THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 320/2024 and 368/2024

In the matter between:

JOHN WALKER	**FIRST APPELLANT**
JOHN WALKER ATTORNEYS INC	**SECOND APPELLANT**
DEON MARIUS BOTHA N O	**THIRD APPELLANT**
BAREND PIETERSEN N O	**FOURTH APPELLANT**
ALLAN DAVID PELLOW N O	**FIFTH APPELLANT**
JOHAN FRANCOIS ENGELBRECHT N O	**SIXTH APPELLANT**
PAMODZI GOLD EAST RAND (PTY) LTD	**SEVENTH APPELLANT**
and	
SCHABORT POTGIETER ATTORNEYS INC	**FIRST RESPONDENT**
GERT LOURENS STEYN DE WET N O	**SECOND RESPONDENT**
KAREN KEEVY N O	**THIRD RESPONDENT**
SIMONE LIESEL MAGARDIE N O	**FOURTH RESPONDENT**
IRENE SUSAN PONNEN N O	**FIFTH RESPONDENT**
AURORA EMPOWERMENT SYSTEMS (PTY) LTD	**SIXTH RESPONDENT**
THE MASTER OF THE HIGH COURT, PRETORIA	**SEVENTH RESPONDENT**

Neutral citation: *Walker and Another v Schabort Potgieter Attorneys Inc and Others* (320/2024 and 368/ 2024) [2025] ZASCA 154 (17 October 2025)

Coram: MBATHA ADP and MATOJANE and UNTERHALTER JJA and HENNEY and KUBUSHI AJJA

Heard: 18 August 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 11:00 on 17 October 2025.

Summary: Claim of a company in liquidation for assets recovered by an attorney – attorney's duty to account and debatement of accounts-whether s 32(1)*(b)* of the Insolvency Act 24 of 1936 applies – whether the word 'fails' in s 32(1)*(b)* includes inability to proceed with legal proceedings on behalf of the company in liquidation-whether a creditor who finances litigation on behalf of the company in liquidation is entitled to the proceeds – duty to account and debatement of accounts by an attorney – attorney's statutory, contractual and fiduciary duties.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Skosana AJ sitting as court of first instance):

1. The appeal is dismissed with costs, including the costs of two counsel where so employed.

2. All the appellants are ordered to pay the costs of this appeal jointly and severally, the one paying the other to be absolved.

JUDGMENT

Mbatha ADP (Matojane JA and Henney and Kubushi AJJA concurring):

[1] The issues before this Court arise from an appeal brought by the first appellant, Mr John Walker; the second appellant, John Walker Attorneys Inc; the third appellants, Deon Marius Botha N O, Baren Pietersen N O, Allan David Pellow N O, and Johan Francois Engelbrecht N O, being the joint liquidators of Pamodzi Gold East Rand (Pty) Ltd (the Pamodzi liquidators); and the fourth appellant, Pamodzi Gold East Rand (Pty) Ltd (in liquidation) (Pamodzi). The appeal is against the judgment and order of the Gauteng Division of the High Court, Pretoria, (the high court). The high court granted various orders in favour of the respondents, Gert Lourens Steyn De Wet N O, Karen Keevy N O, Simone Liesel Magadie N O, and Irene Susan Ponnen N O (the Aurora liquidators); and Aurora Empowerment Systems (Pty) Ltd (in liquidation) (Aurora). The names Pamodzi and the Pamodzi liquidators, as well as Aurora and the Aurora liquidators, will be used interchangeably throughout the judgment.

[2] The high court granted judgment in favour of Aurora and the Aurora liquidators. The essence of the order was that Mr Walker, the attorney, was required to account

and to debate the accounts that he had rendered in respect of his professional services.

[3] Aurora was placed in final liquidation on 4 October 2011. One of its major creditors, Pamodzi, lodged a claim of R1.5 billion against Aurora. Consequently, an inquiry under ss 417 and 418 of the Companies Act 61 of 1973 (the Companies Act) was conducted concerning Aurora. This inquiry revealed the existence of impeachable dispositions made under ss 26, 29, 30 and 31 of the Insolvency Act 24 of 1936 (the Insolvency Act),[1] which unfairly disadvantaged Aurora's creditors. As a result, the court's intervention was required to recover Aurora's assets.

[4] It soon became clear that Aurora was not in a financial position to pursue the recovery of these impeachable dispositions and other claims. As a major creditor of Aurora, Pamodzi, represented by its liquidators, offered to finance the prosecution of the claims. This led to the conclusion of a tripartite fee and mandate agreement between Mr Walker, Aurora and Pamodzi, represented by their respective liquidators. When the fee and mandate agreement was signed on 7 July 2012, Mr Walker practised as a sole proprietor under the name John Walker Attorneys. As of January 2014, he was employed as a professional assistant at Schabort Potgieter Attorneys (Schabort). At the time of this litigation, he had left Schabort and, as of July 2018 resumed independent practice as the director of John Walker Incorporated (J Walker Inc). Throughout all these professional transitions, he acted on behalf of Aurora and retained control of the files in order to recover Aurora's assets.

