relevant materials placed before the court by the parties. In this case, the learned Chief Judge had ruled, though erroneously, that the 1st defendant was a juristic person. Why then the order to amend?***

***True enough, order 32 empowers the trial court to order an amendment to be made of its own motion. This, however, is a power that is very rarely exercised. In this country, as in England, the function of a court in a civil case, is not inquisitorial. See Fallon v. Calvert (1960) 1 All E.R. 281 at 282, per Pearce, LJ. The court’s function is to act as a kind of umpire. And it is not the duty of the court to force upon the parties amendments for which they do not ask. See Cropper v. Smith***

(1884) 26 Ch. D 700 at 715, per Fry, L.J.

When counsel for the defendants took objection to the joinder of 1st defendant on the ground that it is not a juristic person, it was open to counsel for the plaintiffs to apply for amendment, on the ground of misnomer. He did nothing of the sort. Rather he argued, and the learned Chief Judge agreed with him, that the 1st defendant was a juristic person. Clearly, this was a course of argument totally inconsistent with asking for amendment of the name of the 1st defendant.

***What the learned Chief Judge, with respect to him, appeared to have done in this case was to force an order of amendment on the parties who did not ask for it. And the order is inconsistent with the learned Chief Judge's finding that the 1st defendant was a juristic person. On the authorities, an order of amendment is not just made; reasonable excuse must be given by the offending party why the error was made in the first instance. No such excuse was given in this case and could not have been given having regard to the stance of the plaintiffs.***

It is instructive to observe that rather than the plaintiffs applying to amend the name of the 1st defendant, they applied to join 3 other defendants namely, the owners of the vessel "Christian Maersk"; "The master of the vessel "Christian Maersk" and Dampskibsselskabet at 1912 etc. Curiously, the learned Chief Judge dismissed the application on the ground that -

*"Here in this case, there is no misconception as to the identity of the defendant. The name whether trade name or actual name was used and from the beginning of the transaction and action the identity of the defendant was known. I do not think the cases cited fall in all fours with the present case."*

The refusal of this application appears to me to be in contradiction of the order to amend that he made on his own motion, and not on the application of either party.

If their Lordships of the court below had properly adverted their minds to the circumstances of the case highlighted above they would not have affirmed the order of amendment on the ground solely that order 32 empowered the Chief Judge to suo motu make the order. I, therefore, resolve issues 1 and 2 in favour of the defen-

dants.

### Issue 3

The complaint of the defendants here is that the 1st plaintiff's application to join the 2nd plaintiff was taken in chambers thus rendering the proceedings null and void. There is nothing in the rules of the Federal High Court permitting it to take such an application in chambers. The court below in dismissing a similar complaint made before it said, per Oguntade JCA:

*"Even if the argument of the appellants' counsel is sound and cannot be assailed for the principle the argument projected, I regret to observe that the argument did not have any evidential support. From the record of proceedings, there was nowhere it was shown that the lower court sat in chambers when it heard arguments and made a ruling on the motion for joinder. The drawn up order before us which is all we have before us does not indicate that the order was made in chambers. Appellant's counsel never sought leave and was not granted one to call further evidence on appeal. So where is the evidence upon which to decide the propriety of the order supposedly made in chambers, this issue must therefore be decided against the appellant."*

I think their Lordships of the court below, with respect to them, were being unduly technical in their approach. It was with the leave of their Lordships given on 14th April, 1999 (see page 259 of the record) that the defendants' motion on notice dated 30th January, 1996 and the affidavit in support were made part of the record of appeal before the court below. I have already in this judgment set out the penultimate paragraphs of the said affidavit. But for ease of reference I quote below paragraph 9 once again. It reads:

*"9. That consequently, by the time he discovered that the matter was to come up before the Honourable Justice Belgore, the matter had in fact been heard and the order for joinder made in chambers, as the court room was on that date used by the Honourable Justice Bello and the Honourable Justice Belgore had to sit in chambers."*

The plaintiffs did not controvert the above averment nor even react to it in any way. That is not all. In the appellant's brief of argument filed in the court below, the following appears (see page 119 of the record):

*"The 1st respondent by its particulars of claim dated 21st of September, 1995 commenced the present action against the appellants. The 1st respondent, the shipper on the 2nd of January, 1996, filed an application seeking an order amending the particulars of claim to include Abex Trading Company Limited the consignee as co-plaintiff. This application was granted in chambers on the 29th day of September, (sic) 1996."* (Italics mine)

There was no reaction to this either by the plaintiffs in their respondents' brief.

Again, the defendants filed a motion in the court below, dated 26th February, 1998, praying that court for orders for extension of time within which to seek leave to appeal against the decision of the Federal High Court Lagos (No.1) delivered on the 29th of January, 1996, leave to appeal, extension of time to appeal against the said decision and an order consolidating the appeal with appeal no. CA/L/342/96 (see pages 141-143 of the record). Paragraph 3(a) of the affidavit in support of the motion reads:

*"3. That I am informed by Babajide Koku Esq. of counsel and I verily believe the same to be true as follows:-*

*(a) that the Federal High Court No.1, Lagos, per Belgore, FCJ (sic) delivered a ruling granting an amendment of the plaintiff's originating processes in chambers on the 29th January, 1996, by adding and/or joining additional parties to the suit without recourse to the defendant/appellants."* (italics mine)

***The plaintiffs did not at any time controvert the allegation in all these documents that the proceedings of 29th January, 1996 in the Federal High Court were taken in chambers.***

***That allegation being of fact, must be taken as undisputed.*** See First African Trust Bank Ltd. & Anor. v. Basil O. Ezegbu & Anor. (1994) 9 NWLR (Pt. 367) 149; Okangwu v. NNPC (1989) 4 NWLR (Pt.115) 309, per Nnaemeka-Agu JSC –

*"For every material point canvassed in an appellant's brief which is not countered in the respondent's is deemed to have been conceded to the appellant."*

