UMSO Construction (Pty) Ltd v City of Johannesburg and another

GAUTENG LOCAL DIVISION, JOHANNESBURG
AC DODSON AJ

Date of Judgment: 31 MAY 2018 Case Number: 2018/17263

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Civil Procedure – Interim interdict – Requirements – Applicant establishing prima facie *right, irreparable harm if interim relief not granted, that the balance of convenience favoured it and that there was no suitable alternative remedy*

Civil Procedure – Locus standi – *Whether individual party to joint venture has legal standing to seek relief in respect of bid where joint venture was the bidder – Court confirming standing on ground that party to the joint venture stood to benefit from the bid, if awarded, in its own right*

Civil Procedure – Non-joinder – Insofar as parties in new tender process would be affected by outcome of dispute, they had to be joined in the application

Editor's Summary

In an urgent application, the applicant ("Umso") sought to interdict and restrain the first respondent (the "City") from proceeding with a tender process for the construction of civil engineering infrastructure and low cost housing.

In an earlier tender in 2015, for the same work, a joint venture to which Umso was a party had submitted a bid. UMSO was informed that on account of problems with the tax clearance certificates of UMSO and its joint venture partner, the second respondent ("Nebavest") and the withdrawal of Nebavest from the joint venture, the "bid validity had expired". UMSO sought to interdict the further processing of the new tender pending a judicial review of the decision not to proceed with the initial tender. UMSO also sought an order substituting the City's decision one confirming the award of the tender to the joint venture.

UMSO's founding affidavit was deposed to by one of its directors ("Mr Nkosi"). Stated that after providing audited financial statements in respect of both companies in the joint venture, he and a fellow UMSO director started receiving anonymous phone calls in which the caller purported to represent the City, and demanded a bribe. When UMSO refused to negotiate, the callers stated that the tender would not be awarded to the joint venture because of UMSO's unwillingness to cooperate. Two days after the last of the anonymous phone calls, the joint venture members received an email requesting updated tax clearance certificates, to which UMSO took the position that the tax clearance certificates already provided were sufficient for purposes of the bid. After eight months of silence from the City in response to requests for updates on the bid adjudication process, UMSO was advised that due to alleged fraud in connection with the tax clearance certificates provided, and due to Nebavest having in the meanwhile withdrawn from the joint venture, the joint venture would not be awarded the contract.

Mr Nkosi pointed out that neither the alleged fraud in relation to the tax certificates, nor the alleged collapse of the joint venture had ever been taken up

with UMSO, and that it had not been afforded any opportunity to respond before the decision against it was made. That led to the bringing of the review application by UMSO. In February 2018, Mr Nkosi discovered that the City had decided to open a new tender process in respect of the works which were the subject matter of the initial tender. Notwithstanding the request for an undertaking not to proceed with the new tender, was advertised. That led to the present application interdict the processing of the new tender.

The City raised three points *in limine*, contending UMSO had no legal standing to seek relief because it was not the bidder in the initial tender. As the bidder was the joint venture, it was said to be the only entity that could seek relief. The second point was that the parties who submitted bids in the new tender were interested parties who ought to have been joined in the urgent application. Finally, it was contended that UMSO failed to make out any case for urgency, and that any urgency was self-created as a result of the delays in launching the application.

Held – In disputing UMSO's standing, the City that the effect of rule 14 was that an entity such as a partnership or unincorporated association must bring proceedings in the name of the partnership or the unincorporated association. Rule 14 provides that a partnership, a firm or an association may sue or be sued in its name. The use of the word "may" showed that the provision was not peremptory. UMSO therefore had a choice either to sue in the name of the joint venture or to follow the common law path and ensure that both parties to the joint venture were joined. It chose to do the latter. UMSO was a party to the joint venture and stood to benefit from the bid, if awarded, in its own right. It therefore had a direct and substantial legal interest in the dispute. The Court thus confirmed its standing to bring the urgent application.

On the issue of non-joinder, the court pointed out that UMSO sought relief that would take the form not only of reviewing the City's decision-making in relation to the initial tender, but also of confirming the award of the initial tender to it. As such the bidders in the new tender had a direct and substantial interest in the outcome of the dispute and were potentially prejudicially affected by its outcome. They therefore needed to be joined in the application. The Court decided to issue a rule *nisi* rather than dismissing the application. In terms of the rule City and the bidders in the new tender were called upon to show cause why an order should not be made as sought in the notice of motion.

The Court then turned to consider whether UMSO has satisfied the requirements for the grant of an interim interdict. It was found that UMSO had established a *prima facie* right to such relief by establishing a reasonable prospect of showing that the decision-making process pertaining to the initial tender was flawed in a manner giving rise to several potential review grounds.

The court was also satisfied that UMSO faced irreparable financial harm if the interim relief was not granted, that the balance of convenience favoured it and that there was no suitable alternative remedy.

Despite the City's disputing that urgency had been established, the Court found that UMSO was entitled to have brought the matter in an urgent basis in the circumstances of the matter.

Notes

For Civil Procedure: Superior Courts see:

- *LAWSA* Replacement Volume 2017 (Vol 4, paras 1–945)
- Harms, DR (SC) *Civil Procedure in the Superior Courts* Durban LexisNexis, Service Issue 63 (October 2018)

Cases referred to in judgment

United Apostolic Faith Church v Boksburg Christian Academy 2011 (6) SA 156 (GSJ) – **Referred to** 522

Judgment

DODSON AJ:

Introduction

[1] This is an urgent application to interdict and restrain the first respondent (the "City") from proceeding with a tender process for the construction of civil engineering infrastructure and low cost housing in Klipspruit Extension 7, Soweto.

[2] The tender is, to all intents and purposes, in respect of the same work as had formed the subject matter of an earlier tender for which bids were invited in 2015 (the "initial tender"). A joint venture to which the applicant ("UMSO" or the "applicant") was a party submitted a bid in the initial tender. However, UMSO was ultimately informed that on account of problems with the tax clearance certificates of UMSO and its joint venture partner, the second respondent ("Nebavest"), and the withdrawal of Nebavest from the joint venture, the "preconditions" of the executive adjudication committee were not met and "the bid validity had expired".

[3] The applicant seeks to interdict the further processing of the new tender pending a judicial review of the decision not to proceed with the initial tender. Those review proceedings are currently under way.[1] In the review proceedings, UMSO also seeks an order substituting the City's decision with one confirming the award of the tender to the joint venture.

The case alleged by the applicant

[4] The initial invitation to bid was advertised on 27 March 2015. The joint venture's bid was submitted on 27 May 2015 with the bidder reflected as the UMSO/Nebavest Joint Venture. The contract price was R435,580,969,40. The bid closed on 31 May 2015.

[5] In terms of the invitation to bid, bidders were required to include in their submissions an original valid tax clearance certificate from the South African Revenue Service ("SARS") certifying that the taxes of the bidder were in order.

[6] UMSO and Nebavest concluded a joint venture on the same day as their bid, 27 May 2015. As required by the invitation to bid, the joint venture agreement was included in the bid documentation. The joint venture was formed specifically to carry out the project which formed the subject matter of the bid.

[7] Clause 2.1 of the joint venture agreement, under the heading "Purpose" provides as follows:

> "The parties hereby establish a joint venture being an unincorporated association under the name of Umso Nebavest Joint Venture . . . for the purposes of carrying out all or some of the following:
>
> • Entering into the contract with the employer; and

1 See case number 17/23864.

a • Performing all the services to be undertaken for the project by the joint venture under the contract".