[5] The fee and mandate agreement specifically mandated Mr Walker to take all necessary steps regarding Aurora's claims. In return, Pamodzi agreed to cover the costs of Aurora's litigation as outlined in the agreement and indemnified Aurora in respect thereof. Consequently, the liquidators of Pamodzi co-signed the fee and mandate agreement.

[6] A material term of the fee and mandate agreement required Mr Walker to render a final account with supporting vouchers. Clause 4.2 states that: '[a]ll

[1] These are proceedings to set aside improper dispositions in terms of the Insolvency Act.

disbursements reflected in the account will, [in] so far as possible, be accompanied by supporting documentation…'. In respect of fees, the attorney was required to include a brief description of the work performed, along with the total hours spent executing the tasks. In addition, Mr Walker was required to keep Aurora informed about the progress made in fulfilling the terms of the fee and mandate agreement.

[7] For the seven years following the signing of the agreement, Mr Walker pursued the litigation in the name of Aurora. He was largely successful in prosecuting and collecting debts on Aurora's behalf, initially recovering approximately R5 million. The total amount collected by Mr Walker was close to R20 million. However, he refused to account for these funds to Aurora, claiming that he had no legal obligation to do so, as Aurora was never his client. Instead, he asserted that he was only required to account to the liquidators of Pamodzi, who were responsible for paying his fees. This led to an application brought by Aurora and its liquidators before the high court, which was contested by Mr Walker and the Pamodzi liquidators.

[8] Before this Court, Mr Walker maintained that he was mandated by the liquidators of Pamodzi to prosecute the claims; and therefore, he had no duty to account to Aurora and its liquidators for the legal fees or the settlement of the amounts. He argued that, under s 32 of the Insolvency Act, Aurora was merely a nominal applicant. In addition, he submitted that his professional fees, paid by Pamodzi, were reasonable and that he had provided Aurora with a bill of costs regarding these fees. As a result, he claimed he owed no duty to account to anyone else. Furthermore, Mr Walker contended that Aurora and its liquidators had no standing in relation to the fee and mandate agreement to recover the proceeds of the litigation. Notably, Mr Walker initially asserted that he owed no fiduciary, statutory, or contractual duty to account to Aurora – a position he later abandoned during counsel's oral argument.

[9] In support of his argument, Mr Walker indicated that the mandate had been given to J Walker Attorneys, which ceased to exist in 2012. He disavowed the existence of any legal relationship between Aurora, Schabort, and J Walker Inc. He also stated that the orders granted by the high court were moot and unenforceable, since he had already submitted his accounts for consideration and inspection to

Aurora. He denied having any further obligation to discuss or debate the accounts with Aurora's liquidators.

[10] In support of Mr Walker's position, the Pamodzi liquidators argued that, under s 32 read with s 104 of the Insolvency Act, all funds collected by Mr Walker were to be paid to Pamodzi until their claim was settled. Additionally, they submitted that Aurora, by merely signing the agreement, did not become a party to the litigation, as they alone bore the responsibility for legal fees and the oversight of the entire litigation.

[11] Aurora countered by arguing that Mr Walker had a legal obligation to account to them, deriving from the fee and mandate agreement, and that he owed a fiduciary duty under the Attorneys Act 53 of 1979 (now repealed by s 119 of the Legal Practice Act 28 of 2014). They further contended that the payments made by the debtors were claimed and paid for Aurora's benefit. Therefore, Mr Walker was required to account to Aurora and not to Pamodzi. Aurora emphasised that it was not merely a nominal litigant; Mr Walker was required to account to them, settle accounts, and address any issues arising from the discharge of his professional mandate. Aurora stated that furnishing and debating the account was necessary because the bill of costs included overlaps with unrelated payments that had nothing to do with Aurora. Furthermore, they pointed out that Mr Walker made vague entries with insufficient explanations and no supporting documentation. Lastly, they submitted that the fee and mandate agreement was not an agreement under s 32 of the Insolvency Act, as claimed by Pamodzi and Mr Walker.

[12] This Court is called upon to determine the following key issues: (a) Whether Aurora has a right to claim from Mr Walker the debatement of his account, based on the express terms of the fee and mandate agreement, a fiduciary relationship that derives from the attorney client relationship, and one arising from the applicable statutory framework; (b) The admissibility of Mr Walker's evidence, particularly concerning the alleged new evidence introduced on appeal; (c) Whether s 32(1)*(b)* of the Insolvency Act is applicable in the circumstances of this matter, and if so, whether the section applies to the relationship between Aurora and Pamodzi in a manner that ousts Mr Walker's duty to account to Aurora; and (d) Whether the relief granted a quo has become moot due to Mr Walker's efforts to account.

