IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 102 of 2019
[High Court at Lautoka Civil Action HBC 260 of 2016]

BETWEEN : **RAJENDRA SINGH AND SUDESH SINGH**
Trading as HIZZ & HERZ

Appellants

AND : **THE NEW INDIA ASSURANCE COMPANY LIMITED**

Respondent

Coram : **Basnayake, JA**
Lecamwasam, JA
Jameel, JA

Counsel : **Ms. A. Degei, Mr. S Heritage & Mr. A. Prasad for the Appellants**
: **Mr. S. Krishna for the Respondent**

Date of Hearing : **3 February 2023**

Date of Judgment : **24 February 2023**

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning and conclusion arrived at by Jameel, JA.

Lecamwasam, JA

[2] I agree with the conclusion of Jameel, JA.

Jameel JA

Introduction

[3] This is an appeal from the judgment of the High Court dated 12 July 2019, whereby the learned High Court Judge struck out the Appellants' (***Original Plaintiffs***) Writ of Summons and Statement of Claim, with costs. The striking out was done after trial was concluded, and Written Submissions had been filed by the parties. The court struck out the claim on the basis of what was described as a '*Preliminary Objection'*. The record reveals that this claim was based on a response elicited by the Respondent in cross-examination of the 2nd Appellant. The Appellant has formulated four grounds of appeal, the gist of which is that by striking out the Statement of Claim and deciding the case based on a '*technicality*'', there has been a miscarriage of justice.

The Pleadings

(a) Statement of Claim

[4] The Appellants instituted action by Writ of Summons and Statement of Claim filed on 7 December 2016. In their Statement of Claim, they pleaded as follows: that they were trading under the name and style of "*HIZZ & HERZ*", at Shop No.3, Manji Jadavji Building, Main Street, Nadi, they took out an insurance Policy from the Respondent, bearing number 1123 /10044180/000 /00, dated 15th November 2012 for a sum of $150,000.00 in respect of loss and damage by fire, on stock- in- trade and business fixtures and fittings. The Policy was renewable yearly, valid and current at the time the fire took place, the Appellants had an interest in the shop and its contents to the extent of the insured value, on 14 January 2013 the Appellants' shop and its contents were destroyed by fire, and as a result the Appellants suffered loss and damage to the extent of $150,000, being

the value of the stock -in- trade, and the business furniture, fixtures and fittings, they duly submitted their claim on 13 February 2013 under the said Fire Insurance Policy, and that on 17 December 2015 the Respondent rejected the claim. The Appellants, by letter dated 11 January 2016 made a further request to the Respondent to reconsider the claim on the basis that they, (the Original Plaintiffs) had not caused the fire, and that the Respondent was liable to pay under the said Policy. However, by letter dated 16 September 2016, the Respondent rejected the said request and reiterated its stand. The Appellants claimed that despite their having duly notified the Respondent, it had in breach of the insurance contract rejected the claim and denied payment under the Policy, as a result of the fire they had suffered complete loss of their business, due to the failure of the Respondent to honour the policy and indemnify the Insured, and that the business had been closed from 14 January 2013 until the filing of the action.

[5] In the "*alternative*", the Appellants pleaded that it is an implied term of the insurance contract (the Policy), that the insurer would act swiftly in processing claims and minimize loss and damage to the insured, the failure of the Respondent to process the claim swiftly had resulted in loss of income to the Appellants, and that they were entitled to damages, which is to be quantified as at the date of trial.

[6] The Appellants pleaded further that the Respondent had engaged in misleading conduct, had failed to respond to the claim within a reasonable time and breached the contract.

[7] The Appellants claimed a sum of $150,000.00 being the amount covered by the Insurance Policy, General Damages for breach of contract, damages due to the loss of business, compensation under Section 127 of the Fair-Trading Decree, interest on the sum of $150,000.00 at the rate of 13% per annum from January 2013 to the date of judgment and costs of the action on Solicitor/Client basis.

[8] The Statement of Claim reveals that the Appellants had founded their cause of action under three broad heads; breach of contract (the Insurance Policy), failure to process the claim

within a reasonable time, and deception and misleading conduct in breach of the provisions of the Fair-Trading Decree.