[8] "Project" is defined in clause 1 as –

"The Kliptown/Klipspruit Ext 7 Turnkey Township Development".

b [9] Clause 2.2 under the heading "leading party" provides as follows:

"The parties hereby appoint Umso the Leading Party and representative of the Joint Venture, responsible for the supervision, direction and control, execution and carrying out of the project through the project manager, or in accordance with the policy and direction laid down by the Executive Committee".

c [10] Clause 3.2 is headed "contributions". Clause 3.2.1 provides:

"The parties acknowledge that the contract shall be entered into in the name of Umso Nebavest JV, and the parties agree that they will be jointly and severally liable for Umso Nebavest JV's obligations under the contract".

[11] "Contract" is defined to mean –

d "The contract or contracts entered into between the Employers and Umso Nebavest JV for the Project".

[12] "Employer" is defined to mean –

"City of Johannesburg Housing Department or other successor in title".

[13] All losses and profits of the joint venture were to be shared between the parties in equal shares.

e [14] Clause 12 entitled "duration of agreement" reads as follows:

"12.1 Commencement

This agreement shall come into force upon signature by the parties hereto.

f 12.2 Termination

This agreement shall terminate upon the first happening of any one of the following events:

12.2.1 The agreement in writing of the parties to terminate this agreement;

g 12.2.2 The employer terminates the contract provided that any joint venture obligations that survive such termination remain in place;

12.2.3 The contractor terminates the contract provided that any joint venture obligations that survive such termination remain in place;

h 12.2.4 The project has been successfully completed and all obligations to the employer have been met by the joint venture. Notwithstanding the aforegoing, the joint venture shall be deemed to remain intact for purposes of latent defects".

[15] On 3 May 2016, the City addressed an email to UMSO requesting that the joint venture provide information regarding the financial standing of

i the joint venture members.

[16] UMSO responded on 5 May 2016 by providing the audited financial statements for the 2014/2015 financial year in respect of both companies, along with the March 2016 quarterly management accounts for UMSO.

[17] Mr Tollo Nkosi, a director of UMSO who deposed to the founding

j affidavit, goes on to testify that two weeks later, from around 21 May

2016, he and a fellow director Andile Tshaka, started receiving anonymous phone calls. These continued for two weeks until 4 June 2016. He and Tshaka each received three phone calls during this two-week period. The first two calls that he received sounded like the same person and the third call that he received was from someone else. Both callers were male.

[18] Mr Tshaka's experience was the same as his although they could not confirm that they were contacted by the same individuals. The callers purported to represent the City, demanded that UMSO enter into "under-the-table" talks before it could be awarded the tender and, upon their refusal to negotiate, stated that the tender would not be awarded to the joint venture because of UMSO's unwillingness to talk.

[19] Mr Nkosi stated that the callers were emphatic that he and Mr Tshaka had to agree to informal terms outside of the tender process before the tender would be awarded. He understood the clear meaning to be that UMSO would have to pay a bribe in order to be awarded the tender.

[20] Mr Nkosi went on to name the official who he considered to be responsible for the bribes. Reasons are given for Mr Nkosi's view in the founding affidavit, but it is unnecessary to decide that issue for purposes of the relief sought in this matter.

[21] According to Mr Nkosi, he received the last anonymous call on 4 June 2016. Two days later, on 6 June 2016, the joint venture members received an email from the "Ops Manager: Committees, Legal and Commercial, Strategic Supply Chain Management" saying the following:

> "Dear Service Providers
>
> We are in a process of finalising the abovementioned bid and one of the requirements is that the bidder(s) submit their latest original Tax Clearance Certificate. I received two copies from our housing department [that] are not updated, ie tax clearance certificates that were submitted with the bid documents expired 11 November 2015 for Nebavest and 19 May 2016 for Umso we then requested updated original tax clearance certificates and we received them with these expiry dates: 6 August 2016 for Umso and 28 October 2016 for Nebavest. This is less than a period of 12 months.
>
> It is due to the above explanation that we request Umso/Nebavest JV to provide us with the updated or [text missing] Clearance Certificates or SARS pin code/passwords not later than Friday 10 June 2016, in order to be able [text missing] the procurement process (sic)".

[22] On 9 June 2016, UMSO's attorneys sent a letter to the City pointing out that:

22.1 It is sufficient if the service provider's tax clearance certificate is valid when submitted or at the time that the bid is adjudicated;

22.2 The validity of a tax clearance certificate at any point in the future is only relevant after the project has been awarded to a service provider, when invoices are submitted for payment; and

22.3 The existing tax clearance certificates were sufficient for the bid adjudication process; and

22.4 It would be incorrect for the joint venture's bid to be disqualified on the basis of the contents of the email of 6 June 2016.

[23] On the same day Mr Nkosi on behalf of UMSO sent a letter to the City stating:

> "You will notice that the periods for the Tax Clearance Certificates issued by SARS overlap by some seven months and this is beyond our control. A similar scenario exists with Nebavest. It has been established by our company auditors ("PWC") that this does occur from time to time and as a result of a possible ad hoc audits (sic) that SARS may conduct and this is quite ordinary.
>
> We further confirm that upon expiry of the current valid Tax Clearance Certificates issued to yourselves, new certificates will be applied for and similarly issue same to client ("COJ") should it be so required otherwise we are unable to obtain revised tax clearance certificates at this instance (sic).
>
> We trust you find the above in order".

[24] The City did not respond to the letter from UMSO's attorneys. However, on 22 June 2016, the City replied to Mr Nkosi's email of 9 June 2016 saying:

> "According to SARS the Tax Clearance Certificates submitted are invalid for both companies in the consortium. Should you be contesting SARS view you are requested to submit a Tax Clearance pin number for the City to verify both your tax status (sic).
>
> Please respond by 23 June 2016 15:00. Failure to comply will be considered as agreeing to SARS assertion".

[25] On the same day (ie 22 June 2016, before the stipulated time limit expired), Mr Nkosi replied on behalf of the joint venture as follows:

> "We note receipt of your email below. This matter was previously raised by your colleague and we believe it was adequately addressed. I attach correspondence from our auditors that formed basis for the response previously issued on 9th June 2016. (sic)
>
> Your mail provides no evidence nor reference to the alleged invalidity of the Tax Clearance/s, we request that you conduct a formal enquiry at SARS (not by emails) and similarly we will send our representatives from PWC to form part of (sic). I trust this is in order and await your response".

[26] Attached to the email was a letter dated 9 June 2016 from PriceWaterhouse Coopers stating:

> "Two clearances was (*sic*) issued because at 27/10/2015 when collecting more clearance certificates the system indicated an o/s amount in respect of SDL.
>
> SDL was then paid by UMSO to clear all tax records and the system 'reissued' UMSO's clearance dated 28/10/2015 overriding the original one issued on 19/05/2015".

[27] The next day, 23 June 2016, and within the one day deadline set by the City, Nebavest provided its tax clearance certificate pin number. The City was also provided with UMSO's tax clearance certificate pin number.

[28] On 24 June 2016, his co-director Mr Tshaka, received an email dated (but not sent on) 24 May 2016 from the chief executive officer of Nebavest. The email chain accompanying the letter suggests that there was an unsuccessful attempt to send the letter on 1 June 2016. The material part of the letter reads as follows:

> "Over time and after submission of the bid, Nebavest . . . has taken the decision that the company will no longer participate in joint ventures. This decision is partly influenced by growing commitments. Nebavest . . . therefore proposes a buyout from UMSO Construction at 24% of the R65 327 145,41.

The figure of R65 327 145,41 is 15% of and a profit from the total project value of R435 580 969,40.

We further propose that the 24% be paid to Nebavest on two transactions: 60% on receipt of appointment letter from, and 40% on signing of the service delivery contract with the City of Johannesburg, the client.

Your prompt response will be highly appreciated".

[29] On the same day, Nebavest addressed a letter to the City, the material part of which reads as follows:

"With Nebavest . . . having achieved the Level 8 CE GB PE grading, we resolved that the approach to enter into joint venture agreements in the interests of achieving a high grade, has become redundant.