[13] It is trite that the objective of an account is to enable the claimant to determine the indebtedness of the other party. The right to an account can stem from three sources of obligation: a contractual duty, a fiduciary relationship, or a statutory obligation.

[14] First, a contractual duty may arise from different kinds of contracts, including a mandate. This duty may be expressly stated or tacit. Second, the relationship between an attorney and a client is fundamentally fiduciary in nature. It imposes a duty of good faith and transparency, necessitating an accounting of all matters known and actions taken in the execution of the mandate. Third, a statutory duty is regulated by the Legal Practice Act 28 of 2014 (the Legal Practice Act), and its Code of Conduct, which imposes a statutory obligation on legal practitioners to account truthfully and openly to their clients. This includes faithfully, accurately, and timeously accounting for all trust funds and submitting accounts for taxation or assessment when requested. This statutory duty exists independently of any contractual obligations and ensures the client's right to test the correctness and reasonableness of fees and trust transactions.

[15] The extent of accounting required depends on the circumstances of each case. An inadequate account may be challenged, and the court may make an appropriate order. An attorney must explain and justify his or her actions, bearing the onus to demonstrate proper discharge of their duties, especially when discrepancies or a lack of particularity and supporting vouchers are alleged.

[16] Aurora raised a crucial point in *limine* regarding Mr Walker's attempt to introduce new and contradictory evidence in his application for leave to appeal and in the heads of argument submitted on his behalf. It is settled law that an appeal court will not lightly admit new evidence unless exceptional circumstances are shown and a proper application for its admission is made. The party must explain why the evidence was not presented *a quo*, show it is prima facie truthful, and demonstrate that it has material relevance for the determination of the appeal.

[17] Mr Walker's version, particularly concerning the alleged oral agreement regarding s 32(1)*(b)* of the Insolvency Act, appeared for the first time in his application for leave to appeal. This was neither pleaded in the high court nor included in his initial

answering affidavit. It constitutes an impermissible attempt to cure deficiencies in his original case.

[18] I had initially intended to address whether Mr Walker had a fiduciary and contractual relationship with Aurora arising from the fee and mandate agreement, as well as the current Legal Practice Act that regulates the legal profession. However, it is unnecessary to explore these issues further, as Mr Walker's counsel correctly conceded that Mr Walker owed a fiduciary duty to Aurora under the fee and mandate agreement and the applicable statutory framework as a practising attorney. It is clear that, under the fee and mandate agreement, Aurora was Mr Walker's client, even though his fees were paid by Pamodzi. Consequently, Mr Walker was required to account to his client, regardless of how he chose to practice. The same conclusion follows from the statutory relationship that arose between Mr Walker and Aurora under the Legal Practice Act.

[19] I now turn to the interpretation of the terms of the fee and mandate agreement. The principles of interpretation were established in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (*Endumeni*),[2] which reiterated that interpretation is a unitary and objective exercise that considers the text, context, and purpose of the document or instrument in question.[3] It is also a well-established principle of statutory interpretation that the words used in a document should be understood in their ordinary grammatical sense, unless this leads to absurdity. In *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*,[4] this Court cautioned against using the triad of text, context, and purpose in a mechanical manner.[5] Therefore, I will examine the text in the agreement in light of all relevant and admissible context, including the circumstances surrounding its creation.[6]

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[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).
[3] Ibid paras 18-19.
[4] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA).
[5] Ibid para 25.
[6] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA) para 12.

[20] Upon applying the aforementioned principles, the language used in the agreement is clear and unequivocal. It explicitly outlines the purpose of the agreement. The purpose of the fee and mandate agreement was to recover funds paid to various creditors of Aurora that contravened the provisions of ss 26 to 31 of the Insolvency Act. This is evident from the wording of the fee and mandate agreement, which specifically entrusts Mr Walker with the collection of debts on behalf of the Aurora estate.

[21] The agreement was signed by the liquidators of Aurora, Mr Walker, and the liquidators of Pamodzi. The major creditor, Pamodzi, agreed to pay Mr Walker, the attorney, for his services, while simultaneously indemnifying Aurora against these costs. The fee and mandate agreement was concluded following the completion of the ss 417 and 418 enquiry in terms of the Companies Act, which uncovered the existence of the impeachable transactions. In this context, I am satisfied that the agreement was signed in accordance with s 32(1)*(b)*, even though it does not explicitly state this. This position is further supported by the wording of s 32(1)*(a)*, which provides that: '[p]roceedings to recover the value of property or a right in terms of section 25(4), to set aside any disposition of property under section[s] 26, 29, 30, or 31, or for the recovery of compensation or a penalty under section 31, may be taken by a trustee'. The heading of s 32 is also relevant, as it refers to 'proceedings to set aside improper disposition'.