***That the proceedings of 29th January, 1996 were taken in chambers is a material fact upon which the success of the appeal against the decision taken that day is hinged. That fact was averred in an affidavit before the trial court and in an-***

**other affidavit filed in the court below. The allegation was also made in the defendants' appellants' brief. The plaintiffs did not controvert the allegation. The allegation must be deemed to have been accepted by them as correct. What further evidential support is the court below looking for?**

I pause here to observe that in their brief in this court, the, B  
plaintiffs at page 17 submitted:

*"(4) There is no proof that the joinder of the 2nd respondent was done in chambers or done surreptitiously or clandestinely as obliquely or discreetly insinuated by the appellants. There is no rule C  
that forbids an interlocutory application of this nature being heard in chambers, assuming for the sake of argument that the matter was heard in chambers."*

**Even at this later stage, the plaintiffs still did not controvert the fact alleged by the defendants that the proceedings of 29th January, 1996 were in chambers. That must be because they knew that the said proceedings were in fact, and in truth, taken in chambers. I think on the materials before it the court below ought to have proceeded on the basis that the proceedings for 29th January, 1996 were taken in chambers. D  
And that being so, the proceedings were clearly invalid. The order made thereat is equally null and void. Nigeria Arab Bank Ltd. v. Barri Engineering Nigeria Ltd (1995) 8 NWLR (Pt. 413) 257. E  
I resolve issue 3 in favour of the defendants.** F

All the issues canvassed in this appeal, having been resolved in favour of the defendants, their appeal succeeds and it is hereby allowed by me. I set aside the decisions of the Court of Appeal given in this matter on 20th April, 2000 and of the Federal High Court (Court No.1) given on 29th January, 1996 joining the 2nd plaintiff in G  
this suit and on 27th September, 1996 amending the name of the 1st defendant to its "real name". I substitute thereof orders striking out the name of the 1st defendant and that of the 2nd plaintiff, from the suit.

I award N10,000.00 costs of this appeal to the defendants to H  
be paid by the 1st plaintiff.

**WALI JSC**

I have had the privilege of reading before now, the lead judgment of my learned brother Ogundare, JSC, and I entirely agree with his reasoning and conclusion for allowing the appeal. For those same reasons ably stated in the lead judgment and which I adopt as mine, I also hereby allow the appeal, set aside, the decision of the Court of Appeal, Lagos Division and that of the trial court. In place thereof I substitute an order of striking out the name of the 1st defendant and 2nd plaintiff respectively.

I adopt the order of costs made in the lead judgment.

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**ONU JSC**

I had the opportunity to read before now the judgment of my learned brother Ogundare, JSC just delivered. I am in entire agreement with him that the appeal is meritorious and ought therefore to succeed.

Accordingly, I allow the appeal; substitute orders of striking out the name of 1st defendant and that of the 2nd plaintiff from the suit.

I make similar consequential orders inclusive of those contained in the leading judgment.

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**KALGO JSC**

I have read in advance the judgment of my learned brother Ogundare, JSC just delivered. I entirely agree with him that there is merit in the appeal and it ought to be allowed.

The facts of this case which gave rise to this appeal have been fully set out and discussed in the leading judgment and I do not intend to repeat them here. It is sufficient in my respectful view to say that the substance of the appeal deals principally with the exercise of the powers of the trial court under Order 32 of the Federal High Court (Civil Procedure) Rules, 1976, as it affects the juristic capacity of the 1st appellant to sue or be sued. This is reflected in the two out of the three issues for determination raised by the appellants in his brief. The contention of the appellants' counsel before the trial court was that the 1st appellant (as 1st defendant) was only a trade name

and could not in law sue or be sued. In the trial court ruling of 27th September, 1996 now under appeal, the learned trial Chief Judge Belgore, C.J. held:-

*"I do not find that the Maersk Line which the defendant used in the Bill of Lading - exhibit JO1 is not a juristic name or that it does in anyway cause a doubt to whom it refers to than the defendant... B In this case, I find the defendant was not misled by the plaintiff using its trade name which the defendant is known in his business."*

Thereafter he proceeded to order that the plaintiff should change the defendant's trade name to its real name, pursuant to his power under Order 32 of the Federal High Court (Civil Procedure) Rules 1976. C

On appeal, the Court of Appeal disagreed with the learned Chief Judge that a trade name can be used to sue and be sued as a juristic person, and it relied on the decision of this court in *Fawehinmi v. NBA (No.2) (1989) 2 NWLR (Pt. 105) 558 at 596*. It then held that the trial court should have upheld the objection of the appellants that the 1st defendant/appellant was a non-juristic person. Having so found, learned counsel for the appellants submitted that the Court of Appeal should have upheld the objection itself and strike out the 1st D appellant as a party to the action. It did not do so hence this appeal. E I entirely agree with him on this.

However, instead of striking out the 1st appellant as a party to the action, the trial court ordered that the plaintiff/respondent should change the name of the 1st appellant from trade name to its real name pursuant to order 32 of the said rules. F

Order 32 of the Federal High Court (Civil Procedure) Rules, 1976 says:

*"The court may at any stage of the proceedings either of its own motion or on the application of either party, order any proceedings to be amended whether the defect or error be that of the party applying to amend or not; and all such amendment as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice, embarrass, or delay the fair trial of the suit, H and for the purpose of determining in the existing suit the real question or questions in controversy between the parties shall be so made. Every such order shall be made upon such terms as to costs or otherwise as shall seem just".* G

The powers under order 32 it seems to me, can be invoked at any stage of the proceedings before judgment and could be exercised by the court without any party applying for it. But the exercise of the power can only be done for the purpose of -

- B (a) Eliminating all statements which may tend to prejudice, embarrass or delay the fair trial of the suit;  
(b) determining in the existing suit, the real question or questions in controversy between the parties.

C It is pertinent to note that (a) and (b) above are joined by “and” in the text of the order, which means that both must be available before the application of the order.