Our achievement has had a catalytic effect to the extent of increasing the volume of our work, demanding greater focus of our resources and minimising the risk we may encounter, both from our peers and clients. As such, we have written to inform Umso Construction regarding Nebavest's decision to withdraw from the joint venture agreement. Our company will no longer participate jointly with Umso Construction should the Klipspruit Extension 7 turnkey: 479/15 bid that was submitted by the joint venture, be awarded".

[30] Twenty-four minutes later, the City responded, noting the withdrawal.

[31] Mr Nkosi on behalf of UMSO goes on to aver that the purported withdrawal of Nebavest is an internal matter between the members of the joint venture. It took place after the tender ought to have been awarded and an effective withdrawal after the award of the tender would not result in the cancellation of the project, particularly where UMSO was responsible for the bulk of the work. He also pointed out that UMSO had refused the buy out proposed in Nebavest's letter to it and stated that the terms of an exit by Nebavest from the joint venture were never agreed.

[32] On 27 June 2016, three days later, Mr Nkosi replied to both Nebavest and the City in separate letters. In the letter to Nebavest he pointed out that

"2.1 The parties, Umso and Nebavest, have a joint responsibility and interest to ensure that the bid is awarded to the Umso Nebavest Joint Venture; and

2.2 No award has taken place and as a result discussions regarding implementation of the project and any potential buyout/s of one party by another cannot take place at this stage".

[33] In the letter to the City he pointed out that the joint venture was still able to perform the work required by the bid, that the bid was in the name of the joint venture and not in the name of Nebavest, that UMSO was the leading party in the joint venture and took on the bulk of the responsibilities, that the internal arrangements between the parties in the joint venture had no bearing on the joint venture's relationship with third parties and that "UMSO would in any event perform the work in terms of the tender on its own". The City did not respond either to this letter or to a follow up letter sent on 15 July 2016.

[34] Following this, over a period of some eight months, and despite five written requests from UMSO or its attorneys to the City for updates on the bid adjudication process, there was complete silence from the City. None of the requests for information about progress with the bid adjudication process was answered. Mr Nkosi also draws attention to the fact

that the City's official responded within 24 minutes to Nebavest's email purporting to advise the City of its withdrawal from the joint venture, but took nine months to respond to UMSO's repeated written requests for information about progress in processing of the initial tender.

[35] Eventually, on 31 March 2017, the applicant's attorneys received a letter from the City as follows:

"Your letter of 10 March 2017 refers.

1. The Executive Mayor's office has followed up with the Supply Chain Management Unit to establish the facts following your letter of enquiry on behalf of your client Umso Construction Pty Ltd.
2. We note that you are representing Umso Construction (Pty) Ltd not Umso Nebavest Joint Venture the entity that bid. However the facts established are as follows:
   2.1 EAC of April 2016 recommended the awarded to Umso Nebavest Joint Venture subject to Tax matters of the consortium still being in order.
   2.2 SCM contacted JV to request for the latest Tax clearance certificates, when the tax clearances for the 2 companies making up the Joint Venture were supplied they looked suspect as the dates were not in the normal dating of SARS. For an example for Nebavest the original submission was expiring on 2015-11-04 whereas the updated Tax clearance was expiring on 2016-08-06. The expiring date was less than 12 months as expected. The matter was referred to SARS who declined the certificate as legitimate under case number 203064280.
   2.3 While querying this matter with SARS an official from Supply Chain Unit Mr S Leso received a call from M Ntantala the Chief Executive Officer of Nebavest one of the JV partners who indicated that her email was down so she phoned to indicate the following:
      2.3.1 That her company has its own Tax clearance and that she did not understand why they (the other partner Umso Construction (Pty) Ltd) were not asking her company for a tax clearance as she would have given them. So the facts indicate a tax clearance submitted was fraudulent. When she later emailed her tax clearance it was issued on 2016/06/22 different from the one submitted to the City by the other JV partner.
      2.3.2 Secondly she called to indicate that her company is officially withdrawing from the Joint Venture. This means the Joint Venture that was awarded no longer exist. This was later followed up by an email. When the follow up email was sent she copied UMSO construction. Umso Construction (Pty) Ltd whom you represent did not dispute this but just alerted us that the other JV partner was minor partner and did not need them (Nebavest 45 (Pty) Ltd. (sic) This in itself was to the City an acceptance that the JV had collapsed.
3. It was on the basis of these 2 reasons that the recommendation was halted. The Executive Adjudication Committee precondition was not met. The Joint Venture partner is no longer party to the Joint Venture. This implies the entity that bid no longer exist." (the grammatical and other errors are in the document itself).

[36] Mr Nkosi goes on at some length in the founding affidavit to answer the allegations in the City's letter of 31 March 2017. It is not necessary for the

decision required of the Court in this matter to consider the adequacy or otherwise of those responses. What is important is that he points out that neither the alleged fraud in relation to the tax certificates, nor the alleged collapse of the joint venture had ever been taken up with UMSO and they had never been afforded any opportunity to respond before "the recommendation was halted". *a* *b*

[37] UMSO's attorneys sent their response to the City's letter of 31 March 2017 on 12 April 2017. In the letter UMSO's attorneys announced their intention to bring review proceedings and requested the provision of a range of documents relating to the bid evaluation and adjudication process for purposes of the review.

[38] On 26 April 2017, the City replied refusing to provide the documents on the basis that the request came on behalf of UMSO and not on behalf of the joint venture. A further letter from UMSO's attorneys pointing out in what respects it considered the City's stance to be erroneous went unanswered. *c*

[39] The upshot was the launch by UMSO of the review application in respect of the initial tender, which was served on the City on 4 July 2017. The grounds of the review pertain to the impact of the alleged attempts at bribery on the decision-making process, the delays in the process, the procedural unfairness in concluding that the tax certificates were fraudulent without affording the joint venture an opportunity to respond and an error of law in regard to the impact of the purported withdrawal of Nebavest. *d* *e*

[40] Consequent upon the review, the City became obliged to furnish its record of proceedings in terms of rule 53(1)(b) on or before 6 July 2017. Nothing was received from the City and as a result the matter was set down for hearing on an unopposed basis for 28 August 2017. Three days before the review application was due to be heard, on 25 August 2017, the City belatedly delivered a notice of intention to oppose. This resulted in the removal of the matter from the unopposed roll as well as settlement negotiations, which did not succeed. *f*

[41] Following this, despite letters of enquiry from the applicant's attorneys, neither the record nor any answering affidavit was filed in the review proceedings by the time that this urgent application was launched on 7 May 2018, ten months after the record was due. *g*

[42] On 28 February 2018, Mr Nkosi discovered that the City had decided to open a new tender process in respect of the works which were the subject matter of the initial tender. A letter was therefore sent by UMSO's attorneys on the same day in which it: *h*

42.1 pointed out that the record had still not been provided;

42.2 stated that it had come to UMSO's attention that the City intended to advertise a tender for works which were identical to, or substantially the same as, the works or projects which formed the initial tender, now the subject matter of the review application; *i*

42.3 averred that the delaying of the review application by failing to file the record was a delaying tactic;

42.4 requested a date to be provided by when the record would be filed; *j*

42.5 requested a written undertaking that pending the review the City would not proceed to advertise a new tender in respect of the works; and

42.6 stated that if they did not do so, UMSO would proceed with an urgent interdict to suspend the continuation of the new tender process.

[43] Notwithstanding the request for an undertaking not to proceed with the new tender, it was indeed advertised on 5 March 2018. It is not disputed that it relates to essentially the same works as those under the initial tender.

[44] Letters were then sent by UMSO's attorneys on 8 March 2018, 19 March 2018 and 25 April 2018, following up on the letter of 28 February 2018, pointing out that the new tender had been initiated and calling on the City, through its attorneys, not to proceed with the new tender process.

[45] The City did not respond and accordingly the present application was launched on 8 May 2018 to interdict the processing of the new tender. Nebavest is joined as the second respondent in the application but has not opposed it.