[22] Section 32(1)*(b)* further provides that: '*if the trustee fails to take any such proceedings they may be taken by any creditor in the name of the trustee upon indemnifying the trustee against all costs thereof*'. (Emphasis added). This provision must be read in conjunction with s 32(1)*(a)* as they both outline the purpose of the provision and the means for pursuing the recovery of unlawful dispositions should the trustee fail to act. The provisions should be read conjunctively with s 32(3), which states: '[w]hen the Court sets aside any disposition of property under any of the said sections, it shall declare the trustee entitled to recover any property alienated under the said disposition…'

[23] It is common cause that Aurora was not in a position to finance the recovery of the assets. There was no failure on the part of Aurora's liquidators to act as provided

in s 32(1)*(b)*. In that regard, there was no obstruction by Aurora's liquidators. In fact, Aurora simply lacked the financial resources to do so. I find that the interpretation of the word 'fails' in this provision may encompass an unwillingness, but also an inability to prosecute the litigation. This finding aligns with the purpose of s 32, particularly as the liquidators of Aurora were willing to proceed with the recovery of the claims but faced financial challenges.

[24] Section 32(1)*(b)* provides that the proceedings may be taken by any creditor in the name of the trustee, upon indemnifying the trustee against all costs thereof. Clause 2.2 of the fee and mandate agreement states that: '[t]he Pamodzi liquidators shall be responsible to pay in full all disbursements incurred by the attorney in respect of the fees of service providers such as advocates, experts and assessors who the attorney will be entitled to appoint in his sole discretion when he deems it necessary, as principal viz a viz such service provider'. By signing the agreement, Pamodzi accepted responsibility for the payment of all these costs, thus indemnifying Aurora's liquidators as required by s 32(1)*(b).*

[25] Having reached this conclusion, I must determine who is entitled to receive the funds collected under the s 32(1)*(b)* fee and mandate agreement by Mr Walker. The funds collected can only be for the benefit of the company in liquidation, in this case, Aurora. The litigation is conducted in the name of the insolvent estate and its liquidators. The creditor merely supports the litigation financially in the prosecution of the claims in terms of s 32(1)*(b),* and simply indemnifies the liquidators of the company in liquidation for the costs incurred in the litigation. Section 32(1)*(b)* does not confer legal standing on the creditor to recover the claims.

[26] The agreement clearly outlines Mr Walker's responsibilities in executing his mandate. Clause 7.2 authorises Mr Walker in the following manner: *'[w]e hereby authorise the attorney to receive any monies which may be payable to me, and to recover therefrom any fees and disbursements owing by me/us before any balance is paid out to me'.* (Emphasis added). Both the Pamodzi and Aurora liquidators claim to be the intended recipients of these funds. However, in light of the purpose of s 32(1)*(b)*, this cannot be the case in respect of Pamodzi, because the monies collected are payable to Aurora. It is also unfortunate that Mr Walker selectively interpreted the

terms ‘me’, ‘you’, and ‘us’ in the agreement to refer only to Pamodzi. The language of the agreement must be understood on the basis that Aurora is the claimant of the assets, and the proceeds are payable to Aurora, so that the liquidators may then proceed with the orderly winding-up of the company.

[27] Having found that s 32(1)*(b)* does not entitle Mr Walker to pay Pamodzi – since the funds were recovered on behalf of Aurora – it follows that the funds collected are for the benefit of Aurora. The funds recovered by Mr Walker were to be paid to Aurora and must now be transferred back to Aurora.

[28] This brings me to the consideration of Mr Walker’s duty to account to Aurora. Aurora contended that the litigation was effectively commenced and began yielding results around 2019. However, the quality and frequency of Mr Walker’s reporting to Aurora declined after substantial payments were deposited into his trust account. This raised suspicions that Mr Walker might have misappropriated the proceeds from the litigation, collected on behalf of Aurora, to cover costs associated with Pamodzi’s unrelated litigation. On 4 September 2019, Aurora formally demanded that Mr Walker pay the recovered funds. In response, he declined to account to Aurora and stated that the amount of R5,837,644 paid to Aurora was a gratuitous payment made at Pamodzi's instruction. By then, Mr Walker had recovered approximately R19,995,756.

[29] Pamodzi’s argument that, based on the fee and mandate agreement, along with an alleged verbal agreement, it was a material term that Pamodzi was entitled to receive the funds collected by Mr Walker, is not correct. Additionally, their reliance on s 32 read in conjunction with s 104, which they claimed entitled them to the funds collected by Mr Walker, is equally misplaced. The only benefit that accrues to Pamodzi is stated in s 104(3), which reads as follows:

‘If any creditor has under subsection (1) of section 32 taken proceedings to recover the value of property or a right under section 25(4), to set aside any disposition of or dealing with property under section 26, 29, 30 or 31 or for the recovery of damages or a penalty under section 31, no creditor who was not a party to the proceedings shall derive any benefit from any moneys or from the proceeds of any property recovered as a result of such proceedings before the claim and costs of every creditor who was a party to such proceedings have been paid in full.’

