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

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: A49/2016

In the matter between:

CYBKO SECURITY SERVICES CC Applicant

and

THE DIHLABENG LOCAL MUNICIPALITY 1st Respondent

FOUR RIVERS TRADING 82 CC t/a ZERO TOLERANCE SECURITY 2nd Respondent

CONFIGEN CC 3rd Respondent

CORAM: DAFFUE, J *et* CHESIWE, AJ

HEARD ON: 20 FEBRUARY 2017

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 16 MARCH 2017

I INTRODUCTION

[1] The central issue for determination in this application is the lawfulness of a tender process conducted by the Dihlabeng Local

Municipality. The review application by the unsuccessful bidder was issued on 23 February 2016 and although it was meant to be an urgent application, several delays occurred in the litigation process, *inter alia* insofar as the entity which was eventually accepted to be the successful bidder, Configen CC had to be joined as a party to the proceedings. On 19 September 2016 the application was removed from the roll, apparently as the application papers of one of the judges to whom the matter was allocated were not in order. The matter was eventually set down for hearing on 20 February 2017.

II THE PARTIES

[2] The applicant is Cybko Security Services CC, a registered close corporation specialising in the delivery of security services. I shall refer to applicant as Cybko Security herein later.

[3] First respondent is the Dihlabeng Local Municipality ("Dihlabeng"), duly established in terms of the Local Government: Municipal Structures Act, 117 of 1998.

[4] Second respondent is cited as Four Rivers Trading 82 CC t/a Zero Tolerance Security. This entity was incorrectly cited as a close corporation as it is common cause that it is a private company. It is acknowledged under oath in the second respondent's answering affidavit that it trades as Zero Tolerance Security. This aspect will be dealt with *infra*.

[5] Third respondent is Configen CC, a close corporation who also trades as Zero Tolerance Security. Mr Tefo Warnick Montsitsi ("Montsitsi") is the sole director of second respondent and the sole member of the third respondent. For the sake of convenience I shall hereinafter refer to second respondent as Four Rivers and to third respondent as Configen.

III THE RELIEF CLAIMED

[6] Save for the prayer for condonation based on urgency which is irrelevant at this stage, Cybko Security seeks the following relief *ex facie* the notice of motion:

> "2. The First Respondent's decision of December 2015, alternatively January 2016 to award Public Tender: **APPOINTMENT OF SERVICE PROVIDER FOR THE PROVISION OF PHYSICAL SECURITY SERVICES FOR A PERIOD OF THREE YEARS CONTRACT NO. MUN03/2015** to the second respondent is reviewed and set aside, alternatively is declared unlawful and set aside.
>
> 3. Any Service Level Agreement concluded between the First and Second Respondent, dependent upon the factual existence of the decision mentioned in prayer 2 above and concluded in execution of said decision, is struck down and set aside, alternatively is declared unlawful and set aside.
>
> 4. The First Respondent is ordered to conclude a Service Level Agreement with the Applicant, for the services to be rendered and in accordance which the Applicant's tender.

5. The Second Respondent is ordered to pay the costs of this application. Alternatively, and in the event of the First Respondent opposing, then and in that case, that both the First and Second Respondents be ordered to pay the costs of the application, jointly and severally, payment by one, the other to be absolved."

It will be evident to the reader that not a word is said of Configen. Configen was joined as a party on receipt of Four Rivers' answering affidavit. The application is opposed by Dihlabeng, Four Rivers and Configen.

IV THE ESSENCE OF THE DISPUTE BETWEEN THE PARTIES

[7] Initially it was Cybko Security's case that the decision to award the bid to Zero Tolerance was unlawful for the following reasons. Instead of calculating a bid price for a period of three years (thirty six months), Zero Tolerance made its calculations based on a period of one month only. Dihlabeng decided to simply multiply the monthly amount by thirty six on the assumption that it could correct the arithmetical error. According to Cybko Security this was unlawful in that all bidders were required to discount factors such as inflation, the increase of labour costs and increase in sundry charges such as fuel prices, etc. in submitting a responsible and responsive bid. This, according to Cybko Security, necessarily meant that bidders had to compute different rates for every year and incorporate these in the globular amount ultimately tendered. It concluded therefore that Dihlabeng should have discarded the Zero Tolerance bid simply because it did not adhere to the bid criteria and requirements. The decision to

award the contract to Zero Tolerance was therefore irrational and *ultra vires* an empowering provision of the Supply Chain Management Policy, unfair, arbitrary and capricious. The acceptance of the bid, as Cybko Security submitted, "robbed the process of attributes of fairness, openness and competitiveness."