(b) Statement of Defence

[9] In its Statement of Defence filed on 13 January 2017, the Respondent admitted the following: that the Appellants were operating a business, trading under the name of HIZZ & HERZ at shop No. 3, Manji Jadavji Building, Main Street, Nadi, the Respondent had insured the Appellants against loss and damage by fire in respect of the said business, that the Insurance Policy was valid at the time the fire took place on 14 January 2013, that the stocks and furniture of the Appellants' business were destroyed, that the Appellants made a claim on 13 February 2013 under the Fire Insurance policy, and that it had rejected the claim. The Respondent pleaded that it was unaware of the extent of the loss.

[10] As an "alternative defence', the Respondent pleaded that it had rejected the claim because it suspected that the fire had been deliberately lit inside the shop using accelerants. In other words, the Respondents relied on the fraud exception, and to substantiate this, they led evidence of an Investigation Reports of the National Fire Authority, a Report of Forensic Consultancy Services PTY Ltd., as well as the Report of its Private Investigator. The position sought to be established through this evidence was that the fire was deliberately lit and did not occur due to accidental circumstances.

[11] In paragraph 1 of the Statement of Defence, the Respondent specifically admitted that the Appellants were operating a business trading as HIZZ & HERZ at shop No.3, Jadavji Building, Main Street, Nadi. This was also recorded as an agreed fact. This admission becomes relevant in view of the position taken by the Respondent, after the conclusion of the trial, and the impugned judgment of the learned High Court Judge.

[12] The certificate of registration of the insured in terms of the Registration of Business Names Act (Cap.249), under Section 4 of the Act states that the business name of the firm is HIZZ & HERZ and was registered on 1 July 2011.

The Trial

[13] When trial commenced, the Appellant's Counsel made an application that in view of the Respondent denying the Appellant's claim under the Policy, the Respondent must begin the trial. Upon the parties making submissions, the learned Judge ruled that the Respondent begin the case. At that at that point the learned judge said:

> " *I accept the submission adduced by Counsel for the Plaintiff. The defendant Insurer admitted that a fire has occurred. The substantial matter before the court is whether the fire was caused by the willful act of the Assured- Plaintiff. So, currently in my judgment the Defendant should begin this case and I so rule."*

[14] The Respondent commenced its case and led the evidence of one witness Ashneel Lal, Insurance Officer of the Respondent Company, who testified *inter alia* that the Appellants' claim was rejected on the basis that the Respondent suspected the fire had been deliberately lit, and the Directors of the Insured were the Appellants. In cross-examination he conceded that the Reports relied on by the Respondent did not say that the 1st Appellant had set fire to the premises.

Appellants' Evidence

[15] The 2nd Appellant testified on behalf of the Appellants. She testified that they (the Original Plaintiffs), had a business and were trading in the name of Hizz and Herz, the stock -in -trade, and furniture and fittings of the said business were insured by the Respondent in a sum of $150,000, the insurance company visited the premises before issuing the policy, there was a fire in the premises on 13 of January 2013, the claim under the Policy was made on 13 February 2013, it was rejected on the basis of a Forensic Report. The 2nd Respondent testified that neither she nor her husband started the fire, and that the Police did not interview her.

Cross examination of 2nd Appellant

[16] In cross-examination, the 2nd Appellant was shown exhibit DE2 and the evidence was as follows:

> "*Q: Ma'am I would like you to have a look at DE2, you don't have a. Who owns His and Hers. Is it limit.. I'm sorry let me rephrase this one. Isn't it correct that early limited liability company is trading as His and Hers?*
> *A: Yes my Lord.*
>
> *Q: And isn't that limited liability company called Kushbo Surat Dullam Limited?*
> *A: No my Lord.*
>
> *Q: What's it called?*
> *A: Kubsurat …Limited.*
>
> *Q: Thank you So the plaintiff is not Rajend Singh and Sudesh Singh trading is his and hers isn't that correct?*
> *A: The Plaintiff is His and Hers*
>
> *Q: So it's not Rajend Singh and Sudesh Singh trading as his and hers you have given before isn't that correct?*
>
> *Court: is that correct or wrong?*
>
> *A: That's correct.*

[17] The 2nd Appellant testified in cross-examination that she was not in Fiji at the time the shop premises caught fire, she did not know how it had started, she was interviewed by Maclaren's, but not interviewed by the National Fire Authority or the Police, and she was unaware whether the Police had actually carried out an investigation.

[18] After the parties closed their respective cases, the Court made order to have the case called on 18 March 2019, but on 18 March 2019 the transcript was not ready and the case was refixed for 25 March 2019.

[19] When the case came up on 25 March 2019, twenty-one days were granted for the parties to file Written Submissions, the court made order that Written Submissions of both parties be filed on or before 15 May 2019, and judgment was fixed for 12 July 2019.

