



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.

8 August 2025

Date

Signature

Case number: 2022-013666

In the matter between:

**MATLAKALA REHOBOTH DEVELOPMENT
& CONSTRUCTION (PTY) LTD**

Applicant

and

AUXILIUM INTERNATIONAL FZE

First Respondent

HB MAPEKULA ATTORNEYS

Second Respondent

HUMPHREY B MAPEKULA

Third Respondent

LEGAL PRACTICE COUNCIL

Fourth Respondent

LEGAL PRACTITIONERS' FIDELITY FUND

Fifth Respondent

JUDGMENT – 8 AUGUST 2025

WILLIAMS, AJ

- [1] The Applicant and the First Respondent concluded an agreement and an addendum thereto. In its Amended Notice of Motion the Applicant seeks an order confirming the cancellation of a written Memorandum of Understanding, and the addendum thereto, dated 29 October 2019 and 1 November 2019 respectively. Applicant also seeks payment of R2,500,000.00, plus interest, plus costs from First Respondent or from First to Third Respondents, jointly and severally.
- [2] The relief was initially sought against the First to Third Respondents jointly and severally. In the Amended Notice of Motion relief is now sought against the First Respondent alone (and only in the alternative against the First and Third Respondents, jointly and severally).
- [3] The Second Respondent is a firm of attorneys and the Third Respondent is the individual attorney who dealt with the matter. The Second and Third Respondents are represented by counsel. There is no representation for the First Respondent.
- [4] The Fourth Respondent is the Legal Practice Council ("LPC"), against whom no relief is claimed. The Applicant cited the Fourth Respondent in the expectation that it might cast its eye on the conduct of the aforesaid attorneys.
- [5] The Fifth Respondent, the Legal Practitioners' Fidelity Fund. The Fund has objected to being cited as a Respondent. The Applicant initially thought that it might also be able to obtain an order of payment against the Fifth Respondent, based on the alleged misdemeanours of the attorney Respondents. The

Applicant has recently withdrawn the matter as against the Fifth Respondent, and has tendered the Fidelity Fund's wasted costs. The Fifth Respondent in its affidavit resisting its joinder to these proceedings, had sought attorney and client costs. I will return to that aspect later. Neither the Fourth nor Fifth Respondents are represented by counsel.

- [6] The Applicant wished to establish a business that disposes of medical waste. It needed funding to buy an expensive incinerator. It entered into an agreement with the First Respondent. In terms of the agreement the Applicant would pay R2,000,000.00 to the First Respondent, whereafter the First Respondent would generate a grant for a total value of R8,000,000.00 which would be released in two (presumably equal) tranches. Nothing was ever released.
- [7] The terms of the agreement were further that, after securing the R2,000,000.00 (termed a "Project Owner Contribution"), the monies had to be transferred into a nominated attorney's trust account. That attorney (the Second Respondent) per the agreement between the Applicant and the First Respondent, "... *can upon request provide the project owner (the Applicant) with the necessary professional indemnity and fidelity insurance cover*" (my insertion in parenthesis).
- [8] The First Respondent also undertook to issue, and did issue the Applicant with a "*corporate guarantee*" for the R2,000,000.00 which would be valid for the duration of the programme. All indications were thus that the "Project Owner Allocation" would be held safely in the trust account of the nominated attorney.

- [9] The attorneys however did not countersign the agreement. This “agreement” seems to me to have been calculated to induce the Applicant to part with the R2,000,000.00.
- [10] An addendum was concluded, where the amounts were increased to R2,500,000.00 and R10,000,000.00 respectively.
- [11] The deposit slips reveal that Applicant on 29 October 2019 paid R2,000,000.00 into the trust account of the Second Respondent and on 5 November 2019 a further R500,000.00. The deposit slip that pertains to the R2,000,000.00 refers to the payment being from “*ITO S86(2) Act 28 of 2014*”. This would seem to indicate that it was paid into the trust account of the Second Respondent (the second payment of R500,000.00 being paid into the same account number).
- [12] The project floundered during 2020. The present application was commenced in August 2022. As stated, the Applicant now seeks confirmation of cancellation, as well as re-payment of the R2,500,000.00.
- [13] The First to Third Respondents’ answering affidavit was deposed to by the First Respondent. Third Respondent signed a confirmatory affidavit for the Second Respondent and himself.
- [14] The First Respondent contends that the First Respondent’s failure to repay the R2,500,000.00 is not a repudiation. Further, that the failure to pay is not a material breach on which a cancellation can be based. He says that the First Respondent was not placed in mora, and that the First Respondent would only have had to pay within a reasonable time thereafter. Certain legal arguments

were also proffered in regard to whether the Applicant could rely on the guarantee which had been furnished.

[15] The deponent further admits that R2,000,000.00 was paid into the Second Respondent's trust account. Later in the affidavit the First Respondent explains (on behalf of the attorney Respondents – Second and Third Respondents) that all the funds (R2,000,000.00 plus the R500,000.00) was ultimately paid out by the Second Respondent to various entities, under the instruction of the First Respondent (refer paragraph 41 of the answering affidavit). It is contended that the attorneys never acted for the Applicant.

