REPUBLIC OF SOUTH AFRICA

GAUTENG HIGH COURT DIVISION, PETORIA

CASE NO: 38971/2018

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

19/10/18
DATE

SIGNATURE

In the matter between:

SUMITOMO RUBBER SA (PTY) LTD	Applicant
and	
STEPHEN RUNDLE	1st Respondent
SQUIREWOOD INVESTMENTS 4 (PTY) LTD	2nd Respondent
PAUL DU PLESSIS ATTORNEYS	3rd Respondent

And

CASE NO: 38971/2018

BOAKE INCORPORATED	Applicant
and	
SUMITOMO RUBBER SA (PTY) LTD	1st Respondent
STEPHEN RUNDLE	2nd Respondent

SQUIREWOOD INVESTMENTS 4 (PTY) LTD 3rd Respondent

PAUL DU PLESSIS ATTORNEYS 4th Respondent

J U D G M E N T

MNGQIBISA-THUSI, J:

[1] The applicant seeks on an urgent basis the following relief:

1.1 an interim interdict pending the final determination of an application or action to be instituted within 30 days after the granting of this order in the following terms:

1.1.1 that the third respondent be ordered to keep in its trust account an amount of R3, 244,984.58 together with interest at 10.25% per annum calculated from 18 August 2016 together with costs on an attorney and client scale, from the proceeds of the sale of an immovable property of the second respondent described as Remaining Extent of Erf 128, Koedoespoort, Pretoria, situated at 19 Blesbok Avenue, Koedoespoort Avenue, Koedoespoort Industrial ("the immovable property").

1.1.2 that the first and/or second and/or third respondent(s) keep the applicant apprised of all steps in relation to the registration and transfer of the immovable property, including if the mandate of the third respondent is

terminated or if the transaction is transferred to another firm of attorneys and/or the general status of the transaction.

1.2 Granting leave to the applicant to approach the above court on the same papers, supplemented as the circumstances may require, for further relief.

1.3 That the costs of this application be costs in the application or action to be instituted save in the event of opposition hereto, in which case costs will be sought against the opposing respondents.

[2] The respondents, Stephen Rundle, ("first respondent"); Squirewood Investments 4 (Pty) Ltd ("second respondent"); and Paul Du Plessis Attorneys ("third respondent") are not opposing this application.

[3] However, Boake Incorporated, an auditors and chartered accountants firm has filed an application to intervene in these proceedings as fourth respondent.

[4] The first respondent is a director and sole shareholder of the second respondent. The immovable property which is the subject-matter of this application is owned by the second respondent. As appears from the papers filed Squirewood Investments was previously de-registered and is now re-registered. The third respondent is the transferring

attorneys firm who hold in trust the proceeds of the sale of the immovable property.

Factual background

[5] On 29 Mach 2017 the Registrar of this court granted a default judgment (under case number 95473/2016) sought by the applicant in terms of which the first respondent was ordered to pay to the applicant:

5.1 the sum of R3, 244,984.58;

5.2 interest on the amount of R3, 244,984.58 at 10.25% per annum, in terms of the Prescribed Rate of Interest Act, 55 of 1975 (as amended), calculated from 18 August 2016 to date of final payment.

5.3 costs of the application on an attorney and client scale.

[6] On 9 January 2018 the sheriff attempted to execute a writ of execution against the first respondent in terms of the default judgment at the offices of the applicant in the application to intervene, situated at 19 Blesbok Avenue, Koedoespoort, Pretoria, being the registered address of the second respondent. In terms of the return of the execution of the writ of execution, the first respondent's 'right, title and interest in Squirewood Investment 4 Pty Ltd' was attached[1].

[1] Uniform Rule 45(8)(c)(i) which provides that: "If incorporeal property, whether movable or immovable, is available for attachment, it may be attached without the necessity of a prior application to court in the manner hereinafter provided: (c) In the case of attachment of all other incorporeal property or incorporeal rights in property as aforesaid, (i) the attachment shall only be complete when- (a) notice of attachment has been given in writing by the sheriff to all interested parties and where the asset consists of incorporeal immovable property or in

[7] On 29 January 2018 the sheriff in Hermanus issued a *nulla bona* return after an attempt to execute the writ of execution at the first respondent's residential address at 18 Selkirk Street, Hermanus Heights, Hermanus.

[8] The applicant was made aware by the first respondent that the sale of the immovable property owned by the second respondent is pending payment of outstanding rates and taxes. Further, in its founding affidavit the applicant alleges that there is a mortgage bond over the property in favour of Investec Bank in the amount of R2, 064, 974.66 and that the purchase price for the immovable property is R8, 500,000.00.