[30] In the case of *Reynolds and Others N N O v Standard Bank of South Africa Ltd* (*Reynolds*),[7] the court emphasised the essential nature of s 32(1)*(b)*. It held that when litigation is initiated in the name of the liquidators under this section, it does not alter the fact that the plaintiffs are the ones who will receive payment if the litigation succeeds, and who will be responsible for the costs if it fails. The court also clarified that it is incorrect to refer to the plaintiffs as merely 'nominal plaintiffs'. They are considered plaintiffs because they are the only parties entitled to pursue the litigation in question.

[31] The nature of the tripartite fee and mandate agreement, according to s 32(1)*(b)* read with s 104(3), was clarified in the case of *Myburgh v Walters N O*.[8] The court stated that the 'creditor' is not technically a party to the litigation if the judgment is granted in favour of the plaintiff; only the trustee has the authority to execute it. This applies even though the 'creditor' is the driving force behind the litigation. Essentially, the creditor who litigates on behalf of the trustee is practically considered the litigant. However, any money recovered from the litigation will not be paid directly to the creditor. The concerned creditor enjoys protection in terms of s 104(3) of the Insolvency Act. In conclusion, s 32(1)*(b)* read in conjunction with s 104(3), does not allow the creditor to take control of the proceeds of the litigation and pay themselves. Such conduct would defeat the purpose of s 32(1)*(b)*.

[32] The interpretation of the provisions in s 32(1)*(b)*, read in conjunction with s 104(3) and the mandate and fee agreement, clearly establishes that Mr Walker had a duty to account to the Aurora liquidators. As previously stated, the duty to render an account can arise from a fiduciary relationship between parties, a statutory obligation, or a contractual duty.[9] The claimant must assert and prove the basis for the right to receive the account, demonstrate the defendant's failure to provide an account, and, if an incomplete account was given, show that it was not a proper account. In this case, the relationship between Aurora, the liquidators, and Mr Walker arose from both a fiduciary and a contractual relationship.

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[7] *Reynolds and Others N N O v Standard Bank of South Africa Ltd* 2011 (3) SA 660 (W) paras 9-10.
[8] *Myburgh v Walters N O* 2001 (2) SA 127 (C) at 130E-G.
[9] *Doyle v Board of Executors* (*Board of Executors*)1999 (1) All SA 309 (C); 1999 (2) SA 805 (C) at 812I-813A.

[33] The high court ordered Mr Walker to furnish detailed statements of account and to debate those accounts with Aurora's liquidators. He was further ordered to pay over any outstanding sums of money due to Aurora.

[34] Mr Walker has raised a number of defences before this Court, including that he had no mandate to account to Aurora; that the high court wrongly extended the lifespan of J Walker Attorneys, which ended in 2013; and that the accounting to Aurora had already been completed. Insofar as the debatement of the account is concerned, Mr Walker raised a defence of impossibility. He argued that he could not debate accounts relating to another firm of attorneys, Schabort, as he was not responsible for the books of account for that firm. He further asserted that Aurora's claim may have prescribed, and that, as a result, it was not competent for him to comply with the high court order.

[35] Mr Walker finally conceded that he had both a contractual duty and a fiduciary duty to account to Aurora, but only when the matter served before this Court. This concession has satisfied the first two requirements set out in *Doyle v Fleet Motors PE (Pty) Ltd* (*Fleet Motors*) where this Court held that:

' the plaintiff should aver –

(a) his right to receive an account, and the basis of such right, whether by contract or by fiduciary relationship or otherwise;

(b) any contractual terms or circumstances having a bearing on the account sought;

(c) the defendant's failure to render an account…' [10]

In relation to the contentious issue of whether Mr Walker failed to render an account, the court in *Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd*, relying on *Doyle,* stated as follows:

'The right at common law to claim a statement of account is, of course, recognised in our law, provided the allegations in support thereof make it clear that the said claim is founded upon a fiduciary relationship between the parties or upon some statute or contract which has imposed upon the party sued the duty to give an account. Allegations which do no more than to indicate a debtor and creditor relationship would not justify a claim for a statement of account.'[11]

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[10] *Doyle v Fleet Motors PE (Pty) Ltd* (*Fleet Motors*) [1971] 3 All SA 550 (A), 1971(3) SA 760 (A) at 762F-H.

[11] *Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd* 1975 (1) SA 961 (W) at 963.

[36] In *Scholtz and Another v De Kock NO and Others (Scholtz)*,[12] this Court clarified when fiduciary duties to account arise. It held that deposits into an attorney's trust account do not, on their own, automatically create an accounting obligation to account to the depositor. The nature and extent of a fiduciary duty can only be determined after a thorough consideration of the facts. Therefore, there is no automatic duty to account merely because someone is an attorney who handles trust funds. The court has to examine the factual matrix and consider the nature of the mandate. In this case, I have found that Mr Walker's duty to account is expressly grounded in the written fee and mandate agreement, as well as in the relationship governed by the Legal Practice Act.

