

SOUTH AFRICA / JUDGMENT

Roberts NO v Brian Kahn Inc and Others (08393/2016) [2016] ZAGPJHC 315 (18 November 2016) [2016] ZAGPJHC 315

COURT

South Gauteng High Court, Johannesburg

BEFORE

Kathree-Setiloane

CASE / FILE NUMBER

08393/2016

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG
CASE
NO: 08393/2016

Reportable: No
Of
interest to other judges: No
Revised.
In

the matter between: PETER
WAYNE ROBERTS
N.O Applicant
and
BRIAN
KAHN
INC Respondent
IN

THE MATTER BETWEEN: BRAIN
 KAHN
 INC Plaintiff
 PETER
 WILLAIM ROBERTS N.O
 PETER
 WAYNER ROBERTS N.O
 MAUREEN
 VERONICA ROBBERTS N.O
 [in
 their capacity as trustees of the hyde Trust
 Master's

Ref: IT9319/96] First
 Defendant
 LOFTUS
 LAW Second
 Defendant
 PETER
 WILLIAM
 ROBBERTS Third
 Defendant

JUDGMENT

KATHREE-SETILOANE:

- [1] The applicant, Peter Wayne Roberts (“Roberts Jnr”), who is in effect the principal debtor, has brought an application for leave to intervene in an action brought by the respondent, as the plaintiff Brian Kahn Inc (“BKI”), against the trustee of The Hyde Trust (“the Trust”), Loftus Law (“Loftus Law”) and Peter William Roberts (“Roberts Snr”).
- [2] In that action, BKI seeks an order that:
- (a) Loftus Law pay the sum of R608 904.84 presently held by it for the Trust to be held in trust by BKI for the claim of BKI against Roberts Jnr;
 - (b) the costs of the application be paid by the Trust; Roberts Snr in the event that the Trust repudiates the decision of Roberts Snr that the Trust not pay the sum of to the plaintiff and Loftus Law, only if it opposes the relief.
- [3] The basis of the claim is that in the period 29 September to 6 October 2015, the Trustees of the Trust resolved in writing that the Trust would stand as surety in favour of BKI for all amounts owed by Roberts Jnr and cede and assign and make over in favour of BKI in securitatem debiti the deposit, as well as the balance of the proceeds of the sale of properties owned by the Trust.

- [4] On the 10 November 2015 the Trust sold the properties to a company known as Abologix (Pty) Limited (“Abologix”). The balance owing in terms of the agreement of sale by Abologix to the Trust is the sum of R608 904.84, which is held in trust by Loftus Law. Roberts Jnr is indebted to BKI in the sum of R981 973.44, alternatively in the sum of not less than R608 904.84.
- [5] The bases on which Roberts Jnr seeks to intervene in the action is that:
- (a) He has a direct and substantial interest in the matter and should have been joined therein, failing which there was a non-joinder;
 - (b) Roberts Jnr wishes to institute a counterclaim against BKI for the funds received and held by BKI in trust on his behalf totalling R20

588 884.14 and the counterclaim can “conveniently and properly be dealt with in these proceeding so as to avoid multiplicity of actions”.

- [6] The action is not for Judgment against the sureties, nor is it an action for judgment against the principle debtor. However, if there is no liability on the part of the principle debtor (and therefore a fortiori against the sureties), BKI would not entitle to the order that it seeks and its action should be dismissed.
- [7] A person is entitled to intervene as a plaintiff or defendant as contemplated in Rule 12 of the Uniform Rules:[1]
- (a) If the intervening party’s right to relief is dependent upon the determination of substantially the same questions of law or facts as one of the parties (which may be referred to as an intervention of desire); or
 - (b) If the intervening party has a legal interest which may be prejudicially affected by the Judgment of the court (which may be referred to as an intervention of necessity);
- [8] A person is also entitled to intervene under the common law on the grounds of convenience (which may be referred to as an intervention

of convenience)[2] An applicant seeking to intervene in an action must show that he or she has a ground for intervention and has a prima facie case. In addition, the applicant must show that the application is seriously made and is not frivolous.[3]

- [9] The plaintiff’s claim against the cited sureties depends upon the claim against the principal debtor. Roberts Jnr, as principle debtor, wishes to demonstrate that he does not owe the money to BKI. His rights as the principal debtor may be adversely affected by a decision concerning the contingent obligations of the surety. Roberts Jnr, therefore, has a right to intervene of necessity.

- [10] In addition, Roberts Jnr has a right to intervene as of desire since his right to relief is dependent upon the determination of substantially the same questions of law or fact as that of the plaintiff and the defendant. Moreover, it is in the interest of justice (an intervention of convenience) that Roberts Jnr be allowed to intervene so as to avoid a multiplicity of actions and duplication of processes with the usual possibility of different decisions being given by different courts on the same issue.
- [11] BKI has not disturbed Roberts Jnr prima facie case nor does it suggest that the application is frivolously made. There is accordingly no basis for refusing the intervention application of Roberts Jnr.
- [12] BKI contends that it was not necessary to join Roberts Jnr in the action. I am unable to agree because even if there was no necessity for joinder, Roberts Jnr is entitled to intervene out of desire and/or out of convenience.
- [13] In the result I make the following order;
1. The Applicant is granted leave to intervene in the action as the fourth defendant.
 2. The Respondent/Plaintiff is ordered to pay the costs of this application.

JUDGE KATHREE-SETILOANE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

Counsel for the Applicant/ Plaintiff: D Vetten

Instructed by: Martin-Patlansky

Counsel for the Respondent/ Defendant: P Strathern SC

Instructed by: Brian Kahn Incorporated

Date of Hearing: 2 November 2016

Date of Judgment: 18 November 2016

- [1] Shapiro V South African Recording Rights Association Ltd (Galeta Intervening) 2008 (4) SA 145 (W) paras 9-19.
- [2] Ex Parte Sudurhavid (Pty) Ltd: In re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd 1993
- (2) SA 737 (Nm) 741A-F; Vitorakis v Wolf 1973

(3) SA 928 (W) at 930H; Maritz t/a Maritz & Kie Rekenmeester v Walters and another; Maritz t/a Maritz & Kie Rekenmeester v Walters and another (FirstRand Bank Ltd Intervening; Maritz t/a Maritz & Kie Rekenmeester v Walters & others 2002 (1) SA 689 (C) at 700H.

[3] Shapiro para 18-19.

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