

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 42212/2021

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

FILING SHEET

BE PLEASED TO TAKE NOTICE THAT the applicant hereby presents its replying affidavit for service and filing.

Dated Sandton on this the 17th day of September 2021.

*SR Rankapole***ENSAFRICA INCORPORATED**

Attorneys for the applicant
The Marc | Tower 1
129 Rivonia Road
Sandown, Sandton
Tel: (011) 269 7600
Email: mkekana@ensafrica.com
pwiner@ensafrica.com
Ref: P Winer/ M Kekana/ 0494952

**TO: THE REGISTRAR OF
THE ABOVE HONOURABLE COURT**
Johannesburg

AND TO: SAIL MINERALS PROPRIETARY LIMITED
First Respondent
Unit 25 Sunninghill Office Park
4 Peltier Drive
Sunninghill, Gauteng
Email: piotr@sailholdings.com
Yang@sailgroup.com

**AND TO: REINHARDT TRANSPORT GROUP PROPRIETARY LIMITED
AJ VAN RENSBURG INCORPORATED**
Attorneys for the second respondent
2 Cardigan Road
Parkwood, Johannesburg
Tel: (011) 477 3034/5143/6017
Email: aj@vrblaw.co.za
wendy@vrblaw.co.za
Ref: AJ VAN RENSBURG/WS/MAT4768

**AND TO: TUBEMECH LOGISTICS PROPRIETARY LIMITED
DOMAN WEITZ ATTORNEYS**
Attorneys for the third respondent
2 Joe Hanna Street, White River
Tel: (013) 750 0216
Email: secdoman@dwatt.co.za
Ref: TUB3/0001/SH/A DOMAN
C/O VENTER & ASSOCIATES INC.
First Floor, Block 4
Pendoring Office Park
299 Pendoring Road
Blackheath, Randburg
Tel: (087) 945 0300
Email: andre@venterinc.co.za
Ref: A.Liebenberg / D.160

AND TO: COMPANIES AND INTELLECTUAL PROPERTY COMMISSION

The DTI Campus
Block F
77 Meintjies Street
Sunnyside
Pretoria

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 42212/21

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

REPLYING AFFIDAVIT

I, the undersigned,

LEE McCANN,

do hereby make oath and say that:

1. I am an adult male, chief executive officer of the applicant.
2. I deposed to the founding affidavit herein and remain duly authorised to depose to this affidavit.
3. The facts deposed to herein are within my personal knowledge and belief, save where the context indicates the contrary, and are furthermore true and correct. Where I refer to information conveyed to me by others, I believe such information to be true. Where I make submissions of a legal nature, I rely on advice provided to me by the applicant's attorneys.
4. I have read the second respondent's affidavit, deposed to by Floris Johannes Du Toit, on Thursday, 16 September 2021. The urgent application was delivered to the second respondent on 2 September 2021, being the day on which the application was issued. In terms of the notice of motion, the second respondent was required to deliver its answering affidavit by Monday, 13 September 2021. The second respondent failed to do so. Instead, the second respondent waited until after the urgent roll had closed on Thursday, 16 September 2021, to deliver its 13 page affidavit at 15h53. No reasons are furnished by the second respondent for the late filing of its affidavit, which has resulted in this replying affidavit having to be prepared under extreme pressure to ensure that it is filed during the course of 17 September 2021.
5. The second respondent was afforded with sufficient time to consider the papers (this being the reason why the application was not set-down for hearing on the first Tuesday after issuing). As is evident from the correspondence attached to the founding affidavit, the second respondent was also advised prior to the issuing of the application that this application would be brought. The application did not come as a surprise to the second respondent and there is no reason for the second respondent's failure to adhere to the

time periods set out in the notice of motion for the filing of its affidavit. It is submitted that its late filing should not be condoned.

6. Before dealing with the contents of the second respondent's affidavit, it is necessary to place before this Court that Absa Bank Limited ("**Absa**"), the largest independent and secured creditor of the first respondent, has confirmed its support for the application to place the first respondent in business rescue and the appointment of Mr Siviwe Dongwana ("**Dongwana**") as its business rescue practitioner. I attach hereto, marked "**RA1**", a copy of a letter received from Absa, which was received after Absa was furnished with a copy of the letter from the second respondent's attorney (annexure AA6 to the second respondent's affidavit).
7. In light of Absa's support of the business rescue and of the appointment of Dongwana, there appears to be no cogent reason for a further practitioner to be appointed. In any event, this aspect can be revisited at the first meeting of creditors in terms of section 147 of the Companies Act, 71 of 2008 ("**Companies Act**"), where all affected persons can consider the appropriateness of the appointment of Dongwana and decide whether to ratify his appointment, as contemplated in section 131(5) of the Companies Act.
8. What cannot go unnoticed is that Absa's claim is by far the largest, independent and secured claim in the approximate amount of R315.8 million, in comparison to that of the second respondent, a concurrent creditor in the approximate amount of R7.2 million.
9. I note upfront that the second respondent does not, in fact, oppose the relief sought by the applicant, but merely states that "*no concession*" is made insofar as the "*viability of whether... [the first respondent] can be rescued or not*". In truth, the second respondent has not taken issue with the primary relief sought by the applicant.