In this case, the order to change the “trade name” of 1st appellant to “real name”, was not asked for by any party, but from affidavit evidence before the court, there was nothing at all to satisfy D (a) or (b) mentioned above. Therefore although the court can exercise the power suo motu, it cannot do so in vacuum without any substance in support. In dealing with the exercise by the trial court of the powers under order 32, the Court of Appeal held that:

E *“The provisions of the above order permit the trial Judge to make any amendment suo motu as he did on this occasion. I do not therefore see that it is open to the appellant to complain against the exercise by the trial Judge of his powers derived under order 32 above”.*

F With due respect to the Court of Appeal, the provisions of the order under consideration do not give the trial court a blanket power to make any order amending the proceedings before it. The provisions in fact limit the exercise of the power to the “purpose” mentioned in the order i.e. those classified under (a) and (b) set out G earlier in this judgment. Having assumed that the learned trial court has the power to make any order under order 32, the Court of Appeal did not even care to examine the extent of the order made and how it affected the proceedings in the case having regard to the provisions of that order. It is this failure that empowers the appellant to H complain against the exercise of the powers under the order by the trial court.

From what I said above, it appears to me very clearly that the trial court was wrong in making the order to amend the proceedings as it did in this case, and that the Court of Appeal was also wrong in

affirming that order. I resolve issues one and two in favour of the appellant.

On issue 3, I adopt the reasoning and conclusions reached therein in the leading judgment, and resolve it also in favour of the appellants. For the above and more detailed reasons given by my learned brother Ogundare, JSC in the leading judgment, I also allow this appeal and set aside the orders of the Court of Appeal affirming that of the trial court in respect of the substitution of the 1st appellant and joinder of 2nd respondent. 1st appellant and 2nd respondent are hereby struck out from the suit. I award N10,000.00 costs to the appellants.

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**AYOOLA JSC (DISSENTING)**

I am unable to agree with the opinions of my learned brothers that this appeal should be allowed. I do not believe that justice will be done if this matter is approached in disregard of reality. Before I state my reasons why I hold that this appeal should be dismissed let me briefly highlight some of the facts to which in my opinion attention should be paid. Although paragraph 10 of the counter affidavit in opposition to the appellants' motion at the trial court was quoted in the leading judgment I think the facts deposed to in that paragraph which are unchallenged have neither been adverted to nor given the weight and consequence they deserve. In that paragraph it was stated that:

*"the 1st defendant is a shipping company whose trade name...bear the name MAERSK LINE and there could not (be) any misrepresentation as to who is the carrier of the Gum Arabic..."*

In the affidavit in support of the appellants' motion in the Federal High Court the facts were deposed to that

*"...the carrier is the Dampskibsselskabet AF 1912, Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg as carrier which is the steamship company of 1912 and steamship company Svendborg."*

None of the parties was in doubt that the action was in respect of obligations arising from a contract of carriage of goods evidenced by the bill of lading exhibit JO1 (so described) by the appellant. Dampskibsselskabet etc issued that bill of lading which had on it

written in bold letters “MAERSK LINES.”

In the leading judgment emphasis was placed on the description of MAESRK LINE as a trade mark without advertng to its description as a trade name as well. As a result, the fact was completely ignored that a trade mark can also be a trade name. Nothing prevents a business from making its trade name its trademark or vice-versa. It is not correct as stated in the leading judgment that “it was the learned trial Chief Judge that introduced trade name into the matter.” It is fair to the learned trial Chief Judge to point out and emphasise that paragraph 10 of the affidavit sworn by Toyin Akinsanya did introduce trade name into the matter.

On this appeal nowhere did the appellants challenge the view of the Chief Judge that

*“(i) there is no misconception as to the ‘identity of the defendant;”*

*“(ii) from the beginning of the transaction and action the identity of the defendant was known.”*

Let me pause to observe that the identity of a person may be known whereas there is no such certainty about that person’s name. Misnomer is all about mistake as to name and not mistake about identity. The Chief Judge was therefore on the right track when he stated that there was no mistake as to identity. So the question was: what was the name of the carrier whose identity was known and about whose identity there was no dispute?

What was the “real name” of the carrier? The Chief Judge did not expressly state it in his order but the parties were at the time he made the order no longer in any doubt as to the “real name” of the carrier.

It had been stated in paragraph 5 of the affidavit sworn by Joseph Olawuyi in support of the appellant’s motion and found to be so in the ruling of the Chief Judge when he held that “the defendant was not misled by the plaintiffs using its trade name (in) which the defendant was known in his (sic) business.” Pursuant to the order of the trial Chief Judge, the respondents filed their statement of claim on 22nd October, 1996 before the appeal in the court below was heard stating the “real name” of the 1st defendant as contained in paragraph 5 of the affidavit in support of the appellants’ motion. In their said statement of claim they averred:

*“The 1st defendants are a Danish shipping company based principally abroad, involved among other things in the business of carriage of goods by sea. The said first defendants trade under the name of MAERSK LINE, and are owners of the vessel MV CHRISTIAN MAERSK 9506, and many others.”*

The parties understood what the Chief Judge meant when he ordered “the plaintiff to change the plaintiffs (defendant’s) trade name (MAERSK LINE) to its real name (Dampskibsselskabet etc). (Words in brackets mine).

So what was the reality that these facts disclose? It is as follows:

(i) the plaintiffs and the 1st defendant entered into a contract of carriage of goods by sea;

(ii) the contract was evidenced by a bill of lading to which the 1st defendant was party;

(iii) the action was in respect of the said contract;

(iv) although the real name of the carrier was Dampskibsselskabet etc the bill of lading contained prominently written in bold letters on top thereof “MAERSK LINE”;

(v) it has not been denied that “MAERSK LINE” is the trade name of the carrier (the 1st defendant) which issued the bill of lading;

(vi) instead of suing the carrier in its real name the plaintiffs erroneously sued it in its trade name;

(vii) neither the carrier nor the plaintiffs were in doubt as to the identity of the carrier, and, by the same token, the person intended to be sued as “1st defendant”;

(viii) The Chief Judge having considered these circumstances exercised his power suo motu to correct the mistake in the 1st defendant’s name.