[8] On receipt of the record of decision Cybko Security filed a supplementary affidavit. It referred to the confusion apparent from the bid document of Configen t/a Zero Tolerance. Details of the confusing bid document will be provided when I evaluate the evidential material. What happened *in casu* was so confusing that the bid was awarded to the wrong entity. Although Dihlabeng tried to rectify the mistake by addressing the letter of 20 January 2016 to Configen, trading as Zero Tolerance and confirming that its tender had been accepted, Dihlabeng was not prepared to accept the confusion and come clear on the issue. Instead, it proceeded throughout the filing of papers herein, including heads of argument, to submit that the tender was in fact awarded to Four Rivers and not Configen. Such attitude, to borrow from Leach JA in *Medirite (Pty) Ltd v South African Pharmacy Council and Others* [2015] ZASCA 27 at para [14] is "shrouded in mystery."

V THE AUTHORITIES RELATING TO REVIEWS

[9] Section 217 of the Constitution is the starting point for an evaluation of the proper approach to an assessment of the constitutional validity of State procurement processes. It reads as follows:

> "1. When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
>
> 2. Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for - (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
>
> 3. National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

[10] In order to comply with s 217(3) the legislature adopted the Preferential Procurement Policy Framework Act, 5 of 2000 ("the PPPFA"). "Acceptable tender" is defined in s 1 of the PPPFA as "any tender which, in all respects, complies with the specifications and conditions of tender as set out in the tender document". In *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and others* [2005] 4 ALL SA 487 (SCA) at paragraph [19] Scott JA pointed out that the definition of "acceptable tender" must be construed against the background of s 217 of the Constitution and continued as follows: "In other words, whether the tender in all respects complies with the specifications and conditions set out in the contract documents must be judged against these values." In terms of s 2(1)(f) of the PPPFA "the contract must be awarded to the tenderer who scores the highest points (calculated in accordance with s 2(1)(b)), unless objective criteria in addition to those contemplated in paragraphs (d) and (e) justify the award to another tenderer."

[11] The Local Government: Municipal Finance Management Act, 56 of 2003 is equally applicable. Procurement is dealt with in Chapter 11 and the wording of s 112(1) echoes that of s 217(1) of the Constitution.

[12] A tender process implemented by an organ of State is an "administrative action" within the meaning of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). See: *Logbro Properties CC v Bedderson NO and Others* 2003 (2) SA 460 (SCA) at para [5]. Therefore the applicant *in casu* was entitled to a lawful and procedurally fair process. Furthermore, it is well established that the executive in all spheres are constrained by the principle that they may exercise no power and perform no function beyond those conferred upon them by law. This is the doctrine of legality. See: *Sapela Electronics supra* at para [11].

[13] The proper legal approach pertaining to procurement processes was set out in the following *dictum* by Froneman, J in *Allpay Consolidated v Chief Executive Officer, SASSA* 2014 (1) SA 604 (CC) at para [22] which I quote:

> "[22] This judgment holds that:
>
> a. The suggestion that 'inconsequential irregularities' are of no moment conflates the test for irregularities and their import; hence an assessment of the fairness and lawfulness of the procurement process must be independent of the outcome of the tender process.
> b. The materiality of compliance with legal requirements depends on the extent to which the purpose of the requirements is attained.

c. The constitutional and legislative procurement framework entails supply chain management prescripts that are legally binding.

d. The fairness and lawfulness of the procurement process must be assessed in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).

e. Black economic empowerment generally requires substantive participation in the management and running of any enterprise.

f. The remedy stage is where appropriate consideration must be given to the public interest in the consequences of setting the procurement process aside."

