

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION LOCAL DIVISION, JOHANNESBURG**

**Case number: 21/42212**

In the matter between:

**CHROMETCO LIMITED**

Applicant

and

**SAIL MINERALS (PTY) LTD**

First Respondent

(Registration Number: 2013/101076/07)

**REINHARDT TRANSPORT GROUP (PTY) LTD**

Second Respondent

(Registration number 2008/011956/07)

**TUBEMECH LOGISTICS (PTY) LTD**

Third Respondent

(Registration number: 1999/14854/07)

**COMPANIES AND INTELLECTUAL  
PROPERTY COMMISSION**

Fourth Respondent

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**SECOND RESPONDENT'S HEADS OF ARGUMENT**

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1. **INTRODUCTION:**

- 1.1 The applicant seeks an order placing the first respondent under supervision and commencing bushiness rescue proceedings in terms of section 131(1).

1.2 Without conceding the merits of this application, the second respondent contends that:

1.2.1 This matter is not urgent. The applicant failed to sufficiently set out facts which render this matter urgent and/or provide reasons as to why it would not be afforded substantial redress at a hearing in due course;

1.2.2 Mr Dongwana should not be appointed as the business rescue practitioner (*alternatively* as the sole business rescue practitioner).

1.3 These heads of argument shall address the following:

1.3.1 Brief background<sup>1</sup>;

1.3.2 Reasons why this matter is not urgent<sup>2</sup>;

1.3.3 The appointment of the business rescue practitioner<sup>3</sup>;

1.3.4 Conclusion<sup>4</sup>.

## 2. **BRIEF BACKGROUND:**

<sup>1</sup> Paragraph 2 page 3 *infra*.

<sup>2</sup> Paragraph 3 page 6 *infra*.

<sup>3</sup> Paragraph 4 page 9 *infra*.

<sup>4</sup> Paragraph 5 page 13 *infra*.

- 2.1 The first respondent ("*Sail Minerals*") is a subsidiary of the applicant ("*Chrometco*"), which in turn has interests in other companies including, *inter alia*, *Sail Recourses (Pty) Ltd*, *Black Chrome Mine (Pty) Ltd ("BCM")* and *Sail Contracting (Pty) Ltd* (in provisional liquidation) ("*Sail Contracting*").
- 2.2 The business of *Sail Minerals* is intrinsically linked to that of *BCM* and *Sale Contracting*. The above entities are collectively referred to herein as the *Sail Group*.
- 2.3 The attorneys acting for the *Sail Group* is *ENS Africa ("ENS")*. *ENS* represents *Sail Contracting* (in provisional liquidation), *Sail Minerals* (the first respondent herein) and *Chrometco* (the applicant herein).
- 2.4 On 1 July 2021, *Sail Contracting* applied, (being represented by *ENS*) on an urgent *ex-parte* basis to be placed in provisional liquidation, which *ex parte* order was granted on 6 July 2021. The *Sail Contracting* urgent *ex-parte* application papers are annexed to the second respondent's affidavit as annexure "**AA1**".
- 2.5 On 5 July 2021, the board of *Sail Minerals* purportedly resolved for it to be placed in business rescue.
- 2.6 It is prudent to note (paragraph 18 of the founding affidavit in the *Sail Contracting* urgent application) that:

"...the applicant, BCM and Sail Minerals are *intrinsicly linked*, in that for the continued success of each of the entities, the relationships created by the various service and lease agreements *must remain in place*". (Own emphasis)

2.7 In paragraph 16 of the founding affidavit *in casu*, the applicant contends that:

"The business of Sail Minerals is ***intrinsicly linked*** to that of BCM and Sail Contracting..."

2.8 On their own version Sail Minerals and Sail Contracting are intrinsicly interlinked. On the same facts and during the same period, one of the "*intrinsicly linked companies*" should be placed in provisional liquidation on an urgent basis (Sail Contracting), however, Sail Minerals can be rescued. The board of Sail Minerals, on 5 July 2021, resolved that there are reasonable prospects that the Sale Minerals can be rescued, but on 23 July 2021 (approximately two weeks thereafter), there was doubt "*specifically whether the board remains of the view that there remains reasonable prospects of rescuing Sale Minerals*"<sup>5</sup>. (Own emphasis)

2.9 The fact that Sail Contracting were placed in urgent provisional liquidation, based upon the same facts, were not disclosed to this Court in the founding affidavit. The only reference that Sail Contracting was placed in provisional liquidation is dealt with in paragraph 16 of the founding affidavit ("*Sail Contracting (Pty) Ltd (in provisional liquidation)*")

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<sup>5</sup> Founding affidavit, paragraph 89.

