IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.
10/7/6/
DATE SIGNATURE

CASE NUMBER: 12040/09

14/7/2010

In the matter between:

EXECUTCRETE READMIX (PTY) LTD **Applicant**

And

AFRICA POWERCRETE (PTY) LTD **Respondent**

JUDGMENT

TOKOTA AJ

[1] On 5 March 2009 the applicant launched an application for the winding up of the respondent. This was preceded by the

service of a letter of demand as envisaged in section 345(1)(a)(i) of the Companies Act No 61 of 1973. On 8 September 2009 this Court, per Rabie J, granted a provisional order for the winding up of the respondent returnable on 6 October 2009. He ordered further that the said court order be served on the employees of the respondent at an address in Soweto. The return date was extended from time to time.

[2] The applicant alleges that the respondent is indebted to it in the amount of R1 141 610.90 being a debt owed as result of a contract of sale of ready mix concrete between the parties. It is alleged that the applicant sold and delivered, at the special instance of the respondent, ready mix concrete during September and October 2008.

[3] This is an application for the confirmation of the provisional order granted on 8 September 2009. The respondent is opposing the confirmation thereof on the basis that;

(a) when it received the ready mix concrete it did so acting as an agent of a company called Proud Afrique Trading 123 (Pty) Ltd;

(b) the ready mix concrete was of an inferior quality;

(c) this application is a debt enforcement and therefore an abuse of the court process.

[4] The applicant contends that the respondent is *de facto* insolvent in that it is unable to pay its debts. It was argued orally that if one has regard to the financial statements of the respondent it becomes clear that the respondent is not able to meet its financial obligations.

[5] I accept the submission that the applicant has nothing to do with Proud Afrique company and therefore the defence that the respondent acted as an agent of Proud Afrique is untenable. However if one has regard to annexures attached to the papers it becomes clear that the respondent was making these orders for and on behalf of Proud Afrique. In a letter dated 15 October 2008 addressed and delivered to the applicant there is a reference to test results. The letter reads thus: "*Our client Proud Afrique Trading requested the test results on the concrete delivered at AnnaBoom Street, Noordwyk, Zone 10. This test (sic) results is required A.S.A.P for proof of strength of concrete to engineers doing site inspection. Without results site can not be passed and no payments will be made either way.*

PS: Please find attached letter from customer stating above mentioned." In another letter dated same date (15 October 2008) from Proud Afrique addressed to the respondent the following is stated. *"We are waiting for the test cube results from the laboratory. Please advise when these results shall be ready for collection.*

We need these results in order to settle your account."

[6] It is common cause that the respondent did not pay its debt to the applicant. In a letter dated 3 February 2009 from its attorneys the respondent acknowledged its indebtedness to the applicant and offered a compromise alleging that it was not in a position to pay the full amount and offered to pay R600 000 immediately and make periodic payments for the balance. It pointed out that its debtors were making empty promises to pay it. The offer was rejected by the applicant. It was argued during the hearing on behalf of the applicant that this is a clear indication of *de facto* insolvency.

[7] In terms of section 344(f) of the Companies Act a Court may wind up a company if it is unable to pay its debts as described in section 345. In terms of section 347 (2) if in an application for the winding-up of a company it appears to the Court that the applicant is entitled to the relief sought, the Court shall make a winding-up order, unless it is satisfied that some other remedy is available to the applicant and that the applicant is acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

[8] In this matter although the respondent has a contract with the applicant, Proud Afrique is the company that has caused the problem of the respondent. The applicant does not need the concrete but makes orders for Proud Afrique. If the applicant had pursued its claim by way of issuing summons the possibility exists that the respondent would have joined Proud Afrique in the proceedings. If the provisional order is confirmed the respondent alone will be ruined at the expense of Proud Afrique. The applicant has another remedy to pursue. It chose to apply for the winding up. In my view and in the exercise of my discretion although the respondent is unable to pay the full amount owed I am not persuaded that it is just and equitable to wind up the respondent.

Accordingly I am not prepared to confirm the provisional order of of this Court dated 8 September 2009.

[9] What remains is a question costs. If I were to find that the applicant is guilty of abusing the Court process an order of costs against it would be justified. However I refrain from making any finding in this regard. Consequently I am not prepared to make any order of costs against any of the parties. In the result I make the following order.

The order of this court dated 8 September 2009 placing the respondent under provisional winding up is discharged.

I make no order as to costs.

B R TOKOTA

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 9 JUNE 2010.

DATE OF JUDGMENT:

Appearances for the applicant : Adv N F De Jager

Instructed by Dyason Inc

Appearances for the respondent : Adv J De Beer

Instructed by Sher & Scholtz Attorneys.