IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]

CASE NO: 16480/20

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

....
DATE SIGNATURE

In the matter between:-

GERT LOURENS STEYN DE WET NO. First Applicant

KAREN KEEVY NO. Second Applicant

SIMOE LIESEL MAGARDIE NO. Third Applicant

IRENE SUZAN PONNEN NO. Fourth Applicant

[as the joined liquidators of Aurora Empowerment Systems Pty Ltd]

AURORA EMPOWERMENT SYSTEMS PTY LTD
(IN LIQUIDATION) Fifth Applicant

and

JOHN WALKER First Respondent

JOHN WALKER ATTORNEYS INC	Second Respondent
SCHABORT POTGIETER ATTORNEYS	Third Respondent
DEON MARIUS BOTHA NO.	Fourth Respondent
BAREND PETERSEN NO.	Fifth Respondent
ALLAN DAVID PELLOW NO.	Sixth Respondent
JOHAN FRANCOIS ENGELBRECHT	Seventh Respondent
[as liquidators of Pamodzi Gold Estate Rand Pty Ltd]	
PAMODZI GOLD ESTATE RAND PTY LTD	Eighth Respondent
THE MASTER OF THE HIGH COURT, PRETORIA	Ninth Respondent

JUDGMENT

SKOSANA AJ

[1] The applicants have brought an application seeking an order to compel the respondents to furnish the applicants with statements of accounts and bill of costs in relation to certain court matters and legal services rendered in respect thereof. The statements of accounts required by the applicants are the following:

(a) A statement of account in rest of all amounts collected and disbursed by the respondents in the following matters:

(i) CF De Wet No. & 3 Others v Shamilla Essay & 2 Others- Case no. 44157/2012;

(ii) Aurora Empowerment Systems Pty Ltd (in liquidation) v Khulubuse Clive Zuma Case no. 38065/2016;

(iii) Aurora Empowerment Systems Pty Ltd (in liquidation) v Zobeida Bhana & 2 Others Case no. 44155/2012;

(iv) Aurora Empowerment Systems Pty Ltd (in liquidation) v Feroza Bhana & 2 Others Case no. 44156/2012;

(v) Aurora Empowerment Systems Pty Ltd (in liquidation) v Mohamed Firoze Limbada & 3 Others Case no. 50016/2012; and

(vi) Aurora Empowerment Systems Pty Ltd (in liquidation) v Yaseen Theba & 2 Others Case no. 44154/2012.

(b) The statements of account in respect of all amounts collected and disbursed by the respondents in respect of the matters referred to in annexures “GDW4.1” to “GDW 4.9” to the applicants’ founding affidavit.

(c) The statements of account in respect of all amounts collected and disbursed by the respondents in respect of any other matters in which any of the respondents acted for any of the applicants in relation to the trade, dealings, affairs and property of Aurora Empowerment Systems Pty Ltd (in liquidation).

(d) A fully itemized bill of costs or duly taxed bill of costs for all fees and disbursements incurred by the respondents in respect of the above-mentioned matters.

[2] In addition, the applicants seek an order directing the respondents to debate the aforesaid accounts and bill of costs with the applicants after the applicants have received them.

[3] They also seek an order that the respondents pay the applicants any amounts found to be due upon the debatement of such accounts and bill of costs and that, should the parties not agree in relation to the debatement of the accounts, that the applicants be granted leave to approach this court for the debatement of the disputed items and payment thereof. Finally, the applicants seek a punitive costs order against the respondents jointly and severally.

BACKGROUND

[4] The applicants consist of joint liquidators of Aurora Empowerment Systems (Pty) Ltd ("Aurora") and Aurora which is in liquidation.

[5] It is common cause that the eighth respondent, Pamodzi Gold Estate Rand (Pty) Ltd ("Pamodzi") is the biggest creditor of Aurora to the tune of R1,5 billion. The papers reveal that Pamodzi concluded an agreement with Aurora, after Aurora's liquidation, in terms of which Pamodzi was to fund litigation to recover money from Aurora's debtors with a view to ultimately secure payment of its debt from Aurora. Such agreement is embodied in the mandate and fee agreement dated 07 July 2012 ("*the F&M agreement*") and signed by the joint

liquidators of Aurora and the liquidators of Pamodzi as well as the first respondent ("*Mr Walker*"). Mr Walker signed the F & M agreement in acceptance of the mandate given to him in terms thereof.