[14] Froneman, J continued in *All Pay supra* at paras [28] and [29] to summarise the approach to be followed by a court considering a review application and I quote: "The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established." Once this exercise has been completed the court must consider the practical difficulties which may flow from declaring the administrative action constitutionally invalid, bearing in mind the just and equitable remedies provided for in the Constitution and PAJA.

[15] In *Bel Porto School Governing Body and Others v Premier, Western Cape* 2002 (3) SA 265 (CC) Chaskalson CJ stated at para [89] for a decision to be justifiable, "…. it should be a rational decision taken lawfully and directed to a proper purpose." Ponnan JA,

relying on *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) expressed himself as follows: "It is well established that an incident of legality is rational decision-making. It is a requirement of the rule of law that the exercise of public power should not be arbitrary. It follows that decisions must be rationally related to the purpose for which the power was given." See *Minister of Home Affairs v Somali Association of South Africa* 2015 (3) SA 545 (SCA) at para [18]. However, as Nugent JA pointed out in *Minister of Home Affairs and Others v Scalabrini Centre* 2013 (6) SA 421 (SCA) at para [65]: "… an enquiry into rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable. As appears from the passage above, rationality entails that the decision is founded upon reason - in contradistinction to one that is arbitrary - which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare."

[16] In *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) Conradie JA said the following in para [13]:

> "In the *Logbro Properties* case *supra*, paras [8] and [9] at 466H - 467C, Cameron JA referred to the 'ever-flexible duty to act fairly' that rested on a provincial tender committee. Fairness must be decided on the circumstances of each case. It <u>may</u> in given circumstances be fair to ask a tenderer to explain an ambiguity in its tender; it <u>may</u> be fair to allow a tenderer to correct an obvious mistake; it <u>may, particularly in a complex tender, be fair to ask for clarification or details required for its proper evaluation</u>. Whatever is done may not cause the process to lose the attribute of fairness or, in the local

government sphere, the attributes of transparency, competitiveness and cost-effectiveness." (emphasis added.)

In *Metro Projects* the Supreme Court of Appeal set aside the award by the municipality to the successful bidder and I quote from para [14]:

> "A high-ranking municipal official purported to give the ninth respondent (the eventual successful tenderer) an opportunity of augmenting its tender so that its offer might have a better chance of acceptance by the decision-making body. The augmented offer was at first concealed from and then represented to the mayoral committee as having been the tender offer. It was accepted on that basis. The deception stripped the tender process of an essential element of fairness: the equal evaluation of tenders. Where subterfuge and deceit subvert the essence of a tender process, participation in it is prejudicial to every one of the competing tenderers whether it stood a chance of winning the tender or not."

See also in this regard *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at para [30] in respect of the requirement that competitors should be treated equally.

VI EVALUATION OF THE EVIDENCE

[17] It is clear that Zero Tolerance did not bid as a joint venture, but confirmatory documents were attached to the bid document allegedly indicating compliance by both Four Rivers, (a company) and Configen (a close corporation). It is *inter alia* alleged in the bid documents that Configen was a dormant entity and therefore

could not present financial statements, but in the same document reliance is placed on the fact that this entity's turnover for the previous financial year was R2m.

[18] Certificates were attached to the bid document issued by the Companies and Intellectual Property Commission in respect of both Four Rivers and Configen. The same applies to certificates issued by PSIRA (the Private Security Industry Regulatory Authority). In terms hereof the date of registration of Configen is stated as 26 October 2015 and registration number 2525507 was allocated to it. Four Rivers' registration number issued by PSIRA is 1271168. A further aspect causing confusion is that the two certificates were issued by PSIRA on the same day, to wit 16 October 2015, indicating that Four Rivers had 34 active employees qualified as grade B to grade E security guards and exactly the same number of employees with the same grading appears on the certificate of Configen. The trade name of Four Rivers is indicated as Zero Tolerance and that of Configen as Zero Tolerance and Private Investigation.

