REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO 24418/2010

DATE: 01/09/2010

In the matter between

RAM TRANSPORT (PTY) LTD **APPLICANT**

and

REPLICATION TECHNOLOGY GROUP (PTY) LTD (IN LIQUIDATION) **FIRST RESPONDENT**

THE MASTER OF THE HIGH COURT **SECOND RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

[1] This is an application in terms of s 360 (1) of the Companies Act 61 of 1973 (as amended) (the Act). The applicant is a proven creditor in the first respondent. The

company, Replication Technology Group (Pty) Ltd (RTG), was placed in final liquidation by an order of this court on 29 October 2009 on the ground of its inability to pay its debts. Its liabilities exceed its assets by almost R50 million. The applicant now seeks the authority of this court to inspect all the books and records of the first respondent in the possession of its joint liquidators. From the report filed by the joint liquidators of the first respondent at the second meeting of creditors it is quite apparent that there is no hope of the applicant's claim being paid out of the liquidation. The applicant states that it suspects that the affairs of RTG were, prior to its liquidation, conducted by its directors and certain controlling members in a reckless or fraudulent manner as contemplated by s 424 of the Act.[1] The applicant accordingly as a preliminary step in order to hold the directors and controlling members of RTG responsible for its liabilities, intends to convene an enquiry in terms of s 417 and 418 of the Act. For this purpose the applicant requires access to the books and records of RTG to motivate the application for the enquiry to the second respondent, who is the Master of the High Court.

[2] The application is unopposed. In correspondence exchanged prior to the launching of this application the liquidators of the first respondent intimated their willingness to allow the applicant inspection of the books and documents but on condition that the authorisation of this court therefor is obtained. Hence the present application.

[3] At the hearing of the application counsel for the applicant very properly referred me to a somewhat obscure, possible obstacle barring the authorisation sought. It is referred to in Henochsberg[2] where the authors in the general note under the discussion of s 360 of the Act, add the following *caveat* to the court's general

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1 Section 424 (1) of the Act provides as follows:

> 'When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that ay person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.'

2 Meskin *Henochsberg on the Companies Act* Vol 1 p 762/3.

discretion to order inspection:

> 'But the Court should not authorise inspection where the applicant's only purpose is to obtain information to enable him for his exclusive benefit to sue a former director of the company.'

This is precisely the factual situation in the present application. In support of the submission the authors cite, with apparent approval, the old English case reported *sub nom In re North Brazilian Sugar Factories* (1887) 37 Ch 83 (CA) at 88/9.[3] Although the case has been referred to in our case law[4] counsel could not refer me to nor was I able to find any South African authority directly in point.

[4] In *North Brazilian Sugar Factories* the Chancery Division, on appeal, upheld the court *a quo's* refusal to authorise inspection of the books and documents of a company in liquidation pursuant to an application under the provisions of s 156 of the UK Companies Act of 1862.[5] The books and documents however, were no longer in possession of the liquidator of the company in liquidation who had handed them over to the new company which, under a scheme of arrangement sanctioned by order of court, had taken over its assets. The fact of the books and documents being in possession of a third party was held by the court (*per* Cotton and Lopes LJJ, each delivering a separate judgment) to have been sufficient reason for refusing the relief sought. Although the finding effectively disposed of the matter both Judges nonetheless proceeded to discuss and express a view on the ambit of the section in question on the assumption that the books and documents were in possession of the liquidator. Departing from the premise that the section related to and provided powers to be used for purposes of winding-up, the learned Judges reasoned that the application launched by and for the benefit of the shareholders in the old company was not directly related but merely collateral to the winding-up of the company, resulting in the application falling outside the

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3 A similar view is expressed in Palmer *Company Precedents* 16 ed p 62; and the 24th edition of *Palmer's Company Law* para 90 -70 p 1623.

4 See *Blom v Promit Beleggings (Edms) Bpk (Jubilant Investments (Pty) Ltd and Another Intervening)* 1970 (2) SA 774 (E).

5 Which provided as follows: '*Where an order has been made for winding up a company by the court or subject to the supervision of the court, the court may make such order for the inspection by the creditors and contributories of the company of its books and papers as the court thinks just, and any books and papers in the possession of the company may be inspected by creditors or contributors in conformity with the order of the court, but not further or otherwise.'*

ambit of the section. This is the view on which the caveat in *Henochsberg* to which I have already referred, is based. Counsel for the applicant, in a helpful and well-researched argument, relying on the cases decided in the United Kingdom and Australia discussed below, submitted that it should not be followed in South Africa. It is accordingly necessary to consider the persuasiveness of the *dicta* in *North Brazilian Sugar Factories* in order to decide whether there is any justification for their introduction into our law.