On these facts, for the reasons which I shall presently fully state I am unable to agree with the conclusion of my learned brothers that the trial Chief Judge and the court below were wrong. When it comes to matters such as this, where the conclusion of the trial Judge and the court below reflected the justice of the matter, well and sufficiently manifested by incontrovertible facts, I think a court such as ours, the supreme appellate court, should be wary of giving even the slightest impression of enthroning superficiality at the ex-

pense of real justice. I venture to suggest that the role which will suit this court in situations such as this is, rather than enlarge what may be conceived to be counsel's inadequacies in failing to apply for leave to amend, is the role dictated by the facts when no miscarriage of justice is thereby occasioned. We should turn away from abstractions and  
B insufficiencies and be empirical in our approach to such matters as this where the rules and the inherent powers of the court permit the court to exercise its discretion even on its own.

In the following pages I intend to show how, the facts and the  
C law, as I understand them, do not support the conclusion that the appeal should be allowed. In so far as there may be the slightest suggestion in the opinion of my learned brothers that the appeal turned on the fact that an application for amendment of the name was not made by the respondents (plaintiffs), I say straightaway that  
D such reasoning is not in consonance with the powers granted to the trial court to amend proceedings suo motu where it deems fit. It is an obvious contradiction to argue that a court cannot exercise its powers of amendment suo motu (where such power is granted) without an application for such relief by a party. That a court may exercise  
E specified powers suo motu in itself implies that neither of the parties has sought the exercise of that power. In this case I do not at all share the view that Or.32 contains any limitation on the power of the court to exercise its discretion on its own other than the limitation that may  
F be dictated by fairness and justice. Or.32 empowers the court to order any proceeding to be amended so as to correct any defect or error. Misnomer is an error.

The two questions that arise in this appeal are: first, whether the Court of Appeal having held that Maersk Line which was sued in  
G the suit as 1st defendant was not a juristic person, was correct in its conclusion that the Federal High Court had power pursuant to Order 32 of the Federal High Court Rules, (Cap. 134, LFN: 1990), on its own motion, to amend the proceedings by substituting for Maersk Line "the real name of the 1st defendant", and, secondly, whether  
H the Court of Appeal was right in its conclusion that there were no facts disclosed before it that the Federal High Court sat in chambers so as to come to the conclusion, as contended by the appellant, that the ruling made by the Federal High Court joining a second plaintiff in the case on an application by the 1st plaintiff was a nullity.

The appellants (hereafter referred to in this judgment as “the defendants”) were defendants in an action instituted in the Federal High Court (“the suit”) by the 1st respondent, Addide Investments Ltd. (referred to in this judgment as “the 1st plaintiff”). On its application the 2nd respondent, Abex Trading Ltd. (referred to as “the 2nd plaintiff” in this judgment) was joined as 2nd plaintiff in the suit. The claim concerned goods carried on board a vessel MV CHRISTIAN MAERSK 9506 under a combined transport bill of lading that were alleged to have been delivered in a damaged state. B

The defendants applied to have the order of joinder of the 2nd plaintiff set aside on the ground that it was made in the absence of the “defendant and its counsel”. It was deposed to in the affidavit in support of the motion that the plaintiff’s application was heard and the order of joinder made in the Chief Judge’s chambers “as the court room was on that date used by the Honourable Justice Bello and the Honourable Justice Belgore had to sit in chambers” whereas counsel for the defendant had expected it to be heard in Justice Aina’s court in which it was not listed in that court. As rightly noted by Oguntade, JCA, who delivered the leading judgment of the Court of Appeal, there was no indication in the record of appeal that the application to set aside the order of joinder had been heard by the Federal High Court. C D E

However, by leave granted by the Court of Appeal on 25th May, 1998 the defendants appealed against the order of joinder made on 29th January, 1996. Their complaint was that the Chief Judge (Belgore, C.J.) erred in law in making the order of joinder of the 2nd plaintiff in chambers. F

The defendants had applied to the Federal High Court to strike out the name of the 1st defendant from the suit on the ground that Maersk Line not being a juristic entity lacked capacity to sue or be sued. In the affidavit in support of the motion the fact was deposed to that Maersk Line was not a juristic entity but a trade mark and that the carrier was the company whose name ‘DAMPSKIBSSELSSKABET AF 1912, AKTIESELSKAB’ and ‘AKTIESELSKAB DAMPSKIBSSELSSKABET SVENDBORG’, rendered in English was ‘Steamship Company of 1912 Limited’ and ‘Steamship Company Svendborg Limited’. The learned Chief Judge dismissed the application but he ordered “the plaintiff to change the G H

plaintiff's trade name to its real name". Evidently, he meant to order the plaintiff to change the 1st defendant's name.

There was a third motion whereby the plaintiff sought to join more parties as defendants and to amend the statement of claim. The defendants' counsel opposed the application on the ground that by granting the application the parties to be joined would be deprived of their rights under the "limitation law". By the same ruling given on 27th September, 1996 the Chief Judge refused the application, not on the ground canvassed by the defendants, but on the ground as the ruling showed, that there was no misconception as to the identity of the 'defendant'. The learned Chief Judge said "The name whether trade name or actual name was used and from the beginning of the transaction and action the identity of the defendant was known." One of the three parties sought to be joined as defendants was described as 'DAMPSKBSELSSKABET AT 1912, AKTIESELSKAB AND AKTIESELSKABET'. There was no appeal from the refusal of the Federal High Court to join fresh defendants.

This appeal is from the decision of the court below in two consolidated appeals wherein the defendants challenged two rulings of the Federal High Court, namely the order joining a second plaintiff; and, the order that a fresh name be substituted for Maersk Line as the 1st defendant. The court below dismissed the appeal in regard to the former on the ground that there was no evidence in support; of the only ground of complaint; and in regard to the latter, on the ground that the trial court had rightly acted pursuant to its power of amendment under Or. 32 of its rules.