Application to intervene

[9] Boake Incorporated, seeks leave to intervene in the main application as it alleges that it is a creditor of the first and second respondents and has an interest in the proceeds of the sale of the immovable property. In its founding affidavit Boake Incorporated alleges that it is a creditor of the second respondent in an amount of R1, 316, 442.57 in respect of services rendered to the second respondent and other related entities; and a further amount of R953, 388.92 for work in progress. To substantiate its claim of the second respondent's indebtedness to it,

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incorporeal right in immovable property, notice shall also have been given to the registrar of deeds in whose jurisdiction the registry the property right is registered, and (b) the sheriff shall have taken possession of the writing or document evidencing the ownership of such property or right, or shall have certified that he has been unable, despite diligent search, to obtain possession of the writing or document;..."

Boake Incorporated has attached to his application for leave to intervene the following annexure:

9.1 a Word document with the heading 'Squirewood Investments 4 (Pty) Ltd' which has a list of data interests. From this document it is not clear ("DB1");

9.2 a suretyship signed on behalf of the second respondent in favour of Boake Incorporated for payment of debts owed to Boake Incorporated by entities mentioned in 'DB1' ("DB2");

9.3 a suretyship by first respondent in favour of Boake Incorporated for payment of debts owed to Boake Incorporated by entities mentioned in 'DB1' ("DB3"); and

9.4 a pledge agreement between the first respondent and Boake Incorporated for payment of debts owed to Boake Incorporated by the first respondent ("DB4"). As security the first respondent pledged his shareholding in the second respondent and all rights attaching to such shareholding.

[10] Counsel for Boake Incorporated submitted that Boake Incorporated would suffer prejudice if it is not allowed to intervene in the main application and the order sought by the applicant is granted particularly because the first respondent had given it an undertaking that it would use the proceeds from the sale of immovable property to pay Squirewood indebtedness to it.

[11] Uniform Rule 12 provides that:

"Any person entitled to join is the plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings applied for leave to intervene as a plaintiff or a defendant. The court may appoint such application make such order, including an order as to costs, and give such directions as to further procedure in the action as to it may seem meet".

[12] In *Shapiro v SA Recording Rights Association Ltd*[2] the court stated the following:

> "[17] In *Minister of Local Government v Sizwe Development* White J held that an application for intervention has to set satisfy the court that:
>
> (i) (H)e has a direct and substantial interest in the subject matter of the litigation, which could be prejudiced by the judgement of the court....;
>
> (ii) the application is made seriously and is not frivolous, and that the allegation made by the applicant constitutes a primer facing case or defence-it is not necessary for the applicant to satisfy the court that he will succeed in his case or defence..."

[13] The applicant opposes the application to intervene on the ground that the application is not bona fide in that Boake Incorporated has not set out the facts to establish a primer facing case in the main application.

[14] From Boake Incorporated's annexure 'DB1' to the founding affidavit it is not clear if the entries made are monies owed to the second respondent by the entities mentioned therein. Boake Incorporated did

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[2] 2008 (4) SA 145 (W) at 152.

not attach any invoices to prove that the monies are owed to the second respondent. The suretyship signed on behalf of the second respondent and a cell pledge session document 20 by themselves prove the indebtedness of the entities mentioned in 'DB1".

[15] Furthermore as correctly pointed out by counsel for the applicant Boake Incorporated was aware of the attachment of the first respondent's shares in second respondent affected by the sheriff. However, Boake Incorporated did nothing to protect its rights as a creditor of the second respondent. It does not assist Boake Incorporated as submitted by his counsel that it waited on the first respondent to do something about the attachment of the shares in the second respondent. I am therefore not convinced that Boake Incorporated has established a pattern facing case to be allowed to intervene in the main application. Even if Boake Incorporated had made out a case that the second respondent is indebted to it, Boake Incorporated has not shown what prejudice it will suffer if the order sought by the applicant is granted. In the event that the order sought by the applicant is granted, that does not appeal the applicant priority over other creditors of the second respondent. Furthermore, if granted, that is not dispositive of the issues at hand. The order would be provisional pending the applicant either succeeds or fails proving its claim to the proceeds in question.

[16] I am therefore of the view that the application to intervene must fail in that Boake Incorporated has made out a prima facie case and that it will suffer any prejudice if it is allowed to intervene. Boake Incorporated has not shown that the application was urgent taking into account that it was aware by January 2018 of the attachment of the first respondent's shares in the second respondent and did nothing to protect its alleged rights.

