



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not Reportable

Case no: A113/2025

In the matter between:

WALTER DU TOIT ATTORNEYS

WALTER DU TOIT

and

HERMANUS THEODORUS STEYN

FIRST APPELLANT

SECOND APPELLANT

RESPONDENT

Neutral citation: *Walter Du Toit Attorneys and Another v Steyn* (A113/2025) [2026]
ZAFSHC 20 (22 January 2026)

Coram: LOUBSER J *et* MAJOSI AJ

Heard: 20 October 2025

Delivered: 22 January 2026

Summary: Appeal – legal principles in claim against an attorney restated – Plaintiff ought to demonstrate that mandate was breached due to professional negligence of the attorney – court finding traversing beyond pleaded case.

ORDER

- 1 The appeal succeeds.
 - 2 The order of the court *a quo* is set aside and replaced with the following:
'The plaintiff's claim is dismissed with costs.'
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JUDGMENT

Majosi AJ (Loubser J concurring)

[1] The appellants herein seek to appeal the whole judgment of the Regional Magistrate, Welkom (the Regional Magistrate), as delivered on 3 July 2025. After a trial on the merits, it was found that the appellants were negligent and breached their mandate as attorneys and judgment was granted in favour of the respondent. The appeal is not opposed by the respondent.

[2] The 14 grounds of appeal can be condensed into three main aspects. Firstly, that the Regional Magistrate erred in not finding that the breach of mandate and negligent action pleaded by the respondent against the appellants was not due to the failure to file a discovery affidavit. Secondly, that the court erred in not finding that, in order to succeed with his claim against the appellants, the respondent had an onus to prove that the respondent would have succeeded in his previous litigation. Lastly, that the court failed to recognise and apply the relevant legal principles relating to the liability of an attorney where breach of a mandate and or negligence is concerned.

[3] The background of the matter is briefly as follows. The respondent approached the first appellant, a law firm in the Welkom area for professional legal services to defend a civil action against him in the district court under case number 4883/2017. The plaintiff in that case, Liberty Group Ltd (Liberty), sued him for repayment of commission in the amount of R68 227.12. Instructions were also given to lodge a counterclaim against Liberty in the amount of R98 774.60 which would extinguish the alleged debt owed. The second appellant was then mandated to act on behalf of the first appellant. After this action was defended, a plea and counterclaim were filed on the respondent's behalf.

[4] The respondent followed up with the second appellant about the status of the matter and he was assured everything will be attended to. During those proceedings, the appellants failed to file a discovery affidavit and, in so doing, the plaintiff in that matter obtained judgment by default against the respondent after his counterclaim was dismissed. The sheriff proceeded to serve a warrant of execution to recover the monies owed to Liberty which he knew nothing about. The second defendant assured him the matter would be taken care of but after no feedback was received, he instructed another firm of attorneys who then brought to his attention in February 2022 that judgment by default had been obtained against him on 15 March 2021.

[5] The now respondent then instituted action proceedings against the appellants in the regional court as he alleged that they were negligent in failing to file a discovery affidavit and in so doing, caused default judgment to be obtained against him. He thus alleged that the appellants breached his mandate and caused him to suffer a real loss.

[6] In the proceedings which led to the appeal, it was alleged by the respondent in the particulars of claim that the defendants (the appellants) did not execute his instructions as the second defendant had a duty of care by virtue of his qualifications and skills as an attorney to act in the best interest of his client. This duty of care was then breached as he failed to do the work he was mandated to do, did not keep him up to date with the matter as expected of a reasonable and professional attorney, failed to serve pleadings timeously and failed to file a discovery affidavit.

[7] The consequence of the breach resulted in default judgment being granted against him for a capital amount of R68 227.12, with further legal costs of R90 130.11. His counterclaim in the amount R98 776.60 was also dismissed, which would have extinguished the debt and him incurring legal expenses in the amount of R21 401.49 with the appellants and further attorneys to perform the work of the appellants and bring an application for rescission of judgment. He also suffered undue stress in the amount of R50 000.00 as upon the sheriff serving the warrant of execution, it was done at his workplace, a guesthouse, in full view of guests.

[8] Further damages were then incurred as the judgment against him meant that he could no longer practice as a consultant in the financial industry and he had to resign but

still had to continue paying monthly registration fees for 11 months resulting in the loss of R 49 0994.43. In total, he thus suffered damages in the amount of R 377 627.75.

[9] The appellants filed a plea wherein they indicated that the first appellant is under curatorship as the second appellant is no longer a practicing attorney as he was struck-off the roll of attorneys. It was pleaded by the appellants that the counterclaim in the district court had no prospects of success even if it had been adjudicated before a trial court as the respondent herein did not have a *bona fide* defence to the claim. Furthermore, that the filing of a discovery affidavit would only have delayed the inevitable of judgment being granted against him and more costs would have been incurred. It was thus denied that any breach of duty of care had taken place.

