IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

16558/13

CASE NO: ~~165558/13~~

21/5/2013

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED
21/5/2013 ……… [signature]
DATE SIGNATURE

In the matter between:

HOLDSWORTH, JOHN CHARLES	First Applicant
ACTIVEX 295 (PTY) Ltd	Second Applicant
CLINE, RAEL IAN	Third Applicant
RANGILA, MOHAMMED	Fourth Applicant
ONI, OPEYEMI OLUWASEUN	Fifth Applicant
JOHNSON, BRIAN RICHARD	Sixth Applicant
FRANCESCO, DARRYN	Seventh Applicant
CHENGALROYEN, JARRYD JERMAINE	Eighth Applicant
MOODLEY, THIRESH	Ninth Applicant
FRANCESCO, DONAVAN GILYAN	Tenth Applicant
NEIMAN, VICTOR	Eleventh Applicant
JOVANOVIC, DAMJAN	Twelfth Applicant
GROBLER, LOUIS	Thirteenth Applicant
OPEN NETWORK SOLUTIONS (PTY) LIMITED	Fourteenth Applicant

and

REUNERT LIMITED	Respondent

JUDGMENT

MOTHLE J

Introduction

1. This application raises the question whether a proved claim as referred to in Section 44 of the Insolvency Act, 24 of 1936 *("the Insolvency Act")* constitutes "a document" as stated in Rule 35(12) of the Uniform Rules of Court and is therefore subject to disclosure. A request for disclosure made in terms of Rule 35(12) must be for a document (or tape recording) which is referred to in a pleading or affidavit.

Background

2. The Applicants, as Respondents in an application pending in this Court *("the pending application")* lodged this interlocutory application in terms of Rule 6(12) of the Uniform Rules of Court in the Motion Court for urgent applications. The relief sought in this urgent application is for the Court to order the Respondent to produce certain documents, in terms of Rule 35(12). This application was brought on urgency as the pending application was due to be heard.

3. The pending application has since been postponed *sine die* to make way for this application. However the Applicants still have to file their answering affidavits. They contend that in order to do so, they

require the following documents, which the Respondent has referred to in its founding affidavit in the pending application namely;

3.1 The Respondent's proved claim in the winding-up proceedings of Black Sheep Development (Pty) Ltd, held in terms of section 44 of the Insolvency Act;

3.2 The subpoenas issued to various banks at the behest of the Respondent.

4. Rule 35(12) provides:

> "*(12) Any party to any proceeding may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 14 in the first schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the Court, use such document or tape recording in such proceeding provided that any other party may use such document or tape recording.*"

5. The Applicants allege that they caused a notice in terms of Rule 35(12) to be delivered wherein they sought production of three documents including the two referred to above. The Respondent has produced the third document but refuses to produce the other two documents mentioned above.

6. In its defence, the Respondent contends that;

6.1 The founding affidavit in the pending application does not make reference to a document but to a claim;

6.2 That such claim is not a document within the meaning of Rule 35(12).

7. During argument, the Respondent could not elaborate as to why it refuses to make available the subpoenas requested. Counsel for the Respondent conceded that indeed subpoenas are documents. It is also not disputed that the founding affidavit in the pending application does make reference to subpoenas.

8. The Applicants contend that the Respondent in the founding affidavit of the pending application, make reference to a proved claim in the following terms:

   "*Reunert proved a claim on the following terms.....*"

   "Reunert proved a claim against the estate of Black Sheep in relation to some of the costs it was required to incur to replace the 10 critical technical employees" and

   "*... as a result of the claim proved by Reunert against the estate of Black Sheep*"...

9. The background to this allegation is that at a meeting of creditors concerning the insolvent estate of the company known as Black Sheep Development (Pty) Limited, and in the absence of the Applicants, a representative of Respondent proved a claim against the estate of the said company. It is further recorded in a copy of the minutes of that meeting that the said representative uplifted the proved claim after the proceedings.

10. Section 44(1) of the Insolvency Act provides that a creditor may prove its claim at a meeting of creditors against an insolvent estate. Subsection 4 of the same Section 44 provides that such claim must be in the form of an affidavit.

11. The Applicants therefore contend that reference to claim in this context refers to an affidavit that was used to present and prove a claim, which affidavit was uplifted by the representative of Respondent at the end of the meeting.

