

## **ESORFRANKI LIMITED**

(Incorporated in the Republic of South Africa)

(Registration number: 1994/000732/06)

JSE code: ESR

(“Esorfranki” or “the company”)

### **VOLUNTARY SENS STATEMENT**

JSE civil engineering and geotechnical group, Esorfranki, wishes to accurately record the proceedings and judgment issued in the matter of Esorfranki Limited v Mopani District Municipality and the Tlong Rea Trading SMN Joint Venture (“Joint Venture”), and to record that the company intends appealing the contradictory findings contained in the judgement, particularly the decision to allow the Joint Venture to continue with the tender in spite of the finding, in Esorfranki’s favour, that the tender process was unlawful and invalid and was to be set aside on this basis as well as the decision to order Esorfranki to pay its own legal costs despite finding that it was correct to challenge the award of the tender.

In Nov 2010 Esorfranki brought an application to review the award of a tender for a R217 million pipeline contract to the Joint Venture. The Joint Venture’s lead party is a close corporation registered two weeks after the tender was first advertised. At the date of submission of the tender, neither the Joint Venture nor either of the parties thereto met the CIDB grading requirement of 9 CE, one of the conditions of the tender, and accordingly on this basis alone the Joint Venture’s bid should have been disqualified.

Esorfranki CEO Bernie Krone explains that the group and Cycad Pipelines (Pty) Limited, another unsuccessful bidder, were surprised by the award of the tender to an unqualified party whose bid was significantly higher than the lowest compliant bid (Esorfranki’s).

The inescapable conclusion to be drawn from the award of the tender to the Joint Venture was that the Municipality was biased in favour of the Joint Venture and that there had been collusion between the Municipality and the Joint Venture. In proving this collusion, reference was made during the proceedings to the conduct of attorney Mahowa and in particular to the numerous examples in which he acted for both parties. (Mahowa denied acting for both parties despite the weight of evidence).

In the judgment delivered on 29 August 2012, Judge Matojane of the North Gauteng High Court unequivocally found, in favour of Esorfranki, that the Municipality and the Joint Venture had colluded unlawfully, that the Municipality was biased, that there had been fraud in the award of the tender and that the award of the tender was unlawful. On this basis he declared the tender process to have been illegal and invalid and set the process aside.

Despite the unequivocal finding of tender fraud neither the Joint Venture nor the Municipality received any sanction at all and the Joint Venture is permitted to retain the tender while Esorfranki is directed to pay its own costs. The failure to sanction either the Joint Venture or the Municipality sends an unfortunate signal that the courts condone corruption and tender fraud.

Further Judge Matojane misinterprets settlement discussions between the parties, at the instance of the Joint Venture and Municipality, as an attempt by Esorfranki to extort a settlement from the Municipality. In this regard, during the proceedings attorneys representing the Joint Venture and the Municipality approached Esorfranki’s legal team and proposed that Esorfranki withdraw its application and enter into a joint venture with

the Joint Venture. Krone points out that by conceding to this request, Esorfranki would have been condoning tender fraud, and accordingly this proposal was rejected. To prevent stalling of the discussions and to facilitate an alternative settlement, Esorfranki's legal team instead proposed that the Joint Venture relinquish the remaining balance of the tender to Esorfranki in which case Esorfranki would undertake to not interfere, whether to promote or discourage, with the pending CIDB enquiry and any possible criminal charges against the Joint Venture and/or the Municipality. This proposal was rejected.

Krone concludes: "We – Esorfranki - have undertaken to challenge any incidences of perceived tender corruption, at great expense to the company. We believe that as a major listed company, we have an ethical and commercial obligation in this regard as this avenue is not available to smaller companies with fewer resources who are also impacted by this widespread corruptive influence in our industry."

---

Footnote 1

Judge Matojane delivered a similar judgment earlier in the week in an unrelated matter in which he found a R10 billion government contract to have been unlawfully awarded and then failed to sanction the guilty parties, who were again permitted to retain the contract. This judgment will also be appealed.

Sponsor  
Vunani Corporate Finance

6 September 2012