[17] The applicant seeks an interim interdict in order to prevent the first respondent from dissipating or hiding assets which might satisfy its judgment debt. From the applicant's papers it appears that the first respondent had refused a request by the applicant to give an undertaking that the proceeds from the sale of the immovable property will not be used until the finalisation of an application or action it intended instituting in order to recover the amounts granted in terms of the default judgment of XXXXX.

[18] In order to succeed in an application for an interim interdict, the court set out the following requirements[3] the applicant has to satisfy:

17.1 A right that, though *prima facie* established, is open to some doubt;

17.2 a well-grounded apprehension of irreparable harm if interim relief is not granted and the ultimate relief is eventually granted;

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[3] See in this regard *Setlogelo v Setlogelo* 1974 AD221 at 227.

17.3 that the balance of convenience is in favour of the granting of the interim relief; and

17.4 that there is an absence of any other satisfactory remedy.

[19] In with reference to an anti-dissipation order the court in *Carmel Trading Company Limited v Commissioner for the South African Revenue Service* and Others[4] stated that:

> "[3] Such an order, which interdicts a respondent from disposing of or dissipating assets, is granted in respect of a respondent's property to which the applicant can lay no special claim. To obtain the order, the applicant has to satisfy the court that the respondent is wasting or secreting assets with the intention of defeating the claims of creditors[5].

[20] In the case of an anti-dissipation interdict like in the present case, it is not necessary for the applicant to prove that there is no other satisfactory remedy available. However, the applicant also has to prove that the respondent is wasting or hiding assets with the intention of defeating the applicant's claim.

[21] It is the applicant's contention that the second respondent is the first respondent's *alter ego*. No basis has been laid for the assertion. It is assumed that the basis for the contention is that because the first respondent is the sole shareholder of the second respondent, the applicant infers that he is the owner of the assets of the second

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[4] 2008 (2) SA 433 (SCA).
[5] See also *Knox D'Arcy Ltd & Others v Jamieson & Others* 1996 (4) SA 348(A).

respondent in his personal capacity, despite the second respondent's separate legal personality.

[22] Furthermore, the applicant contends that there is a reasonable likelihood, based on the first respondent's financial position, that the proceeds of the sale of the immovable property will be dissipated to the prejudice of the applicant's judgment debt.

[23] The applicant, on the basis of the attached shares, has established a *prima facie* right though open to some doubt. Further, the applicant has shown that, in light of the allegation by Boakes Incorporated that the first respondent has undertaken to use the proceeds of the sale of the immovable property for its alleged indebtedness to Boakes Incorporated, there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the ultimate relief is eventually granted. The applicant will be prejudiced if the first and/or second respondent were to dissipate the proceeds of the sale before the dispute between the applicant and the first respondent is finalised and the applicant is successful in whatever application or action it intends pursuing in order to satisfy the judgment debt. Nothing turns on the fact that the second respondent is not a debtor of the applicant. Furthermore, I am of the view that the balance of convenience favours the granting of the interim relief, pending further steps to be taken by the applicant. Taking cognisance of the pledge Boake Incorporated holds over the first respondent's shareholding in the second respondent, and the fact that the applicant is not seeking the

preservation of the entire amount of the proceeds of sale of the immovable property, I am of the view that any other claimant against the first and/or second respondent will not be deprived of its rights.

[24] I am therefore satisfied that the applicant has satisfied the requirements for anti- dissipation order to be granted.

[25] In the result the following order is made:

1. The application to intervene in these proceedings is dismissed with costs.
2. An interim interdict pending the final determination of an application or action to be instituted within 30 days after the granting of this order is granted in the following terms:
   2.1 that the third respondent is ordered to keep in its trust account an amount of R3, 244,984.58 together with interest at 10% per annum calculated from 18 August 2016 together with costs, on an attorney and client scale, from the proceeds of the sale of the immovable property described as Remaining Extent of Erf 128, Koedoespoort, Pretoria, situated at 19 Blesbok Avenue, Koedoespoort Avenue, Koedoespoort Industrial ("the immovable property").
   2.2 that the first and/or second and/or third respondent(s) keep applicant apprised of all steps in relation to the registration and transfer of the immovable property,

including if the mandate of the third respondent is terminated or if the transaction is transferred to another firm of attorneys and/or the general status of the transaction.

2.3 The applicant is granted leave to approach the above court on the same papers, supplemented as the circumstances may require, for further relief.

2.4 Costs to be costs in the application or action to be instituted.

N P MNGQIBISA-THUSI
Judge of the High Court

Applicant's instructing Attorneys: Du Bruyn & Morkel Attorneys
Boake Incorporated's Attorneys: Biccari Bollo Mariano Inc