I start with the second of the questions that arise on this appeal. Was the court below right in its opinion that there was no evidence that the Chief Judge sat in chambers when he made the order of joinder of a second plaintiff on 29th January 1996?

Oguntade, JCA, who delivered the leading judgment of the court below had said:

*"From the record of proceedings, there was nowhere where it was shown that the lower court sat in chambers when it heard arguments and made a ruling on the motion of joinder. The drawn up order before us which (sic) is all we have before us."*

It was argued in this appeal that the view expressed as above was wrong because of the contents of an affidavit in support of the

motion to set aside the order made on 29th January, 1996 joining the 2nd plaintiff. Learned counsel for the defendants argued, in effect, that since that affidavit formed part of the materials compiled as record of proceedings in the court below, that court should have relied upon it as evidence that the Chief Judge had made the impugned order in chambers. It was argued that the court below was in error in not looking at the affidavits filed at the trial court in reaching its decisions. Several authorities were cited in aid of the contention; namely, *Ibodo v Enarofia* (1980) 5 -7 SC 42; *Okafor v. Nnaife* (1987) 4 NWLR (Pt. 64) 129; *Chevron (Nigeria) Ltd. v. Onwuegbula* (1996) 3 NWLR (Pt. 437) 404, 417 C.A.; *Ogele v. Nuhu* (1997) 10 NWLR (Pt. 523) 109, 112, 113. It is expedient to consider these cases, albeit briefly, in order to stem a growing tendency to found propositions of law upon them beyond what they actually decided. *Ibodo v. Enarofia* (supra); (1980) 12 NSCC 196; (1980) 5-7 SC was an application for leave to appeal in which this court emphasized that such application must be supported with adequate materials and in which the application was refused, inter alia, because materials upon which the court could come to a decision were not exhibited. The principle of that case is not relevant to the present case. *Okafor & Ors. v. Nnaife* (supra); (1987) 18 NSCC (Pt. 2) 1194; (1987) 4 NWLR (Pt.64) 129 was an appeal from the refusal by the two courts below to grant a stay of execution in which the only question for determination was “whether their Lordships of the Court of Appeal did or did not exercise their discretion properly on the materials before them in refusing the appellants a stay of execution of the judgment of the High Court.” In *Okafor v. Nnaife* (supra) the materials before the court below were the affidavit and counter affidavit filed in that court. That is not the case in the present case.

In *Chevron (Nigeria) Ltd. v. Onwuegbula* (supra) Rowland, JCA, said at p.417: “*This court has power to look at anything contained in the record of this appeal to enable it arrive at a just decision of the appeal. See Fumudoh v. Aboro (1991) 9 NWLR (Pt. 214) 210.*” But that was said in the context of identifying the prayers in a motion referred to by the trial Judge in the course of the ruling appealed from.

The case of *Ogele v. Nuhu* (supra), an appeal from the High Court of Kwara State to Court of Appeal, deserves some closer at-

tention. In that case one of the questions which arose before the Court of Appeal was whether there was evidence to show that the judgment and other proceedings were done in chambers. There was nothing on the face of the record to show that the delivery of judgment and the other proceedings in the case were done in chambers.

B The Court of Appeal, however, relied on two affidavits and two counter affidavits filed by the parties in a motion on notice to file and argue an additional ground of appeal which the High Court considered and granted. As a result the ground that challenged the legality of the proceedings of the Upper Area Court which had been conducted in chambers in contravention of section 33(3) of the 1979 constitution as well as section 29 of the Kwara State Area Courts Edict 1967 was argued. The affidavits and counter affidavits contained assertion and admission that the Upper Area Court did not sit in public but sat in chambers. Abdullahi, JCA, (as he then was) who delivered the leading judgment of the court held that “the additional ground of appeal by necessity became part of the record of appeal so was all other documents filed and used to facilitate the filing of additional ground of appeal which includes the supporting affidavit and the counter affidavits”. He went further to say that:

*“There is no gainsaying the fact that the contents of the affidavits and the counter affidavits disclosed cogent and direct facts to beat down the integrity and genuineness of the proceedings of the Upper Area Court on 23/1/96 to its lowest level”*

F In *Funduk Engineering Ltd. v. McArthur and Ors.* (1995) 4 NWLR (Pt. 392) 640, 652, Onu, J.S.C., said:

*“The affidavits upon which an application for stay was founded and which formed integral part of the materials placed before the trial court, would as to sufficiency, have enabled it to arrive at the view that the application was meritorious; but as it did not countenance them surely both the court below and this court are entitled to look at their contents.”*

H All these authorities do not, in my opinion, lead to a proposition that an appellate court should ascribe relevance or materiality to every document included in a record of appeal merely because they are so included. A test of the relevance and materiality of such material as the affidavit relied on by the appellant in this appeal is whether it was evidence admitted in and relevant to the proceedings

in the trial court. Although civil appeals to the Court of Appeal are by way of re-hearing by virtue of Or.3 r 2 of the Court of Appeal Rules, and the Court of Appeal is thereby entitled to re-examine the whole evidence tendered in the trial and also the whole course of the trial as compiled in the record of appeal, materials which have been placed before the trial court but which have not been received as evidence, or rejected, as the case may be, cannot properly be regarded as materials which the appellate court should take cognizance of as evidence. Where, also, a document included in a record of appeal has no bearing on the course of the proceedings which are on appeal before the appellate court, that court will be entitled to ignore it.

While *Ogele v. Nuhu* (supra) may satisfy this test, the statement cited from *Chevron (Nig.) Ltd. v. Onwuegbula* (1996) 3 NWLR (Pt. 437) 404, 417 that an appellate court has the power to look at anything contained in the record of appeal before it to enable it arrive at a just decision of the appeal is too wide and must be read subject to the qualification that the material should pass the test of relevance and materiality as stated above.