[37] In Scholtz, as in *Board of Executors*, the court held that although the case involves an *inter vivos* trust, the question at issue was one that could arise in any circumstance where persons stand in a fiduciary position to others.[13] The court went on to explain what a duty to account entails:

'. . .The right to an account was at once two distinct concepts. It is both substantive and procedural. It is a right as well as a remedy. The duties of good faith, which were owed by an agent to his principal, were no different in kind to those which fell on a trustee. . .

An agent who accepts a mandate is bound to execute it. If he fails to do so without sufficient legal excuse, he is liable for the loss which follows. In an action for the damage, the onus is on the agent to show that he is not liable. The degree of care owed by the agent seems to be an open question. It is not clear whether his liability extends to slight negligence. Whatever the answer to that conundrum may be, the duty falls on an agent to demonstrate that he acted with whatever care and skill the occasion demanded. An agent must keep his principal's property separate from his own and must deliver up to his principal that which is his. If he mixes the two, that which he, the agent, cannot prove to be his own is presumed to belong to his principal.

Inextricably bound up with this by no means exhaustive compendium of obligations is *the agent's duty to give an accounting to his principal of all that he knows and has done in the execution of his mandate and with his principal's property*.'[14]

[38] *Board of Executors* essentially emphasised that the duty to account is a substantive legal obligation. The agent must justify his actions and bear the onus of

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[12] *Scholtz and Another v De Kock N O and Others* (312/2023) [2024] ZASCA 132 (2 October 2024) para 15.
[13] *Board of Executors* at 808F.
[14] Ibid at 806E-F and 813E-G.

demonstrating the proper discharge of his office. Mr Walker is therefore legally obligated to provide a comprehensive and fully supported account of his dealings with Aurora's assets. The issue of the adequacy of accounting lies at the heart of the dispute between Mr Walker and Aurora. As the high court found the accounting to be inadequate, Aurora should not be denied the right to enquire and ensure that the accounts are adequate before the debatement, as was the case in *Grancy Property Limited and Another v Seena Marena Investment (Pty) Ltd and Others*.[15]

[39] Aurora complained about the quality of the statements of account, describing them as being vague, with overlapping fee assertions and the alleged misuse of Aurora's funds, amongst other issues. Trust funds managed by an attorney require transparency, contemporaneous documentation, and itemised accounts. Debatement can follow only after a proper accounting has been done. My finding is supported by *Board of Executors*, which relies on Professor Kerr, who states the law as follows:

"An agent is obliged to "account for everything in good faith". It is his duty

"where the business in which he is employed admits of it, or requires it, to keep regular accounts of all his transactions on behalf of his principal, not only of his payments and disbursements, but also of his receipts; and to render such accounts to his principal at all reasonable times, without any suppression, concealment, or overcharge".

This involves an agent in keeping the principal's property separate; in keeping his accounts up-to-date and allowing the inspection of his books; in giving information when necessary; and, when the transaction is complete, in rendering an account and handing over any balance in his hands plus anything to which the principal is entitled."[16]

[40] Aurora submitted that the forensic audit found that Mr Walker had inappropriately used funds collected on behalf of Aurora to settle litigation costs for Pamodzi in unrelated matters. They specifically mentioned R1.5 million, which was received in three instalments, and remained unaccounted for in Mr Walker's account. Additionally, R600 000 was deposited into his trust account on 15 February 2016 and debited on the same day, with no explanation regarding its intended destination. Aurora raised concerns that the accounts provided were summaries rather than comprehensive accounting reports. They noted that no vouchers for disbursements

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[15] *Grancy Propert yLimited and Another v Seena Marena Investment (Pty) (Ltd) and Others* [2014] ZASCA 50; [2014] 3 All SA 123 (SCA) para 19.

[16] *Board of Executors* at 814D-E.

were attached, and there was no account of the movement of funds from Schabort to John Walker Inc. It was of great concern to them that Mr Walker did not differentiate between the matters funded by Pamodzi on behalf of Aurora and the litigation he conducted for Pamodzi.

[41] In light of the aforementioned, I find that Mr Walker did not adequately account to Aurora for the following reasons: the account analysis was conducted by a forensic auditor, rather than being based solely on the claims of the Aurora liquidators; the report from the forensic auditor remains unchallenged; and the funds collected have not been paid to Aurora. Additionally, the JW9 statement, allegedly reflecting all the amounts received by Mr Walker in the conduct of the various matters, is wholly insufficient. It does not constitute a full and proper accounting, as there are no details of who paid the amounts or received any of the amounts. It does not even distinguish payments made by and to Pamodzi. The mere provision of over 400 statements does not amount to proper accounting. Therefore, Mr Walker cannot argue that the duty to account is irrelevant. He has failed to provide a sufficient accounting to Aurora. Aurora is entitled to an appropriate accounting, not a bill of costs, or a bundle of statements. Aurora is also entitled to the debatement of the account. I cannot find fault with the orders granted by the high court, as they set out each and every matter in which accounting and debatement are sought. In the event that proper accounting has been provided, the parties may proceed with the debatement of the accounts.

