IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case Number: **2024-070404**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: Yes

JRG .... 3 March 2026 ……………………

SIGNATURE DATE

In the matter between:

BRU TEXTILES N.V. Applicant

and

CAPITOL ENERGY (PTY) LTD Respondent

Coram: Johann Gautschi AJ

Heard: 12 and 19 June 2025

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 3 March 2026

JUDGMENT

JOHANN GAUTSCHI AJ

[1] This is an opposed application for the final winding up of the Respondent in which the Applicant relies on the inability of the Respondent to pay its debts in terms of section 344 (f) and 345 (1) (a) of the Companies Act 61 of 1973 (the Act) read with item 9 of schedule 5 of the Companies Act 71 of 2008.

[2] The claimant is a company registered in Inc in accordance with the company laws of the Republic of South Africa with registration number 0453835284 which has its principal place of business in Belgium.

[3] The claimant's *locus standi* as a creditor of the respondent is based on the amounts outstanding and due and payable in respect of capital and interest in terms of two written loan agreements, one dated 27 October 2021 for R5 million together with interest and the other dated 26 August 2022 for R5 million together with interest thereon.

[4] The claimant relies on a statutory letter of demand served on the respondent by the applicant's attorneys of record in terms of Section 345 of the Act. Service by the sheriff of the High Court took place on 31 May 2024 by handing a copy of the Letter of Demand personally to Mr Darsot, a director of the respondent. The letter was not responded to.

[5] The respondent's answering affidavit submitted *in limine* that the jurisdiction of the South African courts is ousted by reason of clause 8 of each of the loan agreements which provide as follows:

> *"All issues and questions concerning the construction, validity, enforcement and interpretation of this Agreement – – – shall be governed by and construed in accordance with the laws of Belgium. Only the courts of Antwerp have jurisdiction in the event of a dispute regarding this agreement."*

[6] That *in limine* objection was pursued in oral argument, but without reference to any authorities. Allied to that, a new defence not raised in the answering affidavit was argued in oral argument on behalf of the respondent, namely, that the loan agreements could not be relied upon because they constitute credit agreements

within the meaning of the National Credit Act 34 of 2005 and they are void because the applicant failed to register as a credit provider in terms of section 40(1) of that Act.

[7] The main defences raised in the answering affidavit were stated as follows.

[8] First, that the R5 million which the respondent received from the applicant was not received in terms of that loan agreement, but was instead an investment by the applicant in terms of a verbal agreement, concluded in the context of a familial relationship, to fund the respondent, which it said was an "empty shell", in the setting up and operations of a covid facemask manufacturing plant, that containers of obsolete facemasks were delivered.

[9] There is no substance in that defence. Suffice it to say that the answering affidavit made no attempt to lay any foundation for rectification of the written loan agreement and the respondent's version in the answering affidavit was rambling, incoherent and contradictory.

[10] Second, the respondent alleged that *"the amount of R5.4 million was repaid to the Applicant, albeit into the account of Home Fabrics, being the South African company of the Deponent, as per the proof of payment attached as annexure "CE 4"".* There is also no substance in that defence. As pointed out in the applicant's replying affidavit: *"The reference on the proof of payment "CE 4" substantiates that the payment was made to Home Fabrics on behalf of Fiona Fashions. These are separate juristic entities, which although linked to both parties are not to be conflated with either the applicant or the respondent in the current matter.*"

[11] I granted leave to the parties to submit supplementary heads of argument on the Belgian law jurisdictional objection and the National Credit Act defence to be argued at a postponed hearing. At the postponed hearing on 19 June 2025 the respondent sought to introduce a supplementary affidavit. The applicant objected and I refused the application as in all circumstances it was quite inappropriate at that late stage to try and introduce new matter.

[12] The respondent's supplementary heads of argument contained no submissions on alleged non-compliance with the National Credit Act and as to jurisdiction, merely referred to an SCA judgment on *forum convenience*[1] and conceded that I have jurisdiction, submitting that it was clear in terms of section 149 of the Insolvency Act.

[13] In the result it follows that is unable to pay its debts as contemplated by section 344 (f) of the Act and that the defences raised by the respondent are without merit. In the circumstances the Applicant is, in my view, entitled to an order for the final winding up of the Respondent.

IT ISORDERED THAT:

1. The estate of the Respondent is placed under final liquidation in the hands of the Master of the High Court;

2. The costs of this application are costs in the liquidation of the Respondent's estate.

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JOHANN GAUTSCHI AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

[1] Cordiant TrainingCC v Daimler Chrysler Financial Services (Pty) Ltd 2005 (6) SA 205 (SCA)

For the Applicant: Adv L Matsiela
Instructed by: Cliffe Dekker Hofmeyr Inc
(011 562 1173)

For the Respondent: Adv. Deon M Pool
Instructed by: SOHAIL MANGA ATTORNEYS
(0104433945; 0836616556)

Hearing dates: 11 and 19 June 2025

Judgment date: 3 March 2026