2.10 The applicant's version should be viewed with circumspection. The applicant should at least have disclosed the fact that this "*intrinsicly linked*" company (Sail Contracting) was wound-up on an *ex-parte* urgent basis one day after Sail Minerals' board was of the view that it can be saved. It should further, at least have provided an explanation as to why there are reasonable prospects to save Sail Minerals and not Sail Contracting, in light of the facts deposed to in the Sail Contracting *ex-parte* urgent application. The question further begs why Sail Minerals did not depose to any affidavit in these proceedings dealing with the aforesaid, but merely supports this application (as the first respondent).

2.11 Be that as it may, it is interesting to note that the applicant's attorneys' file reference number in this (business rescue) application is exactly the same as in the *ex-parte* urgent application where Sail Contracting was placed in provisional sequestration. It is also interesting to note that the same deponent (PS Kizkurno) deposed to the founding affidavit (*ex parte* urgent on behalf of Sail Contracting) and the confirmatory affidavit (on behalf of Sail Minerals herein).

2.12 This creates the impression that Sail Minerals is effectively behind this application, although on the applicant's own version "*Sail Minerals supports the relief sought herein and could not institute this application as it has no locus standi having regard to the wording of section 131(1) of the Companies Act, 71 of 2008 ("the Companies Act")<sup>6</sup>.*

2.13 It is subsequently submitted that this application is not urgent, for the reasons dealt with hereunder.

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<sup>6</sup> Founding affidavit, Paragraph 6.

3. **THIS APPLICATION IS NOT URGENT:**

3.1 The applicant is required to set out facts which render the matter urgent and reasons why it would not be afforded substantial redress at a hearing in the normal course. The applicant has failed to sufficiently deal with the requirements of urgency in its founding affidavit.

3.2 In paragraphs 83 to 95 of the founding affidavit, the applicant attempts to deal with urgency. It contends that:

3.2.1 As far back as 5 July 2021, Sail Minerals resolved to commence business rescue. This resolution could not be filed due to a system issue with the fourth respondent (“CIPC”);

3.2.2 Sail Minerals was hopeful that it could reach consensus with RTG and the third respondent (“Tubemech”) to withdraw the winding-up applications, these engagements terminated on 23 July 2021;

3.2.3 There has been *“some delay in the preparation of the application given the various considerations required on the part of Sail Minerals, specifically whether the board remains of the view that there remains reasonable prospects of rescuing Sail Minerals, having due regard to the financial position of Sail Minerals.”* (Own emphasis);

3.2.4 This application was apparently issued as soon as the latest financial information was confirmed;

- 3.2.5 Sail Minerals is "*faced with the precarious position where it needs certainty on the commencement of business rescue proceedings*";
- 3.2.6 Sail Minerals should be afforded "*breathing space*". The BRP should immediately secure further post commencement finance;
- 3.2.7 Sail Minerals has paused its operations given its current financial distress in order not to incur further liabilities and to ensure preservation of all its assets pending the appointment of a BRP;
- 3.2.8 The matter could only be instituted in urgent Court during September 2021.
- 3.3 These contentions are insufficient, with respect. It contains vague and general comments in support of urgency. The applicant failed to sufficiently explain the delay from 23 July 2020 (being the date upon which it became clear to the applicant that an application needs to be issued) until 2 September 2021 (the date this application was issued).
- 3.4 The reason afforded is that the applicant needed to consider whether it remains of the view that Sail Minerals can be rescued. This is contradictory. On 5 July 2021 the board of Sail Minerals were confident that it can be rescued. However, more than two weeks later (after filing the resolution at CIPC) Sail Minerals apparently needed more than a month to reconsider their position.

3.5 In the Sale Contracting *ex-parte* application, Sale Contracting was wound-up **on the same facts** before this Court, however *in casu* a rescue is sought:

3.5.1 On 1 July 2021, Sail Contracting issued the *ex-parte* application seeking its provisional sequestration;

3.5.2 On 5 July 2021, Sail Minerals resolves to be placed in business rescue, contending a reasonable prospect of success;

3.5.3 On 23 June 2021 the board (of the Sail Group) needed to reconsider whether Sail Minerals can be rescued, which apparently caused the delay herein;

3.6 It is trite that "*the anxiety of an Applicant*" does not prevent a redress in due course.<sup>7</sup>

3.7 It is therefore submitted that this matter should be struck from this urgent roll with costs, due to a lack of urgency and the failure to provide this Court with all the relevant facts. *Alternatively*, RTG proposes that Mr Murray be appointed as the BRP.