[42] For all the above reasons, the following order is made:

1. The appeal is dismissed with costs, including the costs of two counsel where so employed.

2. All the appellants are ordered to pay the costs of this appeal jointly and severally, the one paying the other to be absolved.

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Y T MBATHA

ACTING DEPUTY PRESIDENT OF APPEAL

Unterhalter JA:

[43] I have had the pleasure of reading the judgment of Mbatha ADP (the first judgment), and I concur with its central holdings as to the duty of Mr Walker to account to the liquidators of Aurora Empowerment System (Pty) Ltd (in liquidation) (Aurora). Aurora was Mr Walker's client. The permutations under which he practised over the years did not alter his duty to account to Aurora as his client. That duty, as the first judgment finds, is sourced in the mandate Mr Walker accepted; in the fiduciary duties he owed as an attorney to his client; and in the statutory obligations by which he was bound. Nor was that duty attenuated or absolved by reason of the fact that the liquidators of Aurora's principal creditor, Pamodzi Gold East Rand (Pty) Ltd (Pamodzi), agreed to fund the litigation by which Aurora sought to secure the payment of its claims. Whether or not s 32(1)*(b)* of the Insolvency Act 24 of 1936 was of application to the arrangement concluded between Mr Walker, Aurora and Pamodzi, and whatever duties Mr Walker may have had to account to Pamodzi by reason of this arrangement, this did not discharge his duty to account to Aurora. The defence offered by Mr Walker that he had accounted to Pamodzi to their satisfaction has been rightly rejected in the first judgment. So too, Mr Walker's contention that his employment as a professional assistant in the firm of Schabort Attorneys absolved him of his duty to account to his client, Aurora, during the period of his employment, has no merit, as the first judgment holds.

[44] Mr Walker also offered the following defence. He contended that, whatever the incidence of his duty to account to Aurora, he has accounted to Aurora in full. He relied upon an attachment to his answering affidavit, JW9, that Mr Walker contended was a 'statement of all amounts received by me in the conduct of the various matters'. In addition, a decision was taken to proceed with the taxation of the bills in respect of all the matters in which Mr Walker was instructed. The bills were then drawn by a cost consultant for the purposes of taxation. These accounts, Mr Walker argued, constitute 'comprehensive accounts' and there is no more he can provide. His defence was thus that he had discharged his duty to account to Aurora.

[45] In its replying affidavit, Aurora sets out the shortcomings of Mr Walker's accounting. So, for example, the amounts received by Mr Walker, as set out in JW9,

do not disclose from whom the monies were received, and to whom they were disbursed. Of the total proceeds received by Mr Walker in trust of R19 995 756.00, R5 837 644.00 was paid to Aurora by Mr Walker. It is difficult to ascertain how the difference, being R15 155 801.00, is to be accounted for. These, and other shortcomings, are set out in a report that has been compiled by Ms Warricker, a forensic investigator of long experience, attached to the replying affidavit as RA 11, and confirmed by her on oath. Ms Warricker's report considered what Mr Walker relied upon as constituting his accounting, and explained why that effort falls short of what is required. This report builds upon the issues raised by Ms Warricker in her first report, attached to the founding affidavit, as GDW31, and summarised in paragraph 68 of the founding affidavit. I shall refer to these reports as the Warricker reports.

[46] I find, with the first judgment, that the accounting provided by Mr Walker does not discharge his duty to account. His defence, that he has provided a comprehensive accounting, must fail for the reasons set out in the Warricker reports, which have not been rebutted by him. The first judgment recognises that Mr Walker has provided an accounting. It references certain respects in which the accounting is inadequate. But it does not indicate what Mr Walker must do, fully to discharge his obligation. Rather, it concludes that the accounting is inadequate and then dismisses the appeal, leaving in place the order made by the high court. That order is framed in wide terms. It is formulated without regard to the accounting Mr Walker has made, and it does not stipulate what remains to be done to ensure that Mr Walker's obligation is properly performed. The high court order is thus overbroad. It is composed as if Mr Walker had made no accounting at all. And because of its overbreadth, it is likely to give rise to further disputes as to whether Mr Walker has complied with the order. The first judgment does not engage these difficulties when it should. A court order must be obeyed. An order that does not sufficiently specify what must be done, given what has been done, is not an order that should be upheld. Yet the first judgment simply dismisses the appeal and upholds the high court's order. For this reason, I do not concur with the first judgment as to the order it has made because it does not vacate the high court's order and replace it with an order that specifies what remains to be done by Mr Walker to provide an adequate accounting to Aurora.