The City's answer

[46] The City's answering affidavit is deposed to by Mr Mogashoa, the group head: legal and contracts department of the City.

[47] The City's answering affidavit reveals substantial new information regarding the bid process which was obviously not known to UMSO at the time that it launched the urgent proceedings. Apparently, the joint venture was identified as one of four short listed bidders after deliberation by the bid evaluation committee or "BEC".

[48] The City's executive adjudication committee ("EAC") "which is the body that is empowered to award large tenders" requested a liquidity and going concern analysis report on UMSO and Nebavest. The report was furnished on 13 April 2016. It expressed some reservations about their financial positions and on this basis recommended that the City seek a performance guarantee.

[49] The EAC held various meetings in relation to the tender. The last meeting was held on 26 April 2016. A report was prepared for purposes of that meeting and concluded that the joint venture had the necessary technical ability to handle the project under consideration. The report therefore recommended that the tender be awarded to the joint venture.

[50] The minute of the meeting forms an attachment to the City's answering affidavit. I need to quote the material part of the minute in full because there is significant dissonance between the minute and the version contained in the answering affidavit and the correspondence from the City officials that followed the EAC meeting, including the letter of 31 March 2017 referred to earlier. The material part of the minute reads as follows:

"6. Reports

Item 6 Contract No 479/15 – Resubmission: Kliptown/Klipspruit Extension 7, Turnkey Development Project

The Committee raised the following concerns, comments and queries:

1. Probity needs to give opinion services on the report.
2. Page 30 for Risk identifier, the role of the probity advisor was to see if risk is managed in a transparent way and considered all the facts.
3. The only risk were the initial work was done was the financial risk?
4. That the City Treasury department also to conduct their own financial risk analysis.
5. Committee advised the user department to do request performance guarantee in the same way they use to do it for constructions, which is requesting for bank guarantee and GSSCM should request the service providers to submit the valid tax clearance certificates.

The user department responded as follows:

(i) Probity explained that it provided advisory services rather than opinion services.

- They were advising BEC committee as moving along with the process, unlike they were audits and checking compliance at the end of the process
- BEC committee picked-up that there was discrepancy with opening-tender register, the number of bidders on the register vicar vid the actual bid documents
- The starting point was to reconcile the open register with the actual documents received
- The discrepancy aroused as a result of the fact that when they were moving the bid documents, some of the consortium bid documents got removed from the main document and that was received.
- The role of Probity was to get Quantity survey to review the specification process to ensure that the process followed was fair and transparent
- Quantity Surveyor advised that the process was separated into pre-contract stage and post-contract stage, were in post-contract stage they were looking at financial analysis of tenders which has been received

(ii) That all risks associated with the bidder were considered.

(iii) That the City Treasury analysis come to the same conclusion as the probity advisor's analysis, if the City has to make an award we have to request the bidders to provide recent audited financial statements and letter of guarantee were they say they will be able to execute work.

(iv) One of the recommendations was to explore Jozi@work".

The Chairperson proposed that the item be approved subject to amendments.

Individual members concurred.

Therefore it was

Resolved

1. That Contract No: 479/15: Kliptown Klipspruit EXT 7 Turnkey Development Project be awarded to Umso Nebavest JV for an amount not exceeding R435 461 804,21 (including 14% VAT and 10% Contingencies) for a construction period of 3 years.
2. That General Conditions of Contract agreement (GCC2010, (2ed)) be entered into with Umso Nebavest JV.

3. That the Acting Executive Director: Housing be authorised to sign the contract, in consultation with the Group Head: Group Legal and Contracts, and avail a copy to Group Head: Strategic Supply Chain Management within 30 days from signature thereof.
4. That the Acting Executive Director: Housing shall, before the contract referred to above is signed, ensure that the contractor is up to date with the payments of its municipal accounts with the City of Johannesburg Metropolitan Municipality, or that adequate arrangements for payment thereof have been made and to provide the Executive Director: Finance with written confirmation thereof.
5. That the Group Chief Financial Officer be authorised to sign the letter of award after the provisions of paragraph 4 above have been complied with.
6. That the Bid Evaluation Committee confirms that none of the Directors of the recommended tenderer are in the service of the City.
7. That permission be granted to the Department of Housing to enter into negotiations with the recommended tenderer to determine the nature and extent of works that could be subcontracted to local SMME's." (the grammatical and other errors are in the document itself).

[51] Based on this minute, the City alleges in its answering affidavit that the EAC raised "concerns, comments and queries" including a concern regarding the submission of valid tax clearance certificates.

[52] The answering affidavit then goes on to refer to the correspondence between the City, UMSO and Nebavest, which has already been referred to earlier in the judgment.

[53] Strangely, the answering affidavit makes no mention of the fact that an award of the tender had in fact been made to the joint venture at the meeting on 26 April 2018 as recorded in the minute, save where Mr Mogashoa avers that –

> "The City advised the joint venture on 19 July 2016 that the award was for the joint venture, not for the applicant and that the City had not been given information on the second respondent".

[54] This averment is misleading. The document attached to the answering affidavit to substantiate the averment says nothing of the sort. Rather, it is an internal exchange of email correspondence between City officials on 19 May 2016. The particular email upon which reliance is, misleadingly, placed, is addressed by Nokuzola Deliwe to Zacharia Moabi Pekane at 3:31pm and reads as follows:

> "Hi Moabi,
>
> Thanks for the information below, on the attachments, there is quarterly management accounts statement for UMSO and nothing for Nebavest. Kindly request the document from Nebavest because the award is for Joint Venture and not for one company.
>
> Regards,
>
> Zola".

[55] This is followed by another email from her saying:

> "Hi Moabi,
>
> Also ask Nebavest to use their own letterhead for Quarterly Management Account Statements.
>
> Regards
>
> Zola".

[56] Moabi then responds to Zola saying:

> "It sorted now (sic)".

[57] Mr Mogashoa then goes on to aver as follows:

> "The City officials, namely Nokuzola Deliwe and Kiran Ramkissoon, made various enquiries to the SARS (sic) regarding the tax clearance certificates by members of the joint venture. SARS advised that the certificates were invalid. SARS provided the City officials with case numbers regarding queries regarding the validity of the tax clearance certificates".

[58] This correspondence between the City officials is then attached, along with UMSO and Nebavest's tax clearance certificates. On three of them there is written onto the certificate in handwriting the words "Declined for SARS" and a case number is then given and on the fourth certificate in handwriting appear the words "No Records per SARS" and a case number is again given.

[59] The affidavit then goes on to make reference to the correspondence referred to earlier regarding Nebavest's withdrawal from the joint venture.

[60] Mr Mogashoa does concede that the City had not, before 31 March 2017, ever advised the applicant that the City had taken a decision regarding the tender. No explanation is given in this regard, save that it is alleged in the answering affidavit that the City could not convey the decision of the EAC to the joint venture until the City had satisfied itself with the tax affairs of the joint venture. However, as appears from the correspondence, the documents upon which the City allegedly reached its conclusion in relation to the alleged fraud pertaining to the tax certificates had already been provided to the City, allegedly by SARS, by 10 June 2016.

[61] The City also denies strenuously that there was any bribery as alleged by the applicant.

[62] The City takes three points *in limine* on the basis of which it contends that the application stands to be dismissed without the need to enquire into its merits:

62.1 The applicant has no legal standing to seek relief because it was not the bidder in the initial tender. The bidder was the joint venture. Therefore it was the joint venture alone that could seek relief in its own name.

62.2 The parties that have submitted bids in the new tender are interested parties who ought to have been joined in the urgent application as respondents.

62.3 The applicant failed to make out any case for urgency. The urgency was self-created as a result of the delays in launching the urgent application.

[63] In relation to the merits of the application, the City disputed on various grounds that the applicant had made out a case for the grant of interim relief.