[20] The Appellant filed Written Submissions on 13 May 2019, which was within the time directed by Court. The Appellant's Written Submissions covered the evidence that transpired at the trial. This covered the insurance policy, the loss suffered, the particulars of the breach, the evidence led by the Appellant, the burden of proof in respect of the defence taken by the Respondent, the failure of the Respondent to prove by direct evidence that it was the 1st Appellant that had caused the fire, and that the 2nd Appellant was not cross-examined about the allegation that it was the 1st Appellant who had set fire to the property, nor was the 2nd Appellant cross-examined with regard to the damages that were claimed (as specified in the Claim Form), the Respondent's evidence, and the evidence for the Appellant. The Appellants also pointed out the fact that apart from relying on the Forensic Report, the Respondent had been unable to establish that it was the 1st Appellant who had set fire to the premises and pointed out that the Respondent's witness did not implicate the Appellants in respect of starting the fire.

[21] The Respondent's Written Submissions dated 3rd June 2019, (filed after trial), had been filed clearly after the date ordered by court, and it was only then, that for the first time the Respondent took the 'objection' that the Appellants are not the rightful party to the claim, as the insured was Hizz & Herz, but it was Khoob Surat Dulhan Limited, a Private limited liability company, having it's registered office at shop 4, Dee Mall Complex Building, Main Street, Nadi, that should have been the Plaintiff. It is clear that this submission was based on the answer that was elicited from the 2nd Appellant in cross-examination reproduced in paragraph [16] above, and it was on this basis that the Respondent urged that the court strike out the claim, (i.e. on the basis that the Appellants are not the proper party).

The judgment of the High Court

[22] Having reproduced the Statement of Claim, the Statement of Defence, the Agreed Facts, the Issues for determination, itemized the documentary evidence of the parties, the learned High Court upheld the so-called "*Preliminary Objection*" of the Respondent taken in its Written Submissions, filed after the date set by court, (and without the Appellants responding to same), struck out the Writ of Summons and Statement of Claim. The court said:

> *"(E) THE PRELIMINARY OBJECTION*
>
> *(1) <u>During the trial, Counsel for the defendant raised a preliminary objection to the claim</u>. Counsel for the defendant submitted that the plaintiffs are not the rightful party to initiate the proceedings against the defendant insurance company.* (Emphasis added).
>
> *(2) According to the 'Fire insurance Policy' (PEX-2), the insured is 'Hizz and Herz' and not 'Rajend Singh and Sudesh Singh'.*
>
> *(3) The 2nd named plaintiff during cross-examination at the trial confirmed the same. The transcript of 2nd named plaintiff's cross-examination contains this; (page 21 and 22 of the transcript).*
>
> *(4) Counsel for the plaintiffs has very clearly avoided in responding to the most decisive preliminary point raised by the defendant, which in my view is indicative of the implausibility of the plaintiffs claim against the defendant.*
>
> *(5) According to the 'Certificate of Registration' (DEX – 1) the business name of the insured is 'HIZZ & HERZ' and the corporate name is 'Khoob Surat Dulham Limited.' It is my considered view that the plaintiffs' should have been 'Khoob Surat Dulham Limited' trading as 'HIZZ & HERZ' and not 'Rajend Singh and Sudesh Singh' trading as 'HIZZ & HERZ'.*
>
> *(6) The action was instituted by a wrong party and this is a clear case of abuse of process and also an attempt to use courts machinery improperly."*

[23] Aggrieved by the judgement of the High Court, the Appellants have appealed on the following grounds.

Grounds of Appeal

1. ***THAT*** *the Learned Trial Judge erred in law and in fact in dismissing the Appellants claim on a technicality rather than deciding in the interest of justice the Appellants claim against the Respondent.*

2. ***THAT*** *the Trial Judge erred in law and in fact in not deciding the Appellants claim on merits and as such there was a substantial miscarriage of justice.*

3. ***THAT*** *the Learned Trial Judge erred in law and in fact in not taking into consideration that the Appellants were the policy holders and as such they were entitled to institute the claim against the Respondents and hence it caused a substantial miscarriage of justice.*

4. ***THAT*** *in the alternative the Learned Trial Judge erred in law and in fact in not directing the Appellants to amend the Appellants name in order to decide on the merits of the Appellants claim.*

5. ***THAT*** *the Appellants reserve the rights to add further grounds of appeal upon receipt of Court Record."*