[47] The high court's order reads as follows:

‘1. Directing the First and Second Respondents to furnish the applicants within 10 days of this order with:

1.1. a statement of account in respect of all amounts received, collected and disbursed by the First and Respondents in the following matters:

1.1.1. CF De Wet N.O & 3 Others v Shamilla Essay & 2 Others – Case Number 44157/2012;

1.1.2. Aurora Empowerment Systems (Pty) Ltd (in liquidation) v Khulubuse Clive Zuma – Case Number 38065/2016;

1.1.3. Aurora Empowerment Systems (Pty) Ltd (in liquidation) v Zobeida Bhana & 2 Others – Case Number 44155/2012;

1.1.4. Aurora Systems (Pty) Ltd (in liquidation) v Feroza Bhana & 2 Others – Case Number 44156/2012;

1.1.5. Aurora Empowerment Systems (Pty) Ltd (in liquidation) v Mohamed Firoze Limbada & 3 Others – Case Number 50016/2012;

1.1.6. Aurora Empowerment Systems (Pty) Ltd (in liquidation) v Yaseen Theba & 2 Others – Case Number 44154/2012;

1.2. a statement of account in respect of all amounts received, collected and disbursed by the First and Second Respondents in respect of the matters referred to in annexures GDW 14.1 to GDW 14.9 to the founding affidavit filed in support of this application;

1.3. a statement of account in respect of all amounts collected and disbursed by the First and Second Respondents in respect of any other matters in which any of the First and Second Respondents acted for any of the applicants in relation to the trade, dealings, affairs and property of Aurora Empowerment Systems (Pty) Ltd (in liquidation).

1.4. a fully itemised bill of costs, or duly taxed bill of costs, for all fees and disbursements incurred by the First and Second Respondents in respect of the aforementioned matters.

2. The First and Second Respondents are directed to debate the aforesaid accounts and bills of costs with the applicants within one month from the date of receipt of the applicants' notice that they have received such accounts and bills of costs and are ready to debate with the First and Second Respondents.

3. The First and Second Respondents are ordered to pay the applicants any amount/s found to be due upon debatement thereof.

4. If the parties do not reach an agreement in debating the account/s:

4.1. directing them to formulate a list of all disputed items within 10 days of a request by one party to the other;

4.2. granting leave to approach the Court on the same papers, duly supplemented as necessary, for a debatement of the disputed items; and

4.3. ordering the First and Second Respondents to make payment of any amount found to be due to the applicants upon debatement thereof.

5. All the Respondents opposing this application are to pay the costs on the attorney and client scale, jointly and severally, the one paying the other to be absolved.'

[48] The high court order is formulated as if Mr Walker had not made any accounting to Aurora – hence it is overbroad. This lack of specificity is easily cured. The Warricker reports read with paragraph 68 of the founding affidavit set out what is still required of Mr Walker to secure a full accounting. Mr Walker should thus be ordered to account so as to make good the deficiencies identified in the Warricker reports. To the extent that he cannot, he should indicate why he is unable to do so, and his accounting may then be subject to debatement. On this basis, the appeal would succeed, but only insofar as the order of the high court was overbroad. However, the appellants would, for the most part, have failed in their appeal, and accordingly must be held liable for the costs of the appeal.

[49] I would accordingly have made the following order:

(i) The appeal succeeds in part.

(ii) The appellants are ordered to pay the costs of the appeal, including the costs of two counsel, where so employed, the one paying the other to be absolved.

(iii) The high court order is set aside and replaced with the following:

'1. Directing the first and second respondents to furnish the applicants, within 30 days of this order, with:

a further statement of account that is responsive to the issues raised in the Warricker reports (being annex GDW 31 to the founding affidavit and RA 11 to the replying affidavit), and to the extent that they cannot do so, to specify their reasons.

2. The First and Second Respondents are directed to debate the accounts and bills of costs, provided by them, with the applicants, within one month from the date of receipt of the applicants' notice that they have received such accounts and bills of costs and are ready to debate them with the First and Second Respondents.

3. The First and Second Respondents are ordered to pay the applicants any amount/s found to be due upon debatement.

4. If the parties do not reach an agreement in debating the accounts:

4.1. directing them to formulate a list of all disputed items within 10 days of a request by one party to the other;

4.2. granting leave to approach the Court on the same papers, duly supplemented as necessary, for a debatement of the disputed items; and

4.3. to seek an order requiring the First and Second Respondents to make payment of any amount found to be due to the applicants upon debatement thereof.

5. All the Respondents opposing this application are to pay the costs on the attorney and client scale, jointly and severally, the one paying the other to be absolved.'

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DN UNTERHALTER

JUDGE OF APPEAL

Appearances

For first and second appellants:	J Hershensohn SC with PJ Greyling
Instructed by:	John Walker Attorneys, Pretoria
	Webbers Attorneys, Bloemfontein.
For the intervening appellants:	SJ Van Rensburg SC
Instructed by:	Crouse Inc, Pretoria
	Webbers Attorneys, Bloemfontein.
For second to fifth respondents:	M Tshele with B Viljoen
Instructed by:	Kwa Attorneys, Johannesburg
	Hill Mchardy and Herbst Inc., Bloemfontein