[16] In the replying affidavit the Applicant proposed to attach correspondence which shows that the parties already in August 2022 regarded the agreement as cancelled. This correspondence was not attached. It was also alleged in reply that the First Respondent had undertaken to repay the R2,500,000.00. No written proof in this regard was attached.

[17] In a supplementary affidavit the Applicant now explains that, due to a technical difficulty, it could not produce a written undertaking made by the First Respondent to repay the R2,500,000.00. That document is now to hand. Condonation is sought for late filing of the supplementary affidavit, a month before the date of hearing. The filing and reception of the annexure which establishes the First Respondent's promise to repay, is very relevant. I am prepared to condone the late filing of the supplementary affidavit and annexures thereto. I thus receive it into evidence.

- [18] The relevant annexure ("TFM3") is a clear and unequivocal statement that the intended project was not successful and that the First Respondent "... *as agreed, we will refund you the project owner contribution ...*". This letter was written with reference to this application. It is a concession of liability. But the stance suddenly changed and what followed was a Notice to Oppose and the answering affidavit, resisting all the relief. Now the First Respondent is absent. Second and Third Respondents are here to avoid judgment also being granted against them.
- [19] The Applicant must succeed against the First Respondent and I will order First Respondent to pay to the Applicant R2,500,000.00, plus interest, plus costs. It is not necessary to issue a declarator confirming cancellation, since the parties clearly, then and now, regarded the matter as terminated. I am also minded, as prayed for, to grant costs against the First Respondent on the scale as between attorney and client, because of its opportunistic baseless defence.
- [20] Counsel for the Second and Third Respondents stated that his brief was to simply ensure that no order for payment by his client, of the R2,500,000.00 be made. Indeed, some R2,500,000.00 in total was paid into the trust account of the Second Respondent. The First Respondent says that the attorneys did not act for Applicant (the implication being that they did not owe Applicant any duty vis-à-vis what was paid into their trust account).
- [21] Counsel for the Applicant correctly did not press me to make an order against the Second and Third Respondents to pay Applicant the R2,500,000.00 (jointly and severally with the First Respondent). It is not possible on these papers to

hold that the attorney Respondents (Second and Third Respondents) owe the Applicant those monies. It is not to say that they do not have such a case.

[22] Applicant, however, invites me to refer the matter to the Fourth Respondent – so that the LPC can scrutinize and evaluate the attorney’s conduct. The basis of this invitation is that the attorneys did not depose to any affidavit herein, but left it to the First Respondent to put up their version. Applicant says that their “version” that they merely acted on the instructions of the First Respondent (when paying out the R2,500,000.00 to various entities) is suspicious. They may, if properly challenged, have to do some explaining. But for now I do not think it fair for me to refer it to the LPC.

[23] It is not a matter where I need to refer the possible misconduct of the Second and Third Respondents to the Legal Practice Council (Fourth Respondent). It is for the Applicant to refer the matter to the Legal Practice Council, if it is of the view that there was misconduct. On the facts before me the issue is neutral.

[24] I will thus dismiss the relief insofar as it pertains to prayers that the Second and Third Respondents must pay. Counsel for the Second and Third Respondents conveyed that his instructions were not to seek any costs order.

[25] I intend also to order the Applicant to pay the Fifth Respondent’s wasted costs, up and until the date of the Applicant’s tender to pay such costs. If the Fifth Respondent wanted an order of punitive costs, as prayed for in its short answering affidavit. In my view it should have been here to ask for that relief. Those costs in any event seem to be minimal. The Fidelity Fund will have to be content with the costs as tendered by the Applicant.

[26] I thus make the following order:

- 26.1. The First Respondent is ordered to pay to Applicant R2,500,000.00, plus interest from date of service of the application (12 August 2022) to date of payment, such interest to be calculated at the mora rate of interest as it prevails from time to time;
- 26.2. The First Respondent is ordered to pay the Applicant's costs of the application on the scale as between attorney and client;
- 26.3. The amount and interest ordered under prayer 1 above, is ordered to be joint and several with any order that may follow against the Second, Third and/or Fifth Respondents;
- 26.4. The application against the Second and Third Respondents is dismissed;
- 26.5. No order is made to costs insofar as it pertains to the Applicant's case against the Second and Third Respondents;
- 26.6. The Applicant is ordered to pay the Fifth Respondent's wasted costs for the abortive application against the Fifth Respondent, up to and until 10 July 2025.



J O WILLIAMS AJ

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Date heard : **6 August 2025**

Date of judgment : **8 August 2025**

Representation for the Applicant : Adv W Maodi
Instructed by T F Matlakala Inc. Attorneys

Representation for the
Second and Third Respondents : Adv W R du Preez
Instructed by H B Mapekula Inc.

Representation for the Fourth
Respondent: None

Representation for the Fifth
Respondent: Instructed by Van Stade van der Ende Inc.