In the present case it was argued that the Court of Appeal should have taken cognizance of the affidavit now sought to be relied on in that court first because the court below allowed departure from the rules and ordered that the bundles of document compiled by the appellants be deemed as a record of appeal and secondly because in the affidavit in support of the application for leave to appeal, it was deposed to that Belgore, CJ, granted an amendment of the plaintiffs' originating process in chambers. None of these reasons is cogent and sufficient.

As to the first reason, when an appellate court grants departure from the rules to enable a party to compile the record of appeal, all that connotes is that the participation of the registrar as prescribed in the rules in the preparation of record of appeal is dispensed with. It does not imply that the Court of Appeal has assumed the function of settling the record so as to determine which documents to include as relevant or material or which to exclude as irrelevant or immaterial.

The second reason, no reasonable tribunal will proceed to determine issues of fact on which a party claims the merit of his appeal depends at the leave stage. It is therefore fruitless and not to be

expected that the other party will enter into combat as to facts at that stage. I venture to think that it is on the appeal that the court will have to examine whether there is or there is not evidence on which the parties rely in the appeal. Where a party appreciates that there is no such evidence he can seek leave to adduce it by way of additional evidence in support of a ground of appeal. It will be a dangerous precedent to hold that an appellate court should in all cases wade through all affidavits filed in interlocutory proceedings to discover evidence on the merits of an appeal.

The inclusion in the record of appeal of the affidavit in support of an unheard application at the trial court that the defendants now want to be regarded as evidence before the Court of Appeal cannot make the affidavit become such evidence by its mere inclusion. The affidavit in question was in support of an application before the trial court to set aside the order of 29th January, 1996 now appealed against. That application was never heard and the trial court did not make any order pursuant to it. The application to set aside the order of joinder in this case was a separate proceeding from the appeal to the Court of Appeal. The affidavits in that application had no relevance to the appeal in the court below from which the present appeal emanated. The facts which the defendant sought to rely on for the purpose of the appeal in the court below should have been placed before that court in a separate affidavit as additional evidence. For these reasons I am of the opinion that the Court of Appeal came to a right decision when it held that the argument against the order of 29th September, 1996 lacked evidential support.

Before I part with this aspect of the appeal, I comment briefly on the observation rightly made by learned counsel for the defendants that the plaintiffs had not adverted to this aspect of the appeal in their brief. It was submitted, relying on *First African Trust Bank v. Ezegbu* (1994) 9 NWLR (Pt. 367) 149, and quoting from the head note thereof, that “where an appellant has raised an issue in his brief of argument and has addressed the court on it but the respondent has neither adverted to the point in his brief or oral address, then the contention of the appellant on the point can be taken as undisputed.” However, the issue in question in that case was one of fact whether the promoters of a company agreed that two promoters who died were replaced by two mentioned persons. In this case, however, the

issue being what materials constituted evidence which the Court of Appeal should take cognisance of, was a question of law.

In my opinion, it is a misconception to hold that because the question whether Belgore, C.J., sat in chambers or not is a question of fact, the question whether what was relied on as evidence of that fact was in law acceptable as such evidence was also a question of fact. In my opinion when the issue is substantially one of law, the appellate court should not decline to consider and pronounce on the correctness of the contention raised by a party merely because the other party who should have responded to the issue had failed to do so. In *Okafor v. Nnaife* (supra) notwithstanding that the respondent did not file a brief at all, this court dismissed the appeal on the appellant's brief alone. Such is a common place occurrence. I hold that there is no general proposition of law that in all cases where one party fails to respond to an issue raised by the other party, the court is bound to uphold the contention of the party who raised the issue, regardless of whether such issue is one of law or not. Each case must depend on its circumstances.

I now turn to the first of the two main issues. Was the court below, having held that Maersk Line not being a juristic person was improperly sued, right in agreeing with the trial court that the occasion was fit for the exercise of power of amendment pursuant to Or.32 and that it could do so suo motu?

Order 32 of the Federal High Court Rules (Cap. 134, LFN, 1990) reads:

*"The court may at any stage of the proceedings either of its own motion or on the application of either party, order any proceeding to be amended, whether the defect or error be that of the party applying to amend or not, and all such amendments as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice, embarrass, or delay the fair trial of the suit and for the purpose of determining in the existing suit the real questions or question in controversy between the parties, shall be so made. Every such order shall be made upon such terms as to costs or otherwise as shall seem just."*

The terms of the order themselves spell out its amplitude. However, learned counsel for the defendant puts his case in relation to the exercise of power of amendment pursuant to the order in

several ways. First, that the order does not justify the making of an order not prayed for by any of the parties; second, that the power of a court to amend proceeding suo motu does not extend to a determination of the competence of the parties before the court” and, third, that the substitution of a juristic person in place of a party already adjudged as non-juristic would occasion a miscarriage of justice as the parties being substituted would be deprived of their right of limitation.

This is an area of our procedural law in which the principles seem well settled. A person who is made a party to an action either as a plaintiff or as a defendant must be a legal person or, if not, a body vested by law with power to sue or be sued. (See *Agbonmagbe Bank Ltd. v. General Manager, G. B. Ollivant Ltd. & Anor* (1961) All NLR 116; (1961) 2 SCNLR 317. In *Okechukwu & Sons v. Ndah* (1967) D NMLR 368, 370 it was held that “If it is successfully shown that a party to an action is not a legal person, that party should be struck out of the suit, and if such party was expressed to be the plaintiff the action should be struck out.”