[10] Merits and quantum were separated and the trial proceeded on the merits only in the regional court. The respondent testified as per his particulars of claim in respect of his various heads of damages and averred in the main that the failure to file a discovery affidavit resulted in judgment being granted against him and that his mandate was breached. The respondent, most peculiarly, conceded that he did not have a defence and that he would not have succeeded in his counterclaim against Liberty in the previous litigation. The court *a quo* thus had to adjudicate two aspects. Firstly, if there was a breach of the mandate/negligence in the previous litigation (failure to file a discovery affidavit). Secondly, whether the damages claimed arose from the breach of mandate as the now respondent would have succeeded in the previous litigation.

[11] The court *a quo*, in her judgment on the merits, found that the respondent conceded that he owed the debt to Liberty and that he did not have a *bona fide* defence against Liberty and that his counterclaim would not have succeeded in the previous litigation. These findings are correct and cannot be faulted as they are in line with the pleaded case and the evidence presented by the respondent and second appellant during the trial. The Regional Magistrate, however, went on to find that the appellants were liable for not advising the respondent that he had no prospects of success in the previous litigation. This is the main grievance of the appeal.

[12] It appears from the pleadings that the respondent's particulars of claim were aimed at the appellants breach of their mandate by not filing a discovery affidavit. The appellants'

main defence to the respondent's claim was that he (the respondent) had no *bona fide* defence or prospects of success in the previous litigation and had the matter gone to trial, the respondent's plea and counterclaim would have been dismissed. No plea in replication was filed dealing with these specific defences.

[13] It is trite that the liability of an attorney towards a client for damages resulting from that attorney's negligence is based on a breach of contract between the parties as the mandate requires the exercise of skill, adequate knowledge and diligence expected of an average practicing attorney.¹ A client must thus prove that the mandate given was breached, presence of negligence, the damages which require proof of the likelihood of success in the aborted proceedings and that the damages sustained were within the contemplation of the parties when the contract was concluded.² Put differently, in order for the respondent to be successful in his claim for damages, he must prove that he would have been successful in the previous litigation to succeed with his claim.

[14] It was common cause during the trial that the appellants admitted that they failed to file a discovery affidavit after being compelled to do so by a court order resulting in judgment by default being granted against the respondent in the previous litigation against Liberty and his counter claim being dismissed. The real issue as alluded to herein above is did the respondent show that he would have succeeded in the previous litigation had that matter gone to trial despite this failure.

[15] In my view, the respondent's concession, under oath, that he was indebted to Liberty and his counterclaim would have failed at trial was fatal to his case for several reasons. Firstly, this concession has the practical effect of conceding that his previous litigation would not have succeeded. In other words, had the matter gone to trial in the normal course, he did not have a *bona fide* defence to the claim against him.

[16] Secondly, even if the discovery affidavit had been filed by the appellants, due to him admitting that he was indebted to Liberty meant that his counterclaim would have been dismissed as it had no merit as there was no causation between the damages suffered and the failure to file a discovery affidavit.

¹ M Townsend and LTC Harms *Amler's Pleadings* 10 ed (2024).

² *Dhooma v Mehta* 1957 (1) SA 676 (N).

[17] Thirdly, the court *a quo* made these findings but made a further finding that the respondent was successful in his claim, as the appellants failed to advise him that he had no prospects of success in the previous litigation. The respondent's cause of action was based on breach of mandate and negligence on the part of the appellants. It was not pleaded by him that the appellants never advised him that he had no prospects of success for his matter. The appellants in their plea specifically alleged that he had no prospects of success to start with. No replication to this allegation was filed by the respondent in the pleadings in the regional court.

[18] By the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits/evidence to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues.³ The court is not at liberty to traverse an issue not contained in the pleadings or affidavits, however interesting or important they may seem.⁴ The finding of the court *a quo* went outside the pleaded case of the respondent and the fatal concessions made by the respondent under oath. The court *a quo* ought to have exercised restraint and confined itself to the breach of mandate only as this was the basis of the respondent's case and not that he was not informed that his case had no prospects of success.

[19] In light of the court *a quo* earlier finding that the respondent did not show that he would have been successful in his previous litigation, the appeal must succeed and the order of the court *a quo* will have to be set aside which will result in dismissing the now respondents claim.

[20] Accordingly, it is ordered as follows:

- 1 The appeal succeeds.
- 2 The order of the court *a quo* is set aside and replaced with the following:
'The plaintiff's claim is dismissed with costs.'



 O R MAJOSI

ACTING JUDGE OF THE HIGH COURT

³ *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) para 13.

⁴ *Ibid* para 14.

I concur and it is so ordered.

A handwritten signature in black ink, appearing to be 'P J Loubser', written over a horizontal line.

P J LOUBSER
JUDGE OF THE HIGH COURT

Appearances

For the appellant: L J Ditsela

Instructed by: Ditsela Incorporated Attorneys, Pretoria
c/o Honey Attorneys, Bloemfontein.