[19] On the first page of the bid document the bidder is required to set out its full name and whether it is a close corporation, company, joint venture, consortium or sole entity. Whoever filled out the form, incorrectly spelt Configen as "Confeogn" and referred to it as Zero Tolerance without any reference whatsoever to the status of the enterprise or enterprise number. Further on in the bid document and on numerous occasions the name of the bidder is referred to as Zero Tolerance and the position of Montsitsi who signed the various documents is indicated as director (instead of

member). I must say that the bid documents indicate at various places that the bidder is indeed a close corporation with reference to the correct registration number thereof. Notwithstanding the auditor's letter attached to the bid documents, indicating that Configen was dormant and thus not trading, it is recorded on page 27 of the documents that the turnover for the previous year was R2m and the expected turnover for the current financial year was R5m with reference *inter alia* to six contracts which the bidder was in the process of executing for various organisations, including Dihlabeng. Notwithstanding the auditor's allegation pertaining to a dormant entity, the bidder attached two letters from third parties indicating that Zero Tolerance were handling their safety and security matters and could be recommended. The versions of the auditor and the bidder cannot both be correct. The one version must be false.

[20] The bidder also attached several screening validation reports from EMPS, a credit bureau, but the client in all these reports are referred to as Four Rivers 82 t/a Zero Tolerance without indicating whether this entity is a close corporation, company, etc. No doubt the certificates do not apply to Configen.

[21] On 6 January 2016 Cybko Security filed an internal appeal against the award of the tender to Zero Tolerance Security. Two points were raised, *inter alia* that the entity was not registered with the Company's Intellectual Property Commission or with PSIRA and furthermore it objected to the increase of the bidding price which was indicated to be R1 138 720,00, but increased by Dihlabeng to R40 993 920,00. On receipt of the internal appeal,

the Acting Municipal Manager of Dihlabeng wrote a letter to Cybko Security dated 19 January 2016 which I quote *verbatim*:

> "1. Responsiveness
>
> 1.1 Please note that the company Zero Tolerance Security it's a trading name under registration 2004/021689/07 Four Rivers Trading 82 it's a legal name.
>
> 1.2 The company is also registered with PSIRA under registration 1271168.
>
> 2. Tender bidding Price
>
> In terms of standard conditions of tender F.3.9 (ie Arithmetical Errors) the Municipality is allowed to correct such errors. In this case the recommended bidder, calculated his price based on monthly rates. Hence the municipality corrected it for the full tender period. (ie. R1 138,720,00 x 36 months = R40,993,920,00)."

[22] The PSIRA registration number quoted in the letter of 19 January 2016 is that of Four Rivers Trading 82 (Pty) Ltd, registration number 2004/021689/07. Clearly Dihlabeng and all its entities such as the Bid Evaluation Committee and the Bid Adjudication Committee were under the impression that the successful bidder was Four Rivers, a private company with the company and PSIRA registration numbers as stated in the letter. As indicated, this confusion created by Dihlabeng caused Cybko Security to cite Four Rivers as second respondent, although incorrectly as a close corporation and not a private company. Throughout the proceedings, i.e. from the filing of Dihlabeng's answering affidavit to the filing of heads of argument on its behalf, Dihlabeng maintained that the bid was awarded to Four Rivers. I quote the following from Dihlabeng's answering affidavit:

1. “The fact of the matter is that the Second Respondent’s bid was in all respects the best bid…”
   [para 18.2]

2. “The second Respondent submitted a bid for the three year period in the amount R40 993 920,00 which was the lowest bid.”
   (para 19.3)

3. “The tender was awarded to the Second Respondent and the First Respondent has no indication to abdicate its responsibilities or obligations in so far as this aspect is concerned.”
   (para 58.3)

[23] On 10 May 2016 first respondent’s heads of argument, prepared by Adv FW Botes SC, were filed. At that stage Configen was still not a party to the proceedings. Throughout the heads of argument various submissions were made that the bid was awarded to second respondent and I quote just one such submission from paragraph [2] of the heads:

> “The First and Second Respondents oppose this application on the basis that the tender was correctly awarded to the Second Respondent, by virtue of the fact that the Second Respondent scored the highest points.”