#### 4. **THE APPOINTMENT OF THE BUSINESS RESCUE PRACTITIONER:**

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<sup>7</sup> East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011 ZAGPJHC 196 (23 Sept 2011)]

4.1 The appointment of Mr Dongwana as the BRP is opposed, in the event it is found that this matter is urgent.

4.2 Where the "*impartiality*" of a BRP is in "*doubt*", the proposed/suggested BRP should not be appointed, all not solely. In this regard the following:

- (i) Mr Dongwana is the Sail Group's attorney's preferred BRP. In effect the Sail Group is choosing its own BRP, which contradicts the intention of the legislature in respect of impartiality and independence;
- (ii) ENS and Mr Dongwana has a prior working relationship;
- (iii) The Public Enterprise Minister criticized their working relationship and his appointment and the R30-million in fees spent whilst SAA was placed under business rescue<sup>8</sup>. Their prior working relationship also came under fire for the R10-billion spent on restructuring SAA without any meaningful progress;
- (iv) Mr Dongwana does not confirm that he has no prior dealings with the Sail Group, Mr Murray does<sup>9</sup>;
- (v) Absa states in a letter to ENS, that ENS suggests the appointment of Mr Dongwana;

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<sup>8</sup> Annexure "AA2" – Pages 8 – 55 to 8 – 57: Caselines

<sup>9</sup> Pages 8 – 73: Caselines – Acceptance letter of Mr Murray

- (vi) The Sail Group is represented by ENS who seeks the appointment, the Sail Group is appointing its own BRP, this should be avoided;
- (vii) In all previous appointments, Mr Dongwana was appointed jointly with other BRPs;
- (viii) Mr Murray has an extensive infrastructure to deal with any appointment as a BRP, Mr Dongwana does not deal with this aspect at all.

4.3 It is therefore proposed that Mr Murray of Sechaba Trust be appointed as the independent/impartial BRP<sup>10</sup>. Mr Murray's appointment cannot be criticized, with respect.<sup>11</sup>

4.4 The second respondent does not criticize Mr Dongwana's capabilities or integrity as a BRP. As the Sail Group and the attorneys acting for them has a prior relationship, the optics are that the Sail Group is appointing its own BRP. This should be avoided, with respect.

4.5 In the event that this Court is amenable that Mr Dongwana be appointed as the interim BRP, this Court is requested to make a dual interim appointment. A matter such as this justifies the appointment of two BRPs for the following reasons:

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<sup>10</sup> Annexure "AA5" is the second respondent's notice of counter application – page 9 – 1: Caselines

<sup>11</sup> Pages 8 – 61: Caselines – CV of Mr Murray

- 4.5.1 On the applicant's own version, the total asset value of Sail Minerals is R1,154,882,550.00 (more than R1.1-Billion);
- 4.5.2 There will be no additional costs involved in a dual appointment since a BRP can only invoice for the services rendered, unless a BRP requests the attorney to attend to its work as a BRP. Mr Dongwana has been criticized for this, Mr Murray not (with Sechaba's comprehensive infrastructure this will not be a concern);
- 4.5.3 According to Mr Dongwana's CV, he has only been appointed twice as a BRP, rescue proceedings of (SAA and Basil Read Limited), never as a sole BRP. Mr Murray's experience is more extensive;
- 4.5.4 ENS Africa is the Sail Group's attorneys, the attorneys of the first respondent (Sail Minerals), and the attorneys of Sail Contracting (in provisional liquidation). The nomination of Mr Dongwana **by** the applicant is in fact a nomination by the first respondent (Sail Minerals). There should be more distance in this regard;
- 4.5.5 In effect, the Sail Group (that is in liquidation and that stands to be rescued) is appointing their BRP of choice, which should not be the case. It should not be business as usual at the company that must be rescued.
- 4.6 In terms of section 131(5) of the Companies Act, this Court may make an order/ a further order appointing as interim practitioner a person who satisfies the

requirements of section 138 of the Act, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors. The applicant contends that "*Section 131(5) does not allow for the court to make an appointment other than one nominated by the applicant.*"

4.6.1 Having regard to a definition of a BRP, this argument is not sustainable. Henochsberg on the Companies Act states the following:

*"Business rescue practitioner – See further the notes on s128 sv Business rescue practitioner. In the context of Chapter 6, 'business rescue practitioner' means the person appointed, or two or more persons appointed jointly, to oversee the company during its business rescue proceedings.... the definition clearly envisages the possibility of appointing more than one business rescue practitioner to oversee the business rescue proceedings of a particular company..."*

4.7 It follows that in terms of section 131(5), the creditors may ratify the interim appointment of the BRP. However, creditors cannot **make** an appointment/a dual appointment, they may only **nominate**. It follows that such relief will then need to be sought by way of an application to Court, incurring further unnecessary costs for the creditors (which even the applicant seeks to avoid).

## 5. CONCLUSION:

5.1 In summary, RTG contend that:

5.1.1 This matter is not urgent and should be struck from the roll with costs;

5.1.2 In the event that the applicant passes the hurdle of urgency, Mr Murray of Sechaba Trust should be appointed as the BRP, in terms of the notice of counter application;

5.1.3 In the event that this Court is not amenable for Mr Murray be appointed as the sole BRP, it is submitted that Mr Dongwana and Mr Murray should be jointly appointed as the BRPs.

**ADV J DE BEER**

**ADV ACJ VAN DYK**

**COUNSEL FOR THE SECOND RESPONDENT**

**CLUB ADVOCATES CHAMBERS**

**20 SEPTEMBER 2021**

