

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 21/42212

In the matter between:

CHROMETCO LIMITED Applicant
(Registration number: 2002/026265/06)

and

SAIL MINERALS PROPRIETARY LIMITED First Respondent
(Registration number: 2013/101076/07)

**REINHARDT TRANSPORT GROUP
PROPRIETARY LIMITED** Second Respondent
(Registration number: 2008/011956/07)

TUBEMECH LOGISTICS PROPRIETARY LIMITED Third Respondent
(Registration number: 1999/14854/07)

**COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION** Fourth Respondent

APPLICANT'S CONCISE SUBMISSIONS
IN RESPECT OF URGENT APPLICATION

1. The applicant ("**Chrometco**") seeks an order placing the first respondent ("**Sail Minerals**") under supervision and commencing business rescue proceedings in terms of s131(1) of the Companies Act 71 of 2008 ("**the Act**") and to appoint Siviwe Dongwana ("**Dongwana**") as the interim business rescue practitioner.
2. The second respondent ("**RTG**") opposes the relief, but only in respect of two issues, namely (a) urgency and (b) the identity of the practitioner to be appointed.

3. It is common cause that the jurisdictional requirements for an order commencing business rescue have been met, namely (a) that Sail Minerals is financially distressed, within the meaning of s128 of the Act; and (b) that there exists a reasonable prospect for Sail Minerals to be rescued, within the meaning of s128 of the Act.
4. An attempt was made by the board of directors to commence business rescue proceedings by way of resolution in terms of s129 of the Act, on 5 July 2021. Due to a change in the system of the fourth respondent (“CIPC”), this could not be done. On the same day, RTG issued an application for the winding-up of Sail Minerals. This resulted therein that the board of directors of Sail Minerals could no longer begin business rescue proceedings by way of resolution, which is more expedient and cost effective. Chrometco, the major shareholder, therefore had to take the more cumbersome approach to apply to court in terms of s131 of the Act. Such an application requires more than a mere *prima facie* case or an arguable possibility. See: **Oakdene**.¹
5. Furthermore, updated financial information had to be put up in support of the case of Chrometco. See: **Kariba**.²
6. This application was issued as soon as the latest financial information was confirmed on 27 August 2021.³ Sufficient time was allowed for RTG to

¹ *Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami) (Pty) Ltd and others* 2013 (4) SA 539 (SCA) at par [29]-[31].

² *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and others* 2015 (5) SA 192 (SCA) at par [33]-[34].

³ Founding affidavit par 91, CaseLines 001-39.

answer the application and for the application to be enrolled for hearing on 21 September 2021.

7. RTG's first complaint concerns urgency but, aside from these type of applications being inherently urgent, the result of the competing business rescue application and winding-up application is that there is a stalemate situation: the winding-up application cannot proceed while the business rescue application is pending, by virtue of the provisions of s131(6) of the Act, which suspends those liquidation proceedings until the court has adjudicated upon the business rescue application or the business rescue proceedings end, if the court makes the order applied for.
8. Therefore, as things stand, absent this court considering the business rescue application, and granting or dismissing it, everything is in limbo.
9. The second objection of RTG concerns the appointment of the business rescue practitioner. RTG wishes for a different business rescue practitioner to be appointed, instead of Dongwana *alternatively* for Dongwana and the alternative business rescue practitioner to be appointed jointly.
10. S131(4) of the Act provides that after considering an application in terms of s131(1), the court may (a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that (i) the company is financially distressed; (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment related matters; or (iii) it is otherwise just and equitable to do so for financial reasons, and

there is a reasonable prospect for rescuing the company; or (b) dismiss the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.

11. In terms of s131(5), if the court makes an order in terms of s131(4)(a), the court may make a further order appointing as interim practitioner a person who satisfies the requirements of s138, and who has been nominated by the affected person who applied in terms of s131(1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in s147. See: *Tayob*.⁴
12. *Tayob* is authority for the proposition that even where a practitioner dies, resigns, or is removed from office, a substitute must be appointed by the affected person that made the nomination in terms of s131(5), if business rescue did not commence by way of resolution, but by a court order.
13. Therefore, in the circumstances, Chrometco as affected person is entitled to nominate the business rescue practitioner, whose appointment shall be subject to ratification by the holders of a majority of the independent creditors' voting interest at the first meeting in terms of s147 of the Act.
14. It is submitted, therefore, that Dongwana should be appointed and that the proper forum for considering the ratification of his appointment, would be the s147 meeting.

⁴ *Mahomed Mahier Tayob and another v Shiva Uranium (Pty) Ltd (in business rescue) and 2 others* [2020] ZASCA 162 (8 December 2020).

15. The largest creditors of Sail Minerals support the business rescue.⁵
16. In the circumstances, an order will be sought in terms of the draft order which will be uploaded onto CaseLines.

J E SMIT
Counsel for Applicant

Chambers
20 September 2021

⁵ See FA17, CaseLines 001-89; FA18, CaseLines 001-90 and the support of ABSA Bank Limited attached to the replying affidavit.