10. Instead, the second respondent contends that:
 - 10.1. the matter is not urgent; and
 - 10.2. it opposes the appointment of Dongwana.
11. Much of what is contained in the second respondent's affidavit relating to the aforesaid contentions is irrelevant, emotive and misleading. This has been done to create atmosphere in an attempt to detract from the fact that the matter is urgent and that the second respondent has not indicated any facts demonstrating an actual lack of independence on the part of the nominated business rescue practitioner, namely, Dongwana, or the attorneys who have been acting for the Sail Group.
12. In regard to urgency:
 - 12.1. It is denied that this application is not urgent. All of the allegations contained in the second respondent's affidavit to the contrary are denied.
 - 12.2. The founding affidavit sufficiently sets out the grounds for urgency and explains the reasons for the time period it took to bring this application.
 - 12.3. This application also remains urgent due to the fact that the first respondent is hamstrung by the current liquidation proceedings which have been instituted by the second and third respondents, and urgently requires the commencement of the business rescue proceedings. Likewise, the liquidation proceedings are suspended due to this application.
 - 12.4. The allegations contained in paragraphs 3.5 to 3.6 of the second respondent's affidavit relating to the provisional liquidation of Sail Contracting (Pty) Limited ("**Sail Contracting**") are without merit and irrelevant to the business rescue proceedings of the first respondent:

12.4.1. Paragraph 16 of the founding affidavit records Sail Contracting as being an entity within the Sail Group and being in provisional liquidation. The date of its provisional liquidation is irrelevant to this application and its timeline, which is explained in detail in the founding affidavit.

12.4.2. The second respondent has failed to explain the relevance of such allegations or any consequences of the liquidation of Sail Contracting on the proposed business rescue of the first respondent.

12.4.3. The purported allegations that the *ex parte* application was brought on the “*same facts*” is also without merit - the financial position of the first respondent is different to the financial position of Sail Contracting, hence the liquidation of the one and the proposed business rescue of the other. The fact that certain background might be similar, given that the companies are in the same group, does not detract from the fact that each company is a separate entity with its own financial affairs, requiring separate assessments of its prospects of success.

12.5. It is accordingly denied that this matter is not urgent or that there was a “*failure to provide this Court with all of the relevant facts*”.

13. In regard to the appointment of the business rescue practitioner:

13.1. In paragraph 3.8 of the second respondent’s affidavit, it is alleged that due to the purported “*failure to provide this Court with all of the relevant facts*”, being the *ex parte* application of Sail Contracting, the second respondent proposes the appointment of Mr Cloete Murray as the business rescue practitioner.

- 13.2. As set out above, the *ex parte* application of Sail Contracting is irrelevant to this application and does not justify the second respondent's conclusion that another business rescue practitioner should be appointed.
- 13.3. The further "*grounds*" provided by the second respondent in paragraph 3.10 for the opposition to the appointment of Dongwana are irrelevant, without merit and denied. The second respondent fails to point out that it is not about a "*preferred*" appointment but what the legislature stipulates for the qualifications of a business rescue practitioners, and how business rescue practitioners are nominated and appointed.
- 13.4. The applicant, and previously the first respondent in terms of the business rescue resolution, followed the provisions of the Companies Act in this regard, and Dongwana complies with the requirements of the Companies Act.
- 13.5. The second respondent concedes in paragraph 3.13 that they are not criticising Dongwana's capabilities or integrity.
- 13.6. Instead, the suggestion is that Dongwana is not as experienced as the second respondent would like, and to support that suggestion, they refer to the prior appointment of Dongwana in two other matters, the one being South African Airways SOC ("**SAA**") and Basil Read Limited. The SAA business rescue is one of the largest, if not the largest, business rescue that this country has seen.
- 13.7. The fact remains that statutorily, the affected person who applies to court is entitled to nominate who they believe best suited to take the appointment and that the legislation provides for a mechanism whereby affected persons can revisit the appointment at the section 147 meeting, as contemplated in section 131(5) of the Companies Act.

- 13.8. As concerns the involvement of the attorneys, Edward Nathan Sonnenbergs Inc. ("ENS"), this is an aspect that goes nowhere. No factual substance is given to the suggestion that Dongwana will act in any manner contrary to his statutory obligations. ENS also has a professional relationship with the second respondent's proposed appointee, as the second respondent's attorney also probably has. Significantly, no inappropriate conduct is complained of, nor is there a suggestion that ENS will act in such a manner.
- 13.9. Section 131(5) also does not allow for the court to make an appointment other than the one nominated by the applicant.
14. In regard to the counter-application:
- 14.1. The Supreme Court of Appeal has confirmed the position that it is the applicant as an affected person in a section 131 application who nominates the business rescue practitioner.
- 14.2. Even if the business rescue practitioner can no longer so act, the same affected person has the right to nominate a further / replacement practitioner.
- 14.3. This is always subject to the provisions of section 131 (5) of the Companies Act and the section 147 meeting.
- 14.4. The allegation made by the second respondent that it is necessary for a second appointment has no foundation and would be best considered at the section 147 meeting, where all creditors will be consulted and conduct a vote.
- 14.5. Factually, the costs of two business rescue practitioners will be more but, again, this will best be decided at the section 147 meeting.