[6] It is also common cause that Mr Walker practised as a sole proprietor until December 2013 under the name John Walker Attorneys Inc. During that time an attorney and client relationship developed between him and Pamodzi. During the early part of 2014, he joined the firm Schabort Potgieter Attorneys Incorporated and took along the matters that he had been handling as a sole proprietor to that firm. He however continued to exercise professional responsibility for such matters and to act as an attorney of record therein.

[7] This background only covers what I regard as important in relation to this application which has a narrow scope, namely concerning the duty of an attorney to account to his/her client.

ISSUES AND FINDINGS

[8] The gravamen of the respondents' opposition is that neither Mr Walker, John Walker Attorneys Incorporated nor Schabort Potgieter Attorneys Inc have a legal duty to account to the applicants as Aurora was never a client to any of them. Schabort Potgieter Attorneys Inc (the third respondent) did not actively participate in the proceedings save for the minor issue that arose lately, because

the application was mainly directed at Mr Walker himself in his capacity as an attorney.

[9] Counsel for the first and second respondents, Mr Du Plessis, who was supported by counsel for the fourth to eighth respondents, Mr Van Rensburg contended that the F&M agreement establishes that first, the firm John Walker Attorneys Inc as opposed to Mr Walker was appointed as attorneys. Second, that the client in such agreement was Pamodzi and not Aurora. That though the litigation in the cases in question was to be conducted under the name of Aurora, it was actually Pamodzi litigating and paying for it.

[10] Third, that Pamodzi indemnified Aurora not only from the payment of legal fees to the attorney of record but also from liability for fees of the other party if unsuccessful as reflected by clause 3.3 of the F&M agreement. This, the argument continued, placed the F&M agreement squarely within the provisions of section 32(1)(b) as well as section 104(3) of the Insolvency Act no. 24 of 1936 and demonstrates that the client was Pamodzi. Fourth, the F&M agreement has an exclusionary clause and could only be altered or amended by another written instrument.

[11] I disagree with the first three of the above propositions made on behalf of the relevant respondents. The reasons for my disagreement can be summarized as follows:

[10.1] First, there is no gainsaying the fact that the F&M agreement is an agreement in terms of which a mandator gives mandate to a mandatary and provides for payment of the fees of the mandatary. That is reflected by its label in the first place. As a general rule, a mandatary is legally obliged to render a proper account to a mandator as required by the contract of mandate, by statute or by trade usage[1]. Of course, the mandator is entitled examine book entries and any relevant information kept by the mandatary with a view to ratify, reject or call for the debatement of such account[2].

[10.2] There is no basis for assuming that the word "*we*" or "*us*" in the F&M agreement refers to Pamodzi. The introduction reads "*We, the undersigned, THE JOINT LIQUIDATORS OF AURORA EMPOWERMENT SYSTEMS (PTY LTD (IN LIQUIDATION) do hereby nominate and appoint the partners and their nominees of JOHN WALKER ATTORNEYS with power of substitution (hereinafter called "the attorney") to render professional legal services to us, which shall include the right to prosecute or defend proceedings in any competent court and on my behalf to take all necessary steps in connection with*

1. The collection of debtors on behalf of the Aurora Estate;

2. Further instructions".

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[1] **Doyle v Fleet Motors PE (Pty) Ltd 1971 3 All SA 550 (A); 1971 3 SA 760 (A) 762–763 767; Grancy Property Ltd v Seena Marena Investment (Pty) Ltd 2014 3 All SA 123 (SCA).**

[2] **Jacobson v Simon & Pienaar 1938 TPD 116; Hansa v Dinbro Trust (Pty) Ltd 1949 1 All SA 146 (T); 1949 2 SA 513 (T); Fisher v Levin 1971 1 All SA 172 (W); 1971 1 SA 250 (W); Doyle v Fleet Motors PE (Pty) Ltd supra; Pretorius v Herbst 1952 2 All SA 205 (T); 1952 1 SA 672 (T)**