However, that a person sued is not a legal person does not preclude the court from amending the title of the action to show the correct name of the party sued if it is shown to the satisfaction of the court that it was a case of misnomer. Such power of amendment is covered by the provisions of Or. 32 and such like enactment. The existence of such power of amendment has been acknowledged in several cases. In *Njemanze v. Shell BP Portharcourt* (1966) (Vol. 4) NSCC 6 this court recognized such power and set out the terms of its exercise when it said:

*“It was not enough to complain of the trial Judge’s refusal to amend, it was necessary to show that there were reasonable grounds of excuse in naming the defendant wrongly and that the name of Shell BP could not have given rise to any reasonable doubt as to which company was being sued.”*

An amendment is often readily granted where what is involved is a mere misnomer. See *Olu of Warri & Ors v Esi & Anor* (1958) Vol 1 NSCC 87; (1958) SCNLR 384 where this court said:

*“The cases Establishment Baudelot v. R. S. Graham & Co. Ltd (1953) 1 All E. R. 149 and Alexander Mountain & Co. v. Rumere Ltd (1948) 2 All E. R. 483 ... are authorities to show that in a case of*

*misnomer, if application is made to amend the writ by substituting the proper names, it should be granted."*

Misnomer in this sense means, simply, a wrong use of a name. If the entity intended to be sued exists but a wrong name is used to describe it that, in my judgment, is a misnomer. A closer look at the arguments presented by counsel on behalf of the defendants shows that the contention, in the final analysis, was not so much as to the power to amend the title of a suit to correct a misnomer, but whether such should be done suo motu. However, learned counsel for the defendants submitted, rather tersely, but clearly enough to merit consideration, that "It is trite law that naming a non-juristic person as a party is not a misnomer and a writ cannot be amended to substitute a juristic person." For this submission he relied on *The Manager, SCOA Benin City v. Momodu* SC 23/1964 of 17th November, 1966; *Emecheta v. Ogueri* (1996) 5 NWLR (Pt. 447) 227 and *Agbonmagbe Bank Ltd. v. General Manager, G. B. Ollivant Ltd.*, (1961) 1 All NLR 116; (1961) 2 SCNLR 317. It is right to point out that in *SCOA Benin City v. Momodu* (supra) although this court made "a passing reference to the impropriety of an action against 'the Manager S.C.O.A. Benin City' who is clearly not a juristic person", no point was taken on that issue in the appeal. (See *Nurses Association v. A. G.* (1981) 11 - 12 SC 1). In *Agbonmagbe Bank v. General Manager G. B. Ollivant* (supra) Dickson, J. at page 119 after referring to *Olu of Warri's case* (supra) and the cases referred to in the judgment of Ademola, F.C.J in that case said:

*"Admittedly, those cases deal only with instances where the action were commenced in the name of the wrong person, i.e.; there was misnomer of the plaintiff; but I do not think the principle established is limited to that category of party."*

Quite apart from the obscurity of the statement, it cannot be said that it contained an accurate statement of what a misnomer is. Misnomer does not lie in giving the name of the "wrong person" but in mistakenly giving a "wrong name" to the right person intended to be sued. In my opinion, *Agbonmagbe Bank Case* (supra) cannot be an acceptable authority for the view and did not go as far as deciding, as stated in *Emecheta v. Ogueri* (supra) 240, that "naming a non-juristic person as a defendant is not a misnomer and cannot be amended to substitute a juristic person". *Njemanze v. Shell* (supra) is

authority to the contrary, that amendment be allowed in deserving cases.

A proper statement of the law, in my opinion, is that where the description of the party (whether plaintiff or defendant) on the writ was a mere misnomer, such could be put right by amendment, provided that the person misnamed and intended to be sued is a juristic entity and is in existence. That was so held by the Court of Appeal in *The Owners of the M/V Lupey v. Nigerian Overseas Chartering & Shipping Ltd.* The Lupey (No 22) Vol. 5 (1993-1995) Nigerian Shipping Cases 311 and in *A. B. Manu & Co. (Nig) Ltd v. Costain (W.A) Ltd.* (1994) 8 NWLR (Pt. 360) 112. The approach of the Australian High Court in *Bridge Shipping v. Grand Shipping S.A* (1992) LRC (Comm) 730 was in similar vein as in those two cases.

Quite apart from the express provisions of Or.32, the courts have always exercised inherent jurisdiction to correct a mere mistake in the name of the parties. The inherent jurisdiction of the Federal High Court to do substantial justice between the parties concerned is further strengthened by section 9(2) of the Federal High Court Act (Cap. 134) (as amended by Decree 46 of 1993) which provided that:

*“Where a matter arises in respect of which no provision, or no adequate provision are made in the rules made under subsection (1) of this act or in any other act, or enactment, the court shall adopt such procedure as it deems fit to do substantial justice between the parties concerned.”*

The Federal High Court exercising jurisdiction, whether under inherent jurisdiction or under Or.32, to amend parties need only consider the limits to the exercise of such jurisdiction where its jurisdiction is invoked merely to correct a mistake in the name of a party. A primary step in setting the limit is to bear in mind the distinction between two possible mistakes, namely a mistake as to the name of a party intended to be sued and a mistake as to the identity of the party to be sued. The former is a misnomer which can be put right by amendment, whereas the latter is not. In the words of Dawson, J. in *Bridge Shipping case* (supra) at p. 738:

*“A mistake in the name of a party is not, to my mind the same thing as mistake in the identity of that party. In other words, one may intend to sue the landlord but be mistaken in the belief that*

*X is the landlord. That is not to mistake the name of X, but to mistake the identity of the landlord.”*

Similarly illustrating the distinction but in different context, Donaldson, L.J., in *Evans Construction Co Ltd. v. Charrington & Co Ltd.* (1983) 1 All ER 310 said at 317:

*“In applying RSC Ord 20, r 5 (3) it is, in my judgment, im-  
portant to bear in mind that there is a real distinction between suing  
A in the mistaken belief that A is the party who is responsible for the  
matters complained of and seeking to sue B, but mistakenly describ-  
ing or naming him as A and thereby ending up suing A instead of B.  
The rule is designed to correct the latter and not the former category  
of mistake.”*

I find the test postulated by Devlin, LJ, in *Davies v. Elsby Brothers Ltd.* (1960) 3 All ER 672, 676, apt and I gratefully adopt it. The test is this:

*“How would a reasonable person receiving the document  
take it? If, in all the circumstances of the case and looking at the  
document as a whole, he would say to himself “of course it must  
mean me, but they have got my name wrong”, then there is a case of  
mere misnomer. If on the other hand, he would say “I cannot tell  
from the document itself whether they mean me or not and I shall  
have to make inquiry” then it seems to me that one is getting beyond  
the realm of misnomer.”*

In the present case, the test above is well satisfied. The Chief  
Judge was satisfied that the mistake was genuine and was not mis-  
leading or such as to cause a reasonable doubt as to the identity of  
the person intended to be sued. Having directed himself along those  
lines he concluded that “the defendant was not misled by the plaintiff  
using its trade name which the defendant is known in his business”.  
On the materials placed before him that conclusion was available to  
him and no one has contended to the contrary in this appeal.