[64] I proceed to consider the first two points *in limine*. Urgency is considered at the end of the judgment.

Legal standing

[65] The City disputed the applicant's legal standing. There were two components to this argument. The first is that the effect of rule 14 is that an

entity such as a partnership or unincorporated association must bring proceedings in the name of the partnership or the unincorporated association. A member of an unincorporated association and a partner of a partnership cannot bring proceedings in its own name.

[66] Both parties characterised the joint venture as a partnership. The joint venture agreement characterises it as an unincorporated association. At this stage of the proceedings nothing turns on this as the principles regarding joinder are essentially the same for both.

[67] The City relies for its challenge to legal standing, on the judgment of this Court in *Stefanutti Stocks Cycad Pipelines Joint Venture v Rand Water Board and others*, *Stefanutti Stocks (Pty) Ltd v Rand Water Board and others*.[2]

[68] Rule 14 provides in relevant part as follows:

> "(2) A partnership, a firm or an association may sue or be sued in its name".

[69] Association is defined in rule 14(1) as:

> "any unincorporated body of persons, not being a partnership".

[70] The word "may" is used in rule 14(2) and not the words "must", or "shall". The provision is facilitative rather than peremptory. *Stefanutti* is not authority for any conclusion to the contrary. In that case, the situation was the reverse of the present case. A joint venture sued in its own name and its standing to do so was challenged. The Court, correctly, rejected that challenge. There, the joint venture was characterised as a partnership and the Court recognised its standing to sue. Correctly so: rule 14(2) provides for this.

[71] In *Ex-TRTC United Workers Front and others v Premier, Eastern Cape Province,*[3] Van Zyl J explained the position as follows:

> "The feature that a partnership, and an unincorporated association have in common is that they have no legal personality of their own and do not exist apart from the individuals of whom they are composed. It is by virtue of their legal nature, as well as the common-law rule, that a defendant may as of right demand the joinder in case of joint owners, joint contractors, partners and persons who have a direct interest in the outcome of the action, that each constituent member of these three legal figures must be joined and cited by name to avoid the claim being excipiable for non-joinder. It is in this context that rule 14 was introduced. The purpose of the rule is to simplify the method of citation by enabling an aggregate of persons to be sued in the name which is descriptive of it and to ensure that a plaintiff's claim is not defeated by technical defences of non-joinder. 'In effect the rule says this: the common law procedure of suing each individual member of an unincorporated association need therefore not to be followed, the plaintiff being entitled to sue the unincorporated association by name'. The rule enables a plaintiff to successfully sue the members of an association or, in the case of a partnership, the individual partners where he may not know who they are. What it effectively does is to allow the individual persons who formed the partnership or firm or association to sue or be sued in the name the entity usually bears. 'Implicit in at least the provisions of sub-rules (1) and (2) is that the actual party which trades thus is

2 [2013] ZAGPJHC 171 (7 June 2013).
3 2010 (2) SA 114 (ECB) [reported at [2009] JOL 23737 (ECB) – Ed].

the actual plaintiff"[4]. To put it differently, the members of the partnership or association, as the case may be, will be regarded as if they had been cited individually by name.

[15] Rule 14 is therefore nothing more than a procedural aid assisting a plaintiff to cite certain legal entities that do not have any existence separate from their members or owners".

[72] That judgment was followed by this Court in *United Apostolic Faith Church v Boksburg Christian Academy*,[5] holding that –

"In the absence of the procedural aid of Uniform Rule 14(2), the plaintiff would have been constrained to cite and join each individual forming part of the association. The rule thus simplifies the method of citation by *enabling* such a body of persons to be sued in the name which it normally bears and which is descriptive of it. It ensures that a plaintiff's claim is not defeated by technical defenses in regard to the citing of a party. Rule 14(2) is, however, *a procedural aid only. It cannot vest legal personality where it does not exist*". (emphasis added).

[73] The effect of rule 14(2) in the context of this matter is that UMSO had a choice either to sue in the name of the joint venture or to follow the common law path and ensure that both parties to the joint venture, UMSO and Nebavest, were joined. In this case, it chose the latter course. However, because Nebavest has purported to withdraw from the joint venture, and is seemingly no longer cooperating with UMSO, the appropriate method of joinder was to join it as a respondent. This UMSO has done.

[74] The second component of this challenge was made on the basis of the Constitutional Court's decision in *Areva NP v Eskom Holdings SOC Ltd and another.*[6] However that case is distinguishable on the facts. One company in a group submitted a bid in response to a tender as agent for another company in the group. When the company that had submitted the bid as agent brought review proceedings to set aside the award of the tender to a different company, it asserted standing on the basis that it had submitted the bid in its own right. The Constitutional Court found that this was not the basis of the bid. Because it had made the bid as agent for another entity and not in its own right, its legal standing was rejected[7].

[75] In the present matter, UMSO did not act as agent for the joint venture or for Nebavest. It was a party to the joint venture and stood to benefit from the bid, if awarded, in its own right. It therefore clearly has a direct and substantial legal interest in the dispute.

[76] In the circumstances, I am satisfied that UMSO had legal standing to bring the urgent application.

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4 *Per* Horwitz AJ in *Absa Bank Ltd v Blignault and another and 4 similar cases* 1996 (4) SA 100 (O) at 102D.

5 2011 (6) SA 156 (GSJ) at para [45].

6 2017 (6) SA 621 (CC).

7 See especially at para [44].

Non-joinder

[77] The position in relation to joinder was summarised in *Mashike and Ross NNO and another v Senwesbel Limited and another*[8] as follows:

> "[20] Where a party has a direct and substantial interest in any order a Court may make, or if such order cannot be sustained or carried into effect without prejudicing that party, the joinder of that party is necessary unless the Court is satisfied that that party waived his or her right to be joined or agreed to be bound by the order. The enquiry as to non-joinder is a matter of substance and not of form:
>
> The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings concerned.
>
> And in *Amalgamated Engineering Union v Minister of Labour*, it was said:
>
> "Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests'.
>
> A 'direct and substantial interest' in a matter connotes 'an interest in the right which is the subject-matter of the litigation and. . . not merely a financial interest which is only an indirect interest in such litigation'".

[78] The City contended that the application stood to be dismissed on account of UMSO's failure to join the parties who had submitted bids in the new tender process. UMSO contended in response that the bidders in the new tender did not have a direct and substantial interest warranting joinder. They argued that the bidders in the new tender did not have any legal rights or legitimate expectations with regard to the processing stages of the new tender. Were the City to cancel the new tender before any award is made, that decision would not have any direct external legal effect on the bidders and no right of theirs would be infringed. The grant of the interim interdict sought in this application would be no different in its effect. Accordingly there was no need for the bidders in the tender to have been joined.

[79] In support of this contention, UMSO relied on cases which establish that where a public authority takes a decision to cancel a tender prior to its adjudication, its decision does not amount to administrative action under the Promotion of Administrative Justice Act No 3 of 2000 ("PAJA").[9]

[80] There is no direct correlation between the enquiry as to (a) whether conduct amounts to administrative action within the definition of that term in section 1 of PAJA (which includes requirements that the decision in question adversely affects rights and has a direct external legal effect) and (b) whether a party potentially affected by litigation in relation to a

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8 [2013] 3 All SA 20 (SCA) at para [20].

9 *City of Tshwane v Nemviti Technologies (Pty) Ltd* 2016 (2) SA 495 (SCA) at para [32]; *SAAB Grintek Defence (Pty) Ltd v South Africa Police Service and others* [2016] 3 All SA 669 (SCA) para [34].

pending tender process has a direct and substantial legal interest in, or is otherwise potentially prejudiced by, the relief sought.