[10.3] This is followed by the paragraphs confirming the fees that were to be charged by the attorney including disbursements. It is necessary also to quote paragraph 4 of this agreement in full, which reads:

"I/We understand that:

4.1 the attorney is entitled to render me interim accounts in respect of fees and disbursements and that at the conclusion of the matter he will render me a final account;

4.2 All disbursements reflected in the account will, so far as possible, be accompanied by supporting documentation, and that in respect of fees, the attorney will set out a short cryptic description of the work done by him together with the total hours spent in the execution thereof;

4.3 Should we require the attorney to furnish me with a detailed specified account in respect of services rendered by him, and in the event of the total of such detailed specified account being higher than the total of the account as set out in paragraph 4.2 above, I/we accept the responsibility to:

4.3.1 pay such higher amount; and

4.3.2 pay the costs incurred in the preparation and drafting of such specified detailed account, which may include the costs of a cost consultant;

4.4 If we do not object in writing to the account, or request a specified detailed account, within 14 (FOURTEEN) days of receipt of the account from the attorney,

we shall be deemed to have waive any right which we may might have in respect thereof and that we will/ we shall also then be deemed to have accepted the attorney's account as fair and reasonable".

[10.4] In the first place, the prologue of the F&M agreement evinces a mandate emanating from Aurora, through its liquidators, appointing attorneys. The reason for the co-signing of the F&M agreement by Pamodzi is clear from paragraph 1.1 thereof, being the payment of fees for services rendered in terms of such agreement. But paragraph 4 contractually distinctly obliges such attorney to render accounts to Aurora notwithstanding that payment thereof is to be effected by Pamodzi.

[10.5] The appointee or mandatary is "*partners*" of John Walker Attorneys Inc and their nominees. There is no denial that Mr Walker was the sole partner/proprietor in that firm. He was therefore appointed in that capacity in terms of this agreement. In so far as it may be necessary, it may said that when he joined Schabort Potgieter Attorneys Inc, he acted as a nominee or substitute of such partner (himself) or of the first firm. In other words, "*the sole partner*" of the first firm or Aurora itself would have appointed or nominated him or agreed to his continuing to act for them.

[10.6] Paragraph 4 of the F&M agreement as quoted above also accentuates the entitlement of Aurora to accounting and records regarding fees. Actually, it

seems the attorney would have been equally entitled to sue Aurora for fees as he would from Pamodzi with the entitlement against the former being based on the mandate in general and on clause 1.1 against the latter. That also denotes that, in my view, clause 1.1 does not release or indemnify Aurora from its general obligation to pay the fees to the attorney.

[10.7] As to paragraph 3.3 of such agreement to which Mr Du Plessis and Mr Van Rensburg belatedly latched in support of their reliance on sections 32(1)(b) and 104(3) of the Insolvency Act, my view is that the clause does not assist them. As stated above, the word "*we*" does not admit of their interpretation in the context of the agreement. Applying the same principle as laid down in **Endumeni** case[3] which was heavily relied upon by the respondents, the F&M agreement on its own and without introducing extrinsic evidence thereto, repulses their proposed interpretation.

[10.8] "*We*" refers to the mandator, being Aurora. It follows therefore that clause 3.3 of the F&M agreement does not even come close to being an indemnification of Aurora by Pamodzi and has nothing to do with and cannot be construed as an indemnification as contemplated in the sections of the Insolvency Act relied upon. Section 32(1)(b) of the Insolvency Act provides:

"(b) If the trustee fails to take any such proceedings they may be taken by any creditor in the name of the trustee upon his indemnifying the trustee against all costs thereof."[my undelining]

[3] **Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)**

Section 104(3) complements it as follows:

"*(3)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.*"

[10.9] The sections require clear indemnification from all costs of the proceedings, be it payment of own attorneys, costs of the opponents and other related costs. No such indemnification is apparent from the F&M agreement. Therefore these provisions do not find application. Second, the indemnification contemplated in section 32(1)(b) ought to precede the proceedings in question. This fact is not clear in these proceedings. Third, the indemnification is a subject of agreement between Pamodzi and Aurora and/or their liquidators. It is absurd to have one party regarding a document as indemnification and the other labouring under a contrary understanding. Fourth and importantly, the above provisions of the Insolvency Act cannot be used to confirm or refute the existence of an attorney and client relationship. Their purpose is different. The existence or otherwise of such relationship must be determine with reference to the contract of mandate.