[24] As strange as it may sound, Dihlabeng never tried to obtain leave to file a further affidavit to set the facts straight and no new heads of argument were filed on behalf of its counsel, notwithstanding

the joinder of Configen and the evidential material placed before the court clearly showing the confusion.

[25] When Configen was joined as a party to the proceedings it came up with a totally different story. Strange as it may sound, the same person who deposed to the answering affidavit of Four Rivers, Montsitsi, also deposed to the answering affidavit of Configen. Just like Dihlabeng tried to do, Configen tried its best to show that Cybko Security could in any event not be awarded the bid because its tax matters were not in order. No doubt Montsitsi was advised that attack was the best form of defence. I shall deal with the allegations in respect of Cybko Security's failure to comply with its obligations towards SARS *infra*.

[26] In paragraph 9 of Configen's answering affidavit the following is stated:

> "During 2015, and when the business affairs of both Configen and Four Rivers were discussed with entities' accountants, I was advised to separate the security services of Four Rivers from its other business activities and to render those security service activities in Configen. Based upon the aforesaid advice, Configen was re-instated on the 29th of September 2015, as it was at that stage in deregistration since 2013 as its annual returns were not submitted. After having being re-instated, these activities in respect of the security services were relocated to Configen in order for Configen to submit a bid in respect of the tenders that were called for by the municipality."

[27] Although Montsitsi tried to persuade us that all relevant certificates, such as those of PSIRA were issued to Configen and not Four Rivers, this is clearly not the case as shown *supra*.

Another disturbing factor is the fact that although a totally different registration number was issued to Configen by PSIRA, i.e. 2525507, Dihlabeng all its entities and Acting Municipal Manager were so confused with the various certificates and documentation presented to them, that it was recorded that the bid had been awarded to Four Rivers with its private company registration number and PSIRA registration number 1271168.

[28] Montsitsi failed to explain how Configen which was deregistered for about two years and dormant could execute security contracts on behalf of various organisations and even made a turnover of R2m for the previous financial year and expected a R5m turnover for the current financial year. Although the advice of the auditors may make sense from a financial point of view, it is disturbing that Configen failed to file a confirmatory affidavit from the financial expert to confirm the advice. These facts were also not placed before the various committees of Dihlabeng. It should have been disclosed, but the bidder failed to explain this and/or to provide any detail in the bid document.

[29] I am satisfied that material irregularities have occurred during the evaluation process. Dihlabeng, acting through its Bid Evaluation and Bid Adjudication Committees as well as its Acting Municipal Manager were so confused with the bid documents of Configen that the bid was initially awarded to a different entity who *ex facie* the documents placed before me did not even bid. In awarding the bid to Four Rivers an irrational decision was taken. Four Rivers did not even submit a bid and therefore it did not submit

"an acceptable tender" as defined in s 1 of the PPPFA referred to *supra*. The about-turn of the Acting Municipal Manager by stating in a later letter that the bid was in fact awarded to Configen (and not to Four Rivers as communicated earlier) is contradicted by him in his answering affidavit deposed to on behalf of Dihlabeng, reiterating that the bid was actually awarded to Four Rivers. Whatever Dihlabeng decided, such decision is irrational, unlawful and hopelessly irregular and stands to be set aside.

[30] The fact that Dihlabeng merely multiplied the bid price of Configen by thirty six to get to a figure for a period of three years appears at first sight to be of a purely arithmetical nature. However, as stated by Cybko Security it would be wrong to do so and I am satisfied with the reasons advanced by Cybko Security which I am not going to repeat again. The effect hereof is that Configen and the other competitors such as Cybko Security were not treated equally. See *Metro Projects* and *Firechem Free State supra*. For this reason as well as the decision of Dihlabeng should be set aside.