[81] The interim interdict sought against the processing of the new tender in the present proceedings is aimed at preserving the position pending a review of the decision-making pertaining to the initial tender. In the review, UMSO seeks relief that will take the form not only of reviewing the City's decision-making in relation to the initial tender, but also of confirming the award of the initial tender to it. Such a result would render the new tender process nugatory because it is in respect of the same works.

[82] In those circumstances, there can be no question that the bidders in the new tender have a direct and substantial interest in the outcome of the dispute and are potentially prejudicially affected by its outcome. They ought therefore to be joined in the present application.

[83] The position where there is non-joinder was dealt with in *Mashike*[10] as follows:

> "[22] Where there is a non-joinder the Court may direct that steps be taken to let the matter stand over until the interested parties have been joined or have indicated that they would be bound by the judgment. One way is to let the matter stand over until interested parties have filed their consents to be bound. Another is to issue a rule nisi rather than compelling the applicant to start proceedings *de novo*".

[84] In the course of the hearing, I enquired of both parties whether the Court should issue a *rule nisi* rather than dismissing the application or requiring the applicant to start proceedings afresh.

[85] Counsel for the City contended on the basis of *Mashike* that it was not open to the Court to issue a *rule nisi* because there was no application for the grant of such *rule nisi* before me. In *Mashike*, the Court had declined to come to the assistance of the appellant because there was no application before it either for a stay of proceedings pending joinder, or for the issue of a *rule nisi*[11]. The City also contended that tenders were an open, public process and UMSO could have, and ought to have taken steps before commencing proceedings to establish the identity of the bidders in the new tender and to have joined them from the start. No public source of such information was however identified by the City.

[86] UMSO contended that it was open to the Court to grant a rule *nisi* together with interim relief, notwithstanding that a rule *nisi* formed no part of the notice of motion. During reply, UMSO moved an application for the grant of a rule *nisi* together with interim relief from the bar.

[87] It seems to me that the only realistic source of the information as to the identity of the bidders in the new tender was the City itself. The City made it clear before the launching of the review, that it would not respond to a request for documents needed for the review because UMSO had no standing as it was not the bidder. It is probable that a request for information about the bidders would have met with a similar response. In

10 Above fn 8.
11 At para [22].

a those circumstances it would be unfair to nonsuit UMSO on the basis of non-joinder. It is also noteworthy that in both the cases cited in *Mashike* in support of the view that a Court was entitled to issue a rule *nisi* in circumstances of a non-joinder, no such relief had been sought at the commencement of the application.[12] As Van Dijkhorst J put it in *Ex parte* b *Sengol Investments*, "*a rule nisi is a judicial invitation to join issue and the failure to appear after proper notice thereof is regarded as a waiver of the right to be joined and a submission to the order of the Court*"[13](emphasis added).

[88] In those circumstances, it is appropriate that the Court grant a rule *nisi* calling upon the City and the bidders in the new tender to show cause c why an order should not be made as sought in the notice of motion.

[89] The question that then rises is whether UMSO has made out a case for the grant of an interim interdict pending the return day of the rule *nisi*. In the analysis that follows, that assessment is made on a *prima facie* basis on the facts and arguments that are before me. The bidders in the new tender may present different facts and argument on the return day of the rule *nisi*, d should they choose to enter the fray. The findings in this judgment are not intended in any way to bind the Court that considers the matter at that stage. Nor should they be read as binding the Court hearing the review.

[90] I accordingly turn to consider whether UMSO has satisfied the require- e ments for the grant of an interim interdict.

Requirements for an interim interdict

Prima facie right

f [91] The question whether or not UMSO has shown that it has a *prima facie* right must be determined with reference to its constitutional right to seek the judicial review of the City's decision-making in relation to the initial tender. UMSO must show that it has a *prima facie* case for the review and setting aside of that component of the City's decision-making that had the effect of denying the joint venture the final award of the initial tender.

g [92] In making this assessment, it must be borne in mind that UMSO was constrained in preparing its founding affidavit in this application by the City's failure over a period of some 10 months to deliver the record of its decision-making, as it was required to do in terms of rule 53(1)(b). A proper assessment of the strength of the case in a review application is best h made after the record has been filed and the applicant has exercised its right in terms of rule 53(4) to deliver a supplementary affidavit supplementing its grounds of review, together with an amended notice of motion.

[93] However, the City has attached to its answering affidavit a part of the record. This includes the tax certificates with the handwritten inscriptions i

12 *Ex parte Sengol Investments* (*Pty*) *Ltd* 1982 (3) SA 474 (T) at 477H–478F [also reported at [1982] 4 All SA 309 (T) – Ed]; *Ex parte Jacobson*: *In re*: *Alec Jacobson Holdings* (*Pty*) *Ltd* 1984 (2) SA 372 (W) at 377F–H [also reported at 1984] 3 All SA 349 (W) – Ed].

j 13 Above at 478F.

on them to which I have referred above and what may turn out to be the most important part of the record, namely the minutes of the EAC decision of 26 April 2016.

[94] One of the review grounds which already forms part of the review and which was also referred to as a ground of review in the papers in this application is the complaint that the City breached UMSO's right to procedurally fair administrative action. More particularly, UMSO was never given a proper opportunity of responding to the allegations of fraud and invalidity in relation to the tax clearance certificates before it was decided not to proceed with the initial tender.

[95] The principle is well established that before a public authority takes a decision on the basis of information of which the affected party was unaware, that authority must inform the party of that information and the affected party must be given the opportunity to be heard in relation to that information.[14]

[96] The flimsy and hearsay nature of the evidence put up by the City in support of the alleged fraud made it all the more important that this component of procedurally fair administrative action was complied with. Whilst there was an exchange of correspondence on the tax certificates, this was left hanging by the City. The City did not respond to UMSO's email of 22 June 2016, sent within the stipulated deadline, suggesting a proper clarification of the issue with SARS, with UMSO's auditors present. Given this and the submission of the SARS pin numbers within the stipulated deadline, UMSO was entitled to believe that the concerns regarding the tax certificates had been addressed. Nor were the tax certificates now attached to the answering affidavits with the handwritten notes on them, ever put to the joint venture. On this basis alone, UMSO has a *prima facie* case for the review of the City's decision-making.

[97] On the face of it, the City's decision-making based on the withdrawal of Nebavest from the joint venture was dealt with in a similarly procedurally unfair manner. UMSO was entitled to be heard before the City decided not to proceed with the tender on that ground.

[98] When one takes into account the minute of the EAC's meeting of 26 April 2016, on the basis of which UMSO will be able to supplement its review grounds in its supplementary affidavit, it becomes apparent that UMSO has a number of further potential grounds for a review of the City's decision-making.

[99] The most glaring of these is that, contrary not only to the City's correspondence in the period immediately following the meeting, but also to the answering affidavit in this application, the minute reveals that the

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14 *Theron v Ring van Wellington* 1976 (2) SA (1) (A) at 29 A–E [also reported at [1976] 2 All SA 286 (A) – Ed] and at 46A; *Maharaj v Chairman, Liquor Board* 1997 (1) SA 270 (N) at 277 G–1 [also reported at 1997 (2) BCLR 248 (N) – Ed]; *Farjas (Pty) Ltd v Regional Land Claims Commissioner, Kwazulu–Natal* 1998 (2) SA 900 (LCC) at para [29]–[30] [also reported at [1998] 1 All SA 490 (LCC) – Ed]; *Logbro Properties cc v Bedderson NO and others* 2003 (2) SA 460 (SCA) at para [23]–[26] [also reported at [2003] 1 All SA 424 (SCA) – Ed]; *Majake v Commission for Gender Equality and others* (09/14527) [2009] ZAGPJHC 27 (12 June 2009).

EAC in fact took a final decision to award the tender to the applicant. In the resolution of the committee recorded at the end of the minute, the only precondition to the signature of a contract with the joint venture consequent upon the award is "that the contractor is up to date with payments of its municipal accounts with City of Johannesburg Metropolitan Municipality, or that adequate arrangements for payment thereof have been made".