Evaluation of evidence

12. The Court in *Penta Communication Services (Pty) Ltd v King 2007 (3) SA 471 (C)* has cautioned against attaching a wider meaning to the word "*document*" in Rule 35(12). In particular, even though it need not be described in detail, a document need not be inferred but rather be directly referred to in the pleading or affidavit.

13. It is correct that reference to the words "*proved a claim*" and *"claim proved"* is made in the founding affidavit of the pending application. The words as quoted above appear in paragraph 136 of the affidavit on page 98 of the documents filed.

14. According to *Concise Oxford Dictionary, Eleventh Edition, Oxford Press 2006*, a claim is an object or something that is being asserted, demanded or considered to be one's due. This is a meaning of "*claim*" as a noun and it can also be expressed as a verb, meaning

to acquire something. This process of acquiring may either be oral, written or even by conduct.

15. Section 44 of the Insolvency Act provides for the prove of claims against an insolvent estate. In particular, subsection (4) thereof provides:

"Every such claim shall be proved by affidavit in a form corresponding substantially with Form C or D in the first schedule to this Act."

16. There can be no argument that the affidavit *"in a form corresponding substantially with Form C or D in the first schedule to this Act"* refers to a document. See *ABSA Bank Limited v The Master and Others NNO 1998 (4) SA 15 (NPD) and Eastern Free State Cape Co-operative Ltd v The Master and Others 1997 (3) SA 899 (ECD).*

17. I am of the view that the Applicants are correct in their submission that *"proved a claim"* within the context of insolvency proceedings can only mean presentation of an affidavit in the form prescribed by Section 44(4) of the Insolvency Act. Further, a copy of the minutes of the meeting in which the claim was proved indicates that one Chris Edeling attended on behalf of Respondent with his signature appearing at the bottom of the first page of the minutes of

proceedings. Below his signature stand the words "*claim uplifted Chris Edeling*". This is a clear indication that the claim was in the form of a document which was uplifted.

18. In my opinion, the phrase *"proved a claim"* as used within the context of Section 44 of the Insolvency Act refers to submission of an affidavit, which is a document within the meaning of Rule 35(12). As I have already stated, the Respondent did not present any argument or cogent reasons why it refuses to make available to the Applicants, copies of the subpoenas that were issued against the banks.

Conclusion

19. Considering the conspectus of the evidence before me as traversed in the papers, I am of the view that the application should succeed and the Respondent should be ordered to produce the proved claim in the form of an affidavit as well as subpoena issued to the banks.

20. It is further common cause that this matter first appeared before Mr Justice Prinsloo on the 17^{th} April 2013. Mr Justice Prinsloo was sitting in the urgent Court and could not adjudicate on the matter as it was not ripe for hearing. He accordingly gave directives in regard

to the filing of further affidavits and directed that the matter be set down in the next urgent Court roll. The Respondent argues that it is entitled to the costs of the appearance before Mr Justice Prinsloo in that the Applicants placed the matter prematurely before Court. In response thereto, the Applicants argue that the reason this matter was placed before Mr Justice Prinsloo before the parties concluded the exchange of papers, was that the pending application was also set down on the same day and was due to be heard. The pending application had to be postponed *sine die* to make way for the hearing of this application.

21. It seems to me that the Applicants delayed in bringing this application to Court, given the history of the previous unsuccessful attempts to lodge a similar application in the South Gauteng High Court. The fact that this application had to coincide with the hearing of the pending application is of the Applicants' doing and cannot thus be held against the Respondent. I am therefore of the view that the Applicants have to pay the wasted costs of the appearance on 17 April 2013 before Prinsloo J.

22. In regard to the costs of this application, such costs should follow the result.

23. In the premises I make the following order:

1. The application succeeds and the Respondent is ordered to produce for inspection and allow Applicants to make copies of the documents requested by the Applicants in terms of Rule 35(12) notice, which includes the affidavit of the proved claim against the estate of Black Sheep Development (Pty) Ltd and the witness summonses and/or subpoenas issued by the Master to various banks;

2. That the documents referred to in 1 above must be produced and made available to the Applicants within seven days from the date of this order;

3. The Applicants are ordered to pay the wasted costs of the 17th April 2013; and

4. The Respondent is ordered to pay the costs of this application excluding the wasted costs of the 17th April 2013.

MOTHLE J
Judge of the High Court
21/5/2013

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