Grounds 1, 2 , 3 and 4 of Appeal

[24] I note at the outset that the "*objection"* taken by the Respondent after the conclusion of the trial was not a "*preliminary objection*" although described as such, nor was it raised during the trial, as stated in paragraph (E)(1) of the judgment. In any event, the purported preliminary objection was diametrically at variance with the agreed facts, namely that the Appellants owned and operated a business trading as HIZZ & HERZ at the said premises. Based on these agreed facts, and the issues recorded, the trial commenced and was concluded as set out above. Further, it was not a recorded issue for determination, whether the correct parties were before Court It is without doubt that the Respondent defended the Statement of Claim on the basis of the fraud exception contained in the policy which states that:

"*If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices be used by the insured or anyone acting on his behalf to obtain any benefit under the policy or if any destruction or damage be occasioned by the willful act or with the connivance of the insured all benefit under this policy shall be forfeited".*

Agreed facts

[25] The following facts were agreed upon and recorded during the Trial.

"*<u>Agreed facts</u>*

1. *The Plaintiffs at al material times owned and operated a business trading as HIZZ and HERZ at Shop No. 3 Manji Jadavji Building, Main Street, Nadi Town.*
2. *The Defendant is a foreign company duly incorporated in India and having its principle*(sic)*place of business in Fiji at Suva and carrying on business as insurance underwriters.*
3. *The Defendant issued a Policy of Insurance No. 1123/10044180/000/00 dated 15th November 2012 to the Plaintiffs on the Plaintiff's stock in trade and business furniture fixtures and fittings for a sum of $150,000.00.*
4. *There was a fire at shop no.3, Manji Jadaji Building, Main Street Nadi Town and the shop of the Plaintiff were*(sic) *destroyed.*
5. *On or about 13th day of February, 2013 the Plaintiffs made a claim with the Defendant under the said Fire Insurance Policy for stock, furniture and fittings in the sum of $150,000.*
6. *The Defendant rejected the claim of the Plaintiffs."*

Striking Out: the High Court Rules

[26] Paragraphs [4], [5] and [6] of the judgment reveal that the learned Judge did not properly consider the substance of the so-called objection.

[27] Order 18, r.18 of the High Court Rules, 1988 provides as follows:

"18 (1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:

(a) it discloses no reasonable cause of action or defence or
(b) it is scandalous or frivolous or vexatious or
(c) it may prejudice or embarrass or delay the fair trial of the action; or
(d) it is otherwise an abuse of the process of the court.
And may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1) (a).

(3) This rule shall, so far as applicable, apply only to originating summons and a petition as if the summons or petition, as the case may be, were a pleading.

[28] The Respondent's submission that an objection on a point of law can be taken at anytime, though valid as a general proposition, is to be understood in the context of the purpose of Order 18.r. 18 of the High Court Rules ("***HCR"***).

[29] Having taken up the said objection, in the Written Submissions filed after trial, the learned Counsel for the Respondent went on to deal with its substantive defence. However, the learned High Court Judge did not consider either the Appellants' claim, or the Written Submissions filed by the Respondent, which covered the evidence that transpired on behalf of the Respondent, but chose to strike out the Statement of Claim based on the so-called "*Preliminary Objection*" alone. In my view the learned High Court Judge erred in upholding the purported '*objection'*, because it could not have been taken at the point at which it was taken, nor was it validly taken. Order 18 (2) provides that no evidence shall be admissible on an application under paragraph (1) (a). As will be set out below, the objection itself was misconceived. This is so because the Respondent was in fact alluding to misjoinder of parties, and not to a baseless cause of action. The record reveals that it was only in cross-examination that the learned Counsel for the Respondent suggested to the 2nd Appellant that the Plaintiff ought to have been the limited liability company. In any event, it was never in doubt that the Respondent always knew that it was dealing with the natural persons behind the insured business, namely the directors of His and Herz, the Appellants, who were trading under the said name. What was insured was the stock-in-trade and the furniture and fittings of the business being conducted under the name of Hizz & Herz. This conclusion is fortified by the correspondence from the Respondent to the Appellants when,

by letter dated 17 December 2015, it denied the claim made by the 2nd Appellant on behalf of the insured (business), addressed as follows:

"*Hizz & Herzz,*
P.O. Box 926,
Nadi
Kind Attention: Ms. Sudesh Singh"

[30] In it's letter dated 6 September 2016 the Respondent specifically referred to the insured as Hizz & Herzz.