[100] Because of the misleading communications from the City officials following this meeting, UMSO was led to believe that the initial tender was discontinued and no decision was made to award the tender to it. The fact that a final decision was in fact taken by the EAC on 26 April 2016 to award the tender to the joint venture will introduce into the review proceedings the question whether the City is now bound by that decision on the basis that it is *functus officio*. The well-established principle is that if the City wished to set aside its own decision, it could not do so of its own accord and would have to apply to court to have its decision set aside[15]. What this suggests *prima facie* is that UMSO may have a case not just for the review of the City's decision-making but also an order compelling it to give effect to the decision of its EAC to award the tender to, and conclude a contract with, the joint venture.

[101] What the minute also reveals is that, *prima facie*, there were a number of misleading statements in the correspondence addressed by City officials to UMSO following the meeting of 26 April 2016:

[102] The email from the City of 6 June 2016 begins by saying "[w]e are in a process of finalising the above mentioned bid". This was not correct. The minute shows that the bid had been finalised by the award of the tender and a decision had been taken by the EAC to conclude a contract with the joint venture.

[103] The email of 6 June 2016 goes on to say that "one of the requirements is that the bidders submit their latest original tax clearance certificate". This is incorrect. In the deliberations preceding the resolution adopted at the end of the meeting, it is noted that –

> "[c]ommittee advised the user department to do request performance guarantee in the same way they use to do it for constructions, which is requesting for bank guarantee and GSSCM should request the service provider to submit the valid tax clearance certificates (sic)".

[104] However, what is minuted in this part of the report is an exchange, with the Committee raising issues and the Departmental officials then responding. This part of the minute does not purport to reflect any decision-making by the EAC. That is reserved for the last part of the minute under the heading "resolved". What is clearly the final decision of the EAC is then set out in seven paragraphs in bold print. From that part of the minute, it appears that at the end of the meeting, after considering

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15 *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) at para [37] [also reported at [2004] 3 All SA 1 (SCA) – Ed]; *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) at para [40] [also reported at 2014 (5) BCLR 547 (CC) – Ed].

the Department's response along with amendments proposed by the chairperson, the EAC decided to award the tender to the joint venture without stipulating any condition that tax clearance certificates be provided.

[105] Although the City claims to attach to its answering affidavit its letter of 3 May 2016, all that is attached is an email that says "kindly find attached formal communication from City of Joburg Housing Department for your attention". However, we know from the reply sent by Mr Nkosi on behalf of UMSO that the City's letter of 3 May 2016 elicited the provision by UMSO of its financial statements and those of Nebavest. *Prima facie*, then, the letter of 3 May 2016 must have requested either financial statements or information about the financial position of the joint venture companies.

[106] Again, when one turns to the resolution actually taken by the EAC, no reference whatsoever is made to any requirement that the joint venture provide financial information of this nature as a precondition of the award. There is no mention of financial statements or financial information whatsoever. Why then was the City official asking for this? Moreover, an analysis of the joint venture companies' liquidity and going concern analysis had already been commission by the EAC and furnished on 13 April 2016. That would have necessitated provision and analysis of their financial statements.

[107] What is also not explained by the City is why, if the provision of financial statements and tax clearance certificates were preconditions stipulated by the EAC, they were not both requested immediately following the meeting of 26 April 2016. Why ask only for the financial statements and then wait until June to request new tax clearance certificates?

[108] The City's letter of 31 March 2017 (which precipitated the review application) says that "EAC of April 2016 recommended the awarded (sic) to UMSO Nebavest joint venture subject to Tax matters of the consortium still being in order". Again, *prima facie*, this was incorrect.

108.1 Firstly, the minute shows that the EAC did not recommend the award, it made the award to the joint venture.

108.2 Secondly, the resolution containing the award made no reference whatsoever to "tax matters of the [joint venture] still being in order", whether as a precondition or otherwise.

[109] In paragraph 3 of the letter of 31 March 2017, the City says, referring to the alleged flaws in the tax clearance certificates, "the executive adjudication committee precondition was not met". As already pointed out, no precondition pertaining to the provision of tax clearance certificates was stipulated by the EAC. The only precondition was proof of payment of the joint venture's municipal accounts.

[110] What these misleading statements in the correspondence suggest is that the applicant has a reasonable prospect of showing that the decision-making process pertaining to the initial tender was flawed in a manner

giving rise to several potential review grounds, as listed under section 6(2)(e) of PAJA[16], and on the basis of the principle of legality.

[111] This is so without even enquiring into the alleged bribery. Nevertheless, the fact that these misleading statements were made in the correspondence and their timing, lends weight to, and calls for an investigation in the review proceeedings of, UMSO's allegations in this regard.

[112] What also lends support to the applicant's endeavour to make out a *prima facie* case is the City's failure in the review proceedings over a period of 10 months to provide the record, whilst at the same time proceeding with the new tender which, if not interdicted, will render the review proceedings moot. In the absence of a proper explanation, this bears the hallmarks of an attempt to pre-empt the decision of this Court in the review. The City's answer to this in argument was that the applicant had failed to bring an application to compel the City to provide the record. That is not an adequate response. A party reviewing administrative action is entitled to the record as a component of its right of access to court in terms of section 34 of the Constitution. The public authority whose decision-making is subject to review is under a corresponding constitutional duty promptly to provide the record. This is also consistent with the constitutional goal of open and accountable decision-making[17].

[113] In arguing that a *prima facie* case had not been made out, the City again made the argument that the applicant was not the bidder in respect of the initial tender, but rather the joint venture. That assertion has already been dealt with above in discussing the question of legal standing. Beyond that, the significance or otherwise of the purported withdrawal of Nebavest from the joint venture is a matter to be dealt with at the remedial stage of the review proceedings and need not form a part of the present enquiry. Even if it is necessary to evaluate it now, the wording of the termination clause in the joint venture agreement[18] and UMSO's letter following Nebevest's purported withdrawal suggests *prima facie* that the joint venture was not terminated because the clause was not complied with – agreement in writing was required. And if it was terminated, the joint venture agreement provides for joint and several liability[19]. The City would have been aware of these provisions because the joint venture agreement had to form part of the bid documents.

[114] The City also made reference to the provisions of the Municipal Finance Management Act[20] and the regulations issued under that Act pertaining to the requirement that municipalities not award bids to persons whose tax

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16 Including, for example, the administrative action having been taken:
- for an ulterior purpose or motive;
- after taking into account irrelevant considerations;
- after ignoring relevant considerations;
- in bad faith; and
- arbitrarily or capriciously.

17 *Helen Suzman Foundation v Judicial Service Commission and others* 2017 (1) SA 367 (SCA) at paras [12] to [20] [also reported at [2017] 1 All SA 58 (SCA) – Ed].

18 See above para [15].

19 See above para [11].

20 Act No 56 of 2003.

matters have not been cleared by SARS. This misses the point. First, the tender had already been awarded. Second, UMSO was entitled to a hearing before it was deprived of the benefit of the award on the basis of allegations of fraud relating to the tax clearance certificates.

[115] I am accordingly satisfied that UMSO has shown that it has a *prima facie* right.

Irreparable harm

[116] In the event that interdictory relief is refused and the new tender process is allowed to proceed, resulting in an award of the new tender, the review proceedings in respect of the initial tender will be rendered moot. UMSO is not one of the bidders in respect of the new tender. The effect will be that it is deprived of its constitutional remedy of judicial review in relation to the decision-making pertaining to the initial tender.

[117] The review proceedings hold within them the possibility that UMSO may yet have the award of the initial tender to the joint venture, or to itself, confirmed. The tender is for a substantial contract price. UMSO, no doubt, also expended funds in submitting the joint venture's bid in response to the initial tender.

[118] I am accordingly satisfied that the applicant faces irreparable financial harm if the interim relief is not granted.