[5] The *dicta* were plainly expressed *obiter* and in the normal course one would have expected them to have paled into historic oblivion. Nevertheless the case was afforded some prominence in the United Kingdom, where it was considered and distinguished, and more pertinently in Australia, where it was eventually not followed. As for the United Kingdom, the Court of Appeal in *Re Movitex Ltd* [1992] All ER 264 (CA) distinguished *North Brazilian Sugar Factories* (on which the court below had relied) and for reasons unrelated to the circumstances of this case allowed the post-liquidation creditor to examine certain specified books and records in the hands of the liquidator.

[6] In Australia, the Supreme Court of Victoria in *Re MMC Pty Ltd (in liq)* 1992 (6) ACSR 741 SC (Vic) considered *North Brazilian Sugar Factories* in the context of an application[6] similar to the present application. Senior Master Mahony having dealt extensively with the views of both the learned Judges in *North Brazilian Sugar Factories* expanded on the nature of the relief sought as follows: [7]

> 'The power conferred by s 387[8] is unfettered save by the requirement that an order made in exercise of the power shall be as the court "thinks just"[9]. The "justice" of the order sought must be determined, in the circumstances of the particular case, by reference to the purpose for which the power is conferred. *Re North Brazilian Sugar Factories* exemplifies this. Both Cotton and Lopes LJJ reached their conclusions by reference to the prima facie purpose for which the power was conferred by the section, that is, as they saw it, "the purposes of the winding-up". That was sufficient to be determinative in the circumstances of that case.

6 The application under s 387 of the Companies (Vic) Code was for an order to obtain access to documents and books of a company in liquidation for purposes of instituting action against the former directors of the company in respect of debts incurred when the company was insolvent.
7 At 745 line15 – 50.
8 Section 387 provides as follows: *'The Court may make such order for inspection of books of the company by creditors and contributors as the Court thinks just, and any books in the possession of the company may be inspected by creditors or contributories, but not further or otherwise.'*
9 This is not a requirement in South African law.

> Cotton LJ, however, made it clear that he was not going so far as to conclude that the power could *only* be exercised where it would be for those purposes …
> The section necessarily operates in the context of the law as it stands from time to time. It follows that changes in the law could increase or diminish its scope and, consequently, the power conferred by it. In my view, there have been, since 1887, at least two significant changes in the law of Victoria which have to be considered in determining whether it would be 'just' in this case to make the order sought by the applicant. The first, and most directly relevant, was the enactment of s 556, the section under which the applicant is contemplating proceeding against the directors of the company. In its civil aspect, that section conferred on the creditor of a company which "has been wound-up or is in the course of being wound up" … a cause of action for the recovery from a director of the company of a debt incurred by the company when there were reasonable grounds to expect that it would be insolvent when the time for payment arrived or that, by incurring the debt, it would become insolvent.[10] The existence, or otherwise, of the "reasonable grounds" for one or other of the requisite expectations would frequently be found in the books and records of the company, which, in the case of a company such as this, that is, a company in the course of being wound-up, would be in the custody or control of the liquidator. To commence and proceed to trial in a proceeding under s 556 (1) without knowing what was contained in the books and records of the company held by its liquidator would be an obvious impediment to a plaintiff. Indeed, it is clear that it is to avoid this that this application has been made.'

An order for the inspection of the books and records was made.

[7] Almost at the same time, the Supreme Court of New South Wales Equity Division adopted a similar approach to that in *MMC* in *Re BPTC Ltd* (1992) 7 ACSR 291 SC (NSW) where, in dealing with a similar application,[11] McLelland J said:[12]

> 'I was referred to the decision of the English Court of Appeal in *Re North Brazilian Sugar Factories* …in which consideration was given (obiter) to an equivalent provision, s 156 of the Companies Act 1862 (UK). There is a statement in that case to the effect that the obtaining of evidence in support of actions by individual shareholders against the directors of a company in the course of being wound-up necessarily lies outside the proper ambit of the section. In my opinion such a limited view cannot be regarded as acceptable at the present day. Facilitation of the accountability to individual creditors or contributories, as well as to the company itself, of those who participated in the conduct of its affairs prior to the winding-up should nowadays be regarded as sufficiently related to the winding-up to fall within the scope of the section.'

These views were later echoed by Rowland J in *IACS Pty Ltd v Australian Flower*

10 *Cf* Section 424 of the South African Act.

11 By a creditor to inspect documents in the hands of the liquidator under s 387 of the Companies (NSW) Code, containing the identical wording quoted in *fn* 8 above.