[10.10] The only existing contract of mandate is the F&M agreement and it reflects Aurora as the mandator.

[10.11] In fact, it is paragraph 1.1 of that agreement than paragraph 3.3 thereof which comes close, albeit not close enough, to being such indemnification. But as stated earlier, paragraph 1.1 still does not expressly indemnify Aurora at all and relates only to the fees and disbursements of Mr Walker and not the costs of the other party. Clause 3.3 only confirms the understanding of the mandator of the difference between party and party costs and the attorney and own client costs as well as the liability of the client (Aurora) to pay attorney and own client costs to its attorney regardless of the outcome as well as the costs of the opponent in the event of being unsuccessful.

[10.12] As stated earlier, the reliance by Mr Du Plessis on the exclusionary clause of the F&M agreement demolished the fourth to eighth respondents' dependence on an alleged verbal agreement. Indeed, Mr Van Rensburg impliedly relinquished such course and resorted to joining Mr Du Plessis in that regard.

[10.13] Mr Tsele, for the applicant, further pointed me to various correspondence, most of which was authored by Mr Walker, which unequivocally confirmed that Mr Walker has been acting for and representing Aurora. I agree

with his submission that the respondents' belated defence is contrived and is not supported by their own papers. Similarly, the reliance on sections 32 and 104 of the Insolvency Act is misconceived and is not supported by the facts of the case.

[11] It follows from the above that, having found that Mr Walker was appointed by Aurora to provide the legal services in respect of which accounting is sought in the present application, the applicants are entitled to the relief.

[12] I find no reason to deviate from the general principle that costs must follow the result. I am however not inclined to grant costs on a punitive scale. While on this subject, I also must remark that there is nothing preventing the applicants' counsel, who acted *pro bono*, from rendering his account and/or claiming his fees from the perspective of this court and its Rules. Mr Tsele correctly referred me to the case of **Malusi** in this regard[4]. Whether or not the rules of the Legal Practice Council or the Bar under which he practices prevent him from doing so, I offer no comment thereon since that falls outside the scope of my judgment.

[13] The third respondent was compelled to file a further affidavit as well as to bring an application for leave to do so, as a result of the applicants' allegations in their replying affidavit. The third respondent had not opposed the application initially and had filed a notice to abide and had provided its co-operation to the applicants as stated in its supplementary affidavit.

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[4] **Moko v Malusi 2021 (3) SA 323 (CC) paras 42 & 43**

[14] The applicants filed a notice of opposition to the third respondent's application for leave to file a supplementary affidavit but did not file any affidavit in support of such opposition. It turned out during argument that they do not oppose such application.

[15] I agree that the third respondent incurred unnecessary costs as a result of the applicants' opposition of their application. The applicants are responsible for the payment of such costs.

[16] In the result, I make the following order:

[16.1] The draft order on section 36 of case lines is made an order of court;

[16.2] The applicants are ordered to pay the costs of the third respondent for the preparation and filing of its application for leave to file the further affidavit as well as for appearance on 26 July 2023.

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DT SKOSANA

Acting Judge of the High Court

Pretoria

Date of hearing: 26 July 2023

Date of Judgment: 02 August 2023

APPEARANCES

Counsel for the Applicant:	Advocate M Tsele
Instructing Attorneys:	KWA Attorneys
Counsel for the First & Second Respondent:	Advocate Roelof Du Plessis SC
	Advocate Jannie Greyling
Instructing Attorneys:	John Walker Attorneys Inc
Counsel for the Third Respondent:	Advocate Ruan De Leeuw
Instructing Attorneys:	Magda Kets Attorneys
Counsel for the Fourth to Eight Respondent:	Advocate S J Van Rensburg SC
Instructing Attorneys:	Crouse Incorporated