Balance of convenience

[119] This criterion requires the Court to weigh the prejudice to the applicant if the interim relief is refused against the prejudice to the respondent if it is granted[21]. In doing so, the Court must take into account the applicant's prospects of success in the review proceedings. The stronger the prospects of success, the less the need for the balance of convenience to favour the applicant and *vice versa*[22].

[120] It is my *prima facie* view that the applicant's prospects of success in the review are at the strong end of the spectrum. The prejudice that it will suffer if the interim relief is refused has been explained earlier in this judgment.

[121] The prejudice to the City will be the delay in finally resolving the question of who will do the work required for the project. Also relevant in this regard is the prejudice to the public interest insofar as the work which forms the subject matter of the initial and new tenders is low cost housing for which there is a desperate need.

[122] This notwithstanding, the primary cause of the substantial delays in the matter has been the City, both in the way that it dealt with the award of the initial tender by the EAC and in its unconscionable delays in the provision of the record for purposes of the review proceedings.

[123] Insofar as the public interest is concerned, even though the project relates to the provision of low cost housing, it is also in the public interest that

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21 Van Loggerenberg *Erasmus Superior Court Practice* D6–20.

22 Van Loggerenberg above D6–20 to D6–21.

the legality surrounding the decision-making process be adjudicated upon by a Court of law, rather than the City being allowed to pre-empt the decision of this Court through the award of the new tender.

[124] There is no reason, moreover, why the review proceedings cannot be expedited through approaching the Deputy Judge President for case management aimed at an accelerated exchange of affidavits and an early hearing.

[125] In the circumstances, the balance of convenience favours the applicant.

No other satisfactory remedy

[126] The City argued that the applicant had available to it a suitable alternative remedy in the form of a claim for damages in the event that it was able to show that the process in relation to the initial tender was flawed.

[127] Assuming that such a remedy is available to the applicant (which is open to serious doubt[23]), an award of damages would contemplate that the City in effect pays twice, or substantially more than necessary, for the same work.

[128] This would give rise to an unconscionable waste of public funds. It is far preferable that the deserving bidder is ultimately identified pursuant to the judicial review process, resulting in either the confirmation by the Court of the award made on 26 April 2016 or remittal to the City for proper evaluation and adjudication in a lawful tender process.

[129] Accordingly, there is no suitable alternative remedy other than the review proceedings, combined with the interdictory relief sought in this application.

Urgency

[130] The City argued that the application is not urgent and that the applicant's delay in seeking interim relief only on 7 May 2018 when it had first learned of the new tender on 28 February 2018, deprived the applicant of any entitlement to approach the Court on an urgent basis.

[131] In response, the applicant pointed out that it had acted responsibly in, before rushing to court, seeking to secure through correspondence an undertaking from the City not to proceed with the new tender. The relevant correspondence in this regard has been referred to above. The applicant referred to *Stock and another v Minister of Housing and others*[24]. There the Court held:

> "In *Nelson Mandela Metropolitan Municipality and others v Greyvenouw CC and others* 2004 (2) SA 81 (SE) in paragraph [34] . . . the Court held that protracted attempts by a litigant to resolve a matter before it approached a court did not amount to dilatory action which negated the urgency of the matter. . .

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23 See in this regard *Olitiski Property Holdings v State Tender Board and another* 2001 (3) SA 1247 (SCA) [also reported at 2001 (8) BCLR 779 (SCA) – Ed]; *Steenkamp NO v Provincial Tender Board Eastern Cape* 2006 (3) SA 151 (SCA) [also reported at [2006] 1 All SA 478 (SCA) – Ed] and *South African Post Office v De Lacy and another* 2009 (5) SA 255 (SCA) [also reported at [2009] 3 All SA 437 (SCA) – Ed].

24 2007 (2) SA 9 (C) at 12E–13A.

> In my view the opposition which has been raised by the respondents to urgency is not justified, in terms of the correspondence which has been generated, particularly the desperate attempts by applicant's attorney to obtain a response by Mr Davids or anyone else who was responsible for the TRA. Accordingly I regard it as appropriate for the Court to hear the case as one of urgency".

[132] The applicant also points out that waiting for a hearing in the ordinary course will result in the relief sought in this application being rendered nugatory because the new tender will likely by then have been awarded.

[133] There is merit in both parties' contentions. It is so that the applicant did not act with sufficient urgency in pressing the City for a response to its request for an undertaking not to proceed with the new tender. On the other hand, it was appropriate for it to attempt to secure the undertaking before approaching the Court. Even if it had approached the Court at an earlier stage, it would still have been necessary to proceed urgently in order to avoid the review proceedings being rendered nugatory.

[134] A further aspect that warrants the hearing of the matter on an urgent basis is that each of the parties make serious allegations of corruption or fraud against the other. The City's allegation in this regard is, at this stage, a flimsy one. The applicant, by contrast, has put up sufficient evidence to raise real concerns, particularly once consideration is given to the minute of 26 April 2016. If interdictory relief is not granted because the matter is found not to be urgent and the review proceedings are allowed to become moot, there is a risk that the alleged malfeasance will never receive judicial scrutiny. Moreover, in a society that has been brought to its knees by corruption, allegations of corrupt activity that have a reasonable measure of substantiation lend weight to an argument that the matter should be heard on an urgent basis.

[135] It was accordingly appropriate that this matter be enrolled on the urgent roll and the relevant provisions of the rules dispensed with.

Remedy

[136] The applicant has made out a case for the grant of interim relief halting the new tender process pending the return day.

[137] It is appropriate that the matter be postponed to a date for hearing on the unopposed roll in order that it may first be established whether any of the parties that made bids in the new tender process wish to oppose the relief sought. If there is opposition, the hearing of the matter can be postponed on the return day for a hearing on the opposed motion roll.

[138] It is appropriate that the question of costs stands over for determination on the return day of the *rule nisi* or when the matter is heard on the opposed motion roll in the event of opposition.

[139] I accordingly make the following order:

1. The non-compliance by the applicant with the rules relating to time limits and service is condoned and it is ordered that the matter be heard as one of urgency.
2. A rule *nisi* is issued calling upon the persons identified in annexure "*A*" to this order (the "bidders in the new tender") to show cause on

Wednesday 4 July 2018 (the "return day") why the following order should not be made:

2.1. The bidders in the new tender are joined as the third to forty-second respondents;

2.2. Pending the final determination of the review application instituted out of this Court under case number 17/23864, the first respondent is interdicted and restrained from in any way proceeding further with the processing, evaluation or adjudication of the tender "Construction of Civil Engineering Infrastructure and 1631 Low Cost Houses in Klipspruit Extension 7, Soweto – 547/18" (the "new tender").

3. Pending the return day and the determination of the rule *nisi*, the first respondent is interdicted and restrained from in any way proceeding further with the processing, evaluation or adjudication of the new tender.

4. The first respondent must within 5 court days of this order provide the applicant with all the information in its possession as to the principal places of business and/or the registered addresses of the bidders in the new tender.

5. The applicant must serve a copy of this judgment and order together with the notice of motion, founding, answering and replying affidavits, with annexures, on the bidders in the new tender –

5.1. by email at the email address set out in annexure "A" to this order, within 5 court days of this order; and

5.2. in accordance with rule 4(1), within 10 days of this order.

6. Those of the bidders in the new tender that wish to show cause on the return day why an order should not be made in terms of paragraphs 2.1 and 2.2 above must serve on the applicant and the first respondent and file with the Registrar of this Court, a notice of intention to oppose, by no later than 5 court days before the return day.

7. The costs of this application are reserved.

For the applicant
F Joubert SC and *A Roeloffze* instructed by *Boqwana Burns Attorneys*

For the first respondent
O Mooki and *T Seroto* instructed by *Mkhabela Huntley Attorneys Incorporated*