[31] The law relating to striking out of a Statement of Claim reflects two principles, one is that frivolous, vexatious actions ought not to be entertained, and that the discretion of the court to strike out proceedings should be used very sparingly, and only in exceptional cases where legal questions of importance and difficulty are raised. If there are triable issues which merit the adducing of evidence during the trial whether it is the plaintiffs or the defendants, and is not open to a defendant to take up a position extracted in cross-examination, and to then found a "*preliminary objection*". Whilst courts must ensure that their processes are not being abused, no court would prevent access to it if failure to do so would result in a miscarriage of justice. The Respondent stated in its Written Submissions in the court below that the application for striking out is made on the ground that, "*there is no reasonable cause of action, it is frivolous vexatious scandalous and otherwise an abuse of the process of court, as the plaintiff is not the rightful party in the matter".* This was later reflected in the findings of the learned High Court Judge.

[32] Paragraph [4] of the judgment reveals that the learned High Court judge, considered the contents of Order 18 (where an action disclosed no reasonable cause of action, or is scandalous, frivolous or vexatious and is otherwise an abuse of process of court). Paragraph [5] of the judgment is a finding on non-joinder. An application for striking out of pleadings must fulfil the criteria in Order 18. r. 18, and the discretion of court is to be sparingly exercised. An application for misjoinder or non-joinder must be made at the earliest

possible opportunity is not a ground for dismissal of the action, as was done by the learned High Court Judge.

[33] The guiding criteria in considering an application for striking out has been dealt with in an oft-quoted *dicta* **Davies LJ**, in ***Riches v Director of Public Prosecutions*** *[1973] 2 All ER 935,*at p.939 where his Lordship said:

> *"I do not want to state definitely that, in a case where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or could prevail. In principle I cannot see why not. If there is any room for an escape from the statute, well and good, if it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitation and must fail..."*

[34] In the same case, **Lawton LJ** , at page 942 said:

> *The object of RSC Ord 18, r 19 (which is equivalent to our O.18, r.18) is to ensure that defendants shall not be troubled by claims against them which are bound to fail having regard to the uncontested facts. One of the uncontested set of facts which arises from time to time is when on the statement of claim it is clear that the cause of action is state barred and the defendant tells the court that he proposes to plead the statute and on the uncontested facts", that is no reason to think that the plaintiff can bring himself within the exceptions set out in the Limitation Act 1939. In those circumstances it is pointless for the case to go on so that the defendant can deliver a defense. The delivery of the defense occupies time and wastes money; and even more useless and time – consuming form the point of view of the proper administration of justice is that there should then have to be a summons for directions and an order for an issue to be tried and, for that issue to be tried before the inevitable result is attained."[Emphasis added]*.

[35] In ***Elecitricity Corporation Ltd v Geotherm Energy Ltd [1992] 2 NZLR,*** the court said:

> *" The jurisdiction to strike out a pleading for failure to disclose the cause of action is to be sparingly exercised and only in a clear case we are the court is satisfied that it has all the requisite material to reach a definite and certain conclusion: the plaintiffs case must be so clearly untenable that it could not possibly succeed and the court would approach the application, assuming that all the allegations in the statement of claim are factually correct"*

[36] Kirby J in **The Commonwealth of Australia (No.2) [1996] HCA 14; (1996) 136 ALR 251;** (1996) summarized the principles applicable to striking out as follows:

a. *It is a serious matter to deprive a person of access to the courts of law for it is there that the rule of law is upheld, including against Government and other powerful interests. This is why relief, whether under O 26 r 18 or in the inherent jurisdiction of the court, is rarely and sparingly provided.*

b. *To secure such relief, the party seeking it must show that it is clear, on the face of the opponent's documents, that the opponent lacks a reasonable cause of action ... or is advancing a claim that is clearly frivolous or vexatious.*

c. *An opinion of the Court that a case appears weak and such that is unlikely to succeed is not, alone, sufficient to warrant summary termination... even a weak case is entitled to the time of a court. Experience teaches that the concentration of attention, elaborated evidence and arguments and extended time for reflection will sometimes turn an apparently unpromising cause into a successful judgment.*

d. *Summary relief of the kind provided for by O.26 r 18, for absence of a reasonable cause of action, is not a substitute for proceeding by way of demurrer.... If there is a serious legal question to be determined, it should ordinarily be determined at a trial for the proof of facts may sometimes assist the judicial mind to understand and apply the law that is invoked and to do in circumstances more conducive to deciding a real case involving actual litigants rather than one determined on imagined or assumed facts.*

e. *If, notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a Court will ordinarily allow that party to reframe its pleading.*

f. *The guiding principle is, as stated in O 26 r 18(2), doing what is just. If proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit. [*Emphasis Added*].*