12 At p 292 line 45 – 293 line 5.

Exports Pty Ltd (1993) 10 ACSR 769 SC (WA) 774.

[8] Finally, the Supreme Court of Victoria, Australia (*per* Hayne J) in *North Brazilian Sugar Factories* in *Re William Lawrence (Globe Dyeworks) Pty Ltd (in liq); The Textile Clothing and Footwear Union of Australia (Victorian Branch) v Wight (as liquidator of William Lawrence) (Globe Dyeworks) Pty Ltd) (in liq)* (1993) 12 ACSR 181 SC (Vic) 182/3 questioned the correctness of the *dicta* and then went on to say:

> 'As McLelland J indicates in his judgment in *Re BPTC*, s 486 of the Corporations Law may be seen as being directed towards accountability to creditors and contributories; and if that is so, in my view it follows *prima facie* that on application by a creditor, or for that matter a contributory, an order may be made for inspection of the books of the company even though the principal motive perhaps even if the only motive – is for the furtherance of an individual suit for the benefit of the applicant creditor or contributory rather than the general body of creditors.
> Since the decision in *Re North Brazilian Sugar Factories*, company law has moved to provide in various ways for actions maintainable at the suit of individual creditors for their individual benefit in circumstances not contemplated at the time of that decision. The fact that actions of this kind may now be brought by individual creditors is, in my view, powerful reason for thinking that the power under s 486 may be exercised even in circumstances where the principal motive of the applicant creditor is a motive of furthering its own interests rather than the interests of creditors as a whole.'

[9] I respectfully associate myself fully with the convincing reasoning in the judgments to which I have referred. Having further regard to the position in our law, as I shall presently deal with, the dicta in *Re North Brazilian Sugar Factories* in my view, should not be followed.

[10] And now to the position in our law, it is at the outset necessary to quote s 360 (1) of the Act in full. It provides as follows:

> 'Any member or creditor of any company unable to pay its debts and being wound-up by the Court or by a creditors' voluntary winding-up may apply to the Court for an order authorising him to inspect any or all of the books and papers of that company, whether in possession of the company or the liquidator, and the Court may impose any condition it thinks fit in granting that authority.'

The wording of the section is clear and unambiguous. The object of the section and

its ambit is manifest from, *inter alia,* the repeated use of the word 'any'.[13] It confers a wide discretion on the court which has to be judicially exercised, whether to accede to the request for inspection or not in the light of all the circumstances of the case.[14] The section no doubt was designed to be used within the framework of winding up[15] and with the view to the more beneficial winding up of the company.[16] Against this background, and having considered all the facts of the present matter, the applicant, in my view, has *prima facie* established that it is entitled to inspection in order to motivate its application to the Master to convene an enquiry which, no doubt, will determine the way forward. I am satisfied that the application is *bona fide* and, in upholding considerations of transparency and accountability in regard the conduct of directors of companies in their management of the business of companies, that I should exercise my discretion in favour of the applicant.

[10] In the result I make the following order:

1. The applicant is authorised to inspect all the books and papers of the first respondent in the possession of its joint liquidators.
2. The applicant is to pay the costs of the application.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

13 In *Rex v Hugo* 1926 AD 268, 271 Innes CJ described the word "any" thus:

> *"'Any' is, upon the face of it, a word of wide and unqualified generality. It may be restricted by the subject-matter or the context, but prima facie it is unlimited."*

See also *S v Arenstein* 1967 (3) SA 366 (A) 379H; *Commissioner for Inland Revenue v Ocean Manufacturing Limited* 1990 (3) SA 610 (A) 618H.

14 Cf *Kope v Bourke's Luck Syndicate Ltd (In Liquidation)* 1925 WLD 40 at 42 (where De Waal J considered the corresponding s 191 of Act 31 of 1909 (T)); and *Anchor Holdings Ltd v Cox and Others* 1964 (2) SA 405 (W) 407/8 (where Boshoff J (as he then was) considered s 189 of the Companies Act 46 of 1926).

15 See by way of background *Re British and Commonwealth Holdings plc (Nos 1 and 2)* [1992] 2 All ER 801(CA), a case dealing with the court's general discretion to order discovery of documents between the office holders of an insolvent company in administration and its auditors, pursuant to applications under s 236 of the Insolvency Act of 1986 (UK).

16 *Blom v Promit Beleggings (Edms) Bpk*, supra, 777D-E. It is useful and perhaps necessary to consider an application under s 360 having regard to the requirements of the more well-known and entrenched Anton Piller relief. *Cf* Erasmus *Superior Court Practice* Appendix E10.

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APPLICANT'S ATTORNEYS	***WERKSMANS INC JAN S DE VILLIERS***
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