[31] Adv Grobler who appeared for Cybko Security did not officially ask for an amendment of the notice of motion to substitute second respondent (Four Rivers) with third respondent (Configen) in paragraphs 2 and 3 thereof. However the issue has been fully canvassed and I am satisfied that the orders to be made in this regard cannot prejudice any of the parties.

VII SECTION 8 OF PAJA ENQUIRY

[32] Bearing in mind the attitude of Dihlabeng towards applicant has clearly set out in its answering affidavit, I considered granting relief in terms of paragraph 4 of the notice of motion by directing Dihlabeng to conclude a service level agreement with the applicant in respect of the rendering of security services. Dihlabeng went as far to submit that Cybko Security is a *persona non grata*. There is little doubt that Dihlabeng is not interested to enter into any agreement with applicant. In my view a clear perception of bias has been created. However, the issues raised in the next paragraph cannot be disregarded.

[33] Cybko Security tried to show that its tax affairs are in order, but I am not convinced. It initially relied on a tax clearance certificate attached as annexure "REP1" to its replying affidavit, but this document is inapplicable insofar as it relates to an entity known as Cybko Trading with a totally different registration number. Although a tax clearance certificate was issued to Cybko Security with the correct registration number as is apparent from the document attached to Configen's answering affidavit, the correctness of this certificate is doubted, insofar as judgment has been taken by SARS against Cybko Security on 5 November 2014 for a total tax debt of R218 225,41 in respect of outstanding PAYE, UIF and SDL. Cybko Security's allegation that it has settled its debt towards SARS in respect of VAT might be correct, but it did not deal with the other three taxes for which judgment was obtained.

[34] I considered the requirements set out in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC), but am not convinced that Cybko Security should be granted the relief sought. It would be wrong to direct Dihlabeng to enter into a contract with Cybko Security whilst a cloud is figuratively speaking hanging over its head.

[35] Mr Grobler requested us, in the event of the court refusing to grant relief in terms of paragraph 4 of the notice of motion, to refer the matter back to Dihlabeng, directing it to merely re-evaluate the bids instead of embarking on a new bidding process. Such approach might not be fair, especially insofar as both Cybko and Configen will have to present further documents, bearing in mind the aspects referred to *supra,* whilst other potential bidders should be allowed an opportunity to lodge fresh bids as well. It will be just, equitable and fair to all previous bidders as well as prospective bidders to allow everyone the opportunity to present their bids once a fresh invitation for tenders has been advertised.

VIII <u>COSTS</u>

[36] Cybko Security has obtained substantial success in the application and there is no reason why it should not be granted its costs, such costs to be paid by Dihlabeng and Configen, jointly and severally, the one to pay the other to be absolved.

[37] The application against Four Rivers cannot succeed merely because it is common cause that Four Rivers was not the successful bidder and should not have been cited as a party to these proceedings. However, it is apparent that both Dihlabeng and Four Rivers should be blamed for the fact that Four Rivers were cited, especially bearing in mind Dihlabeng's stance taken in the answering affidavits as well as prior to the filing of the application. Four Rivers caused the confusion by allowing Configen to rely on its documentation in the bidding process. This confused Dihlabeng in particular. When Configen was joined and presented a different version than that of Dihlabeng, Cybko Security decided probably out of caution to maintain its position and not to withdraw against Four Rivers. In normal circumstances Cybko Security would be ordered to pay the costs of Four Rivers as the successful litigant. However, matters are more complicated *in casu* as Dihlabeng continued throughout to rely on the version that the contract was in fact and in law awarded to Four Rivers.

[38] In exercising my discretion and bearing in mind that Four Rivers and Configen are Montsitsi's chosen vehicles for doing business, he being the sole director and shareholder of Four Rivers and the sole member of Configen who also made use of the same attorneys and counsel, I have decided to make no costs order against Cybko Security. I considered granting an order in terms whereof Dihlabeng and Configen be liable for all of Cybko Security's costs, but concluded that it would be more appropriate and fair to all the parties if such order is not made. Instead, these

two parties will be held liable for Cybko Security's costs incurred in its application