[37] The authorities cited above are clear that striking out is the exception, and must be resorted to only when the court is satisfied that the criteria in Order 18 r.1 have been met. The conduct of the Respondent, taken together with the specific admission in it's Statement of Defense that the Appellants were operating on business trading as Hizz & Herz and the recording of this as an agreed fact, in my view estops the Respondent from taking up the position that it had been sued by the wrong party. During the hearing before this court, the

learned Counsel for the Respondent submitted that the Appellants had failed to move for an amendment of pleadings based on the admission of the 2nd Appellant. However, this is misconceived in law because the essence of the Respondent's objection was the non-joinder of a necessary party. In my view, the pleadings of the Respondent and the evidence did led on its behalf, did not entitle it to take that position, and the learned High Court Judge ought to have rejected it, or acted in terms of Order 15. Of the High Court Rules.

[38] The questions raised by the learned Counsel for the Respondent in cross-examination indicated his objection alluded to non-joinder. Based on the Respondent's 'objection', the matter that the court ought to have considered was whether there had been non-joinder of a necessary party, and not acted under the provisions relating to a claim that is an abuse of the process of court. A necessary party is a party whose inclusion is necessary in order to ensure that the judgment and decree if entered against it can be effectively enforced.

[39] All objections for misjoinder and non-joinder must be taken at the earliest possible opportunity, and if not so taken, it will be deemed to have been waived. In this case it cannot possibly be contended by the Respondent that the Insured was not properly before Court, and that therefore the Court would have been able to properly determine the issues before it.

[40] A necessary party is a party is one whose presence is necessary to adjudicate the issues raised in the pleadings. There is no basis on which it could be said that the issue for determination, *viz,* whether the fire was started by the willful act of the insured, could not have been determined by the court in the absence of the limited liability company. If there has been non-joinder of a necessary party, the court must formally require the Plaintiff to add the correct party, and not to strike out the action on the basis that it discloses no cause of action, as it is not a fatal irregularity. Therefore, the learned Judge erred in striking out the Writ of Summons and the Statement of Claim.

[41] The implausibility of the Respondent's submission is clear from the fact that even if assumed that the Plaintiff had been misdescribed, the "*misdescription*" did not mislead the

Respondent. The Respondent's objection was in fact one of misjoinder of parties. Order 15. r.6 of the High Court Rules provides that :

> *"No cause matter shall be defeated by reason of the misjoinder or non joinder of any party; and the court may determine the issues are questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.*
>
> *(2) Subject to the provisions of this role, at any stage of the proceedings in any cause or matter the court may on such terms that it as it thinks just and either of its own motion or on application-*
>
> *(a) are there any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;*
>
> *(b) order anyone of the following persons to be added as a party namely-*
>
> *(i) any person who ought to have joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the course or matter may be effectually and completely determined and adjudicated upon, or*
>
> *(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause of matter."*

[42] In my view the so-called admission of the 2nd Appellant in cross-examination, was not sufficient to enable the court to arrive at the conclusion that the wrong party was before court, or that the claim itself was liable to be struck out under Order.18 r.1. In any event, if that is indeed so, that is a matter that ought to have been taken up by the Respondent at the stage of pleadings, and certainly not after that evidence had been led and at the conclusion of the trial.

[43] In my view, based on the agreed facts, and the evidence led, the insured was properly before Court. Accordingly, I hold that the Writ of Summons and the Statement of Claim, were wrongly struck out. I therefore allow the appeal on all 4 grounds.

[44] I hold that the action ought to be determined on the merits. The case is accordingly remitted to the High Court to be expeditiously heard on the merits.

The orders of the Court are:

1. *The appeal of the Appellant is allowed.*
2. *The case is remitted to the High Court to hear and determine the claim on the merits.*
3. *The Respondent is ordered to pay the Appellants a sum of $3000.00 as costs in this court, and a sum of $2,500.00 as costs in the court below.*

.....
Hon. Justice Eric Basnayake
JUSTICE OF APPEAL

.....
Hon. Justice S. Lecamwasam
JUSTICE OF APPEAL

.....
Hon. Justice Farzana Jameel
JUSTICE OF APPEAL

Solicitors

Iqbal Khan & Associates for the Appellants
Krishna & Co. for the Respondent