- 14.6. The consequence of an interim business rescue practitioner's appointment not being ratified is that affected persons can nominate a replacement business rescue practitioner, supported by the holders of the majority of the independent creditors' votes.
- 14.7. The problem for the second respondent is that it is asserting a right to appoint a joint practitioner, which it does not have. If a court has to be approached, the second respondent will still not be entitled to nominate the practitioner.
- 14.8. Consequently, it is denied that the second respondent is entitled to the relief sought in the counter-application.
15. It has been explained in the founding affidavit that, because of the problem at CIPC with the filing of the resolution, an application had to be brought to court where far more detail is required than in a sworn statement in support of a resolution to commence business rescue. This resulted in updated financial information having to be obtained in order to demonstrate that a reasonable prospect exists for the first respondent to be rescued. The second respondent does not take issue with the financial information and seems to be convinced, having read the founding affidavit, that a reasonable prospect is shown. This point, which is raised in objection to urgency, likewise is of no assistance to the second respondent.

CONCLUSION


16. This affidavit has been prepared under unnecessary time constraints. The right is reserved to supplement it, should the need arise. To the extent that I have failed to deal with any allegation contained in the second respondent's affidavit, if it is inconsistent with what is set out herein or in the founding affidavit, it is denied.

17. In all of the circumstances, the applicant will request that the counter-application be dismissed and will persist with an order in terms of the notice of motion at the hearing of this matter.


LEE McCANN

I certify that:

- I. the Deponent acknowledged to me that:
 - A. He knows and understands the contents of this declaration;
 - B. He has no objection to taking the prescribed oath;
 - C. He considers the prescribed oath to be binding on his conscience.
- II. the Deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God".
- III. the Deponent signed this declaration in my presence at the address set out hereunder on ~~17~~September 2021


COMMISSIONER OF OATHS

Nathanja Charlotte Williams
Commissioner of Oaths Ex Officio
Practising Attorney
Unit 10 Sunninghill Office Park, 20 Peltier Drive

Lem 24



010-13
"RA1"

Corporate and Investment Banking

Absa Building
15 Alice Lane
Sandton
2196
South Africa

T +27 11 895 6000
F +27 11 895 7802
Swift address: ABSAZAJJ
absa.co.za/cib

16 September 2021

ENSAfrica
The MARC | Tower 1
129 Rivonia Road
Sandton
Johannesburg
2196

Attention: Paul Winer: pwiner@ensafrica.com

And to: Lee McCann: lee@sailgroup.com
Yashvir Ramsaywok: yashvir@sailgroup.com
William Yang: yang@sailgroup.com
Manchadi Kekana: mkekana@ensafrica.com

- BY ELECTRONIC MAIL -

Dear Paul,

SUPPORT REQUEST

1. We refer to the:
 - 1.1. Revolving trade facility letter entered into on or about 24 June 2015, between Sail Minerals Proprietary Limited (Registration Number: 2013/101076/07) ("**Borrower**"); Sail Mining CC (Registration Number: 2007/198707/23); Sail Logistics Proprietary Limited (Registration Number: 2013/121266/07); Theradex Proprietary Limited and Absa Bank Limited ("**Bank**"), as amended by:
 - 1.1.1. the agreement titled "Second Addendum to the Revolving Credit Trade Finance Facility entered into between the Parties on or about 30 December 2016;
 - 1.1.2. the agreement titled "Third Addendum to the Revolving Credit Trade Finance Facility" entered into between the Parties on or about 30 December 2016;

010-13

hen N.W

010-14

1.1.3. the agreement titled "Fifth Addendum to the Revolving Credit Trade Finance Facility" entered into between the Parties on or about 30 April 2019; and

1.1.4. the agreement titled "Sixth Addendum to the Revolving Credit Trade Finance Facility" entered into between the Parties on or about 24 April 2020,

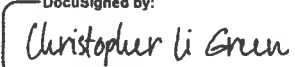
(the "**Agreement**"); and

1.2. The court documents filed on behalf of the Borrower's majority shareholder, Chrometco Limited ("**Chromecto**") on 2 September 2021 applying for the business rescue of the Borrower.

2. You have, in your capacity as counsel to the Borrower's and Chromecto, requested that Absa, as a major creditor of the Borrower, provide you with an indication of support of Chromecto's business rescue application.

3. To this end Absa would not be obstructive to the business rescue application as Chromecto seeks to achieve a better return for all creditors in accordance with the provisions of Chapter 6. You have further represented that Chromecto seeks to appoint Siviwe Dongwana as the business rescue practitioner and Absa is supportive of this appointment.

Yours faithfully

DocuSigned by:

C3CD8348CF83492

Christopher Li Green
Special Asset Management
Absa Corporate and Investment Banking
On behalf of Absa Bank Limited

DocuSigned by:

6CAF38279376470

Rudy Wuite
Head Structured Trade
Absa Corporate and Investment Banking
On behalf of Absa Bank Limited

010-14

2 N-
han