In the affidavit in support of the application to strike out the  
name of the 1st defendant it was clear:

- (i) who the carrier was;
- (ii) which bill of lading was the basis of the plaintiffs’ claim;
- (iii) that the bill of lading (copy exhibited) had written on it

MAERSK LINE in bold letters at the top and written in very small  
letters at the bottom the name of the carrier.

In the plaintiffs' particulars of claim it was clear that the contract of carriage of goods on which the claim was based was evidenced by the bill of lading described above. In the counter affidavit sworn in opposition to the defendants' application to strike out the name of the 1st defendant the facts were deposed to that the carrier  
 B DAMPSKIBSSELSSKABET used MAERSK LINE as its trade name and that that name had an "international reputation." On these facts this was as clearly a case where the parties to the contract of carriage were existing entities and, on the facts deposed to, the carrier, an  
 C existing entity, was reputed to be known by the trade name, MAERSK LINE. There was no question of creating a party for the first time.

I am of the view that this case cannot be equated to such cases where, for instance, an action has been commenced in the name of or against a dead party, or where the responsibility for the  
 D cause of action is clearly not attributable to an entity recognized by the law, as when the act complained of was in the name of an office and it was clear that the intention was to sue an "office".

I think that the point needs be made that there is a distinction between a "trade mark" and a "trade name". Although the learned  
 E Chief Judge was clearly in error when he said that "I find it hard to accept that a trade mark is not a juristic entity", his opinion cannot be faulted when he said that "name normally includes any designation and if anybody trades by such name and he is known by it, he puts  
 F himself out by that name, it cannot be heard if that name was used to describe, to say that name is not his." While a "trade mark" is a term identifying and distinguishing a business products, a "trade name" is a description of a manufacturer or dealer and applies to business and its good will. A trade name is the "name or title lawfully adopted and  
 G used by a particular organization engaged in commerce." For these definitions see Black's Law Dictionary (6th Edition) p 14. A trade name attaches to an entity. In this case 'MAERSK LINE' attached to a known entity.

I think enough has been said to show that this was a case of  
 H mere misnomer. The only question left, I should think, is whether the learned Chief Judge should have, on his own motion, corrected the misnomer. It is because this is the decisive issue in the appeal that considerable time had been devoted to the background circumstances in which he ordered on his own motion that an amendment of the

1st defendant's name be made. That Or.32 empowers the court to order an amendment to be made of its own motion is beyond dispute. That the court rarely exercises such power is not a denial of its existence. What is important when an issue is made of the exercise of such power is whether the exercise had occasioned a miscarriage of justice. Learned counsel for the defendants contends in this appeal that a miscarriage of justice would be occasioned as "the parties being substituted would be deprived of their rights to limitation." The misconception in that line of reasoning lies in the assumption that in all cases where an amendment is made to correct a mistake in the name of a party, a new party is being substituted. The entire basis of correcting a misnomer is that the right party had been sued but in a wrong name. It does not involve introducing a new party into the proceedings. I agree with the view expressed by Dawson, J. in Bridge Shipping case (supra) at p 736 that:

*"The correction of a misnomer or mis-description does not involve the substitution of a new party except in a technical or formal sense, since the party after the correction is the same person as was misnamed or mis-described. In such a case, at least as a matter of theory, no question of defeating a statute of limitation arises."* (Italics mine)

I fail to see any substance in the argument that a miscarriage of justice had been occasioned by the learned Chief Judge in making the order complained of on his own motion.

I must confess to all initial impression that the order that the name of the 1st defendant (the carrier) be corrected was inconsistent with the learned Chief Judge's refusal to order a joinder of the same carrier by its correct name. However, on a careful reading of the judgment it is evident that no such inconsistency existed. As pointed out earlier in this judgment and as clearly put in the appellants' brief *"What in effect the court was saying was that 'this is not a case of joinder but one of amendment and since the court can suo motu grant an amendment, the court will so declare in order to determine the real issue in controversy between the parties'".* That, as I understand the ruling, is the correct interpretation.

Although not of significance to the result of the appeal, the comment must be made that this appeal has not been brought in the name of DAMPKIBSELSSKABET AT 1912 but in the name of

MAERSK LINE as 1st defendant even though it was the basis of the appeal that it was a non existent entity. DAMPKIBSSELSSKABET AT 1912 does not seem to have complained that its name has been substituted as 1st plaintiff or that it was not the entity intended to be sued, as carrier on the contract of carriage evidenced by the bill of lading it issued. This comment is made to show that there is no end to technicalities. The judicial process malfunctions and is discredited when it is bogged down by technicalities and is manipulated to go from technicality to technicality and thrive on technicalities. That is why, at all times, the tendency towards technicality should be eschewed and the determination to do substantial justice should remain the preferred option and the hallmark of our judicial system.

In this case, notwithstanding that much cost and time would have been saved had the plaintiffs paid due attention to the true name of the carrier, much time and expense had equally been expended on what, at the end of the day, all parties concerned ought to have been in no doubt about was an error that can be corrected without injustice to the parties. Be that as it may, I feel no hesitation in holding that substantial justice has been done by the discretion exercised by the Chief Judge and confirmed by the court below, to correct the error.

For the reasons which I have given I am of the view that this appeal ought to be dismissed. I therefore dismiss it accordingly with N10,000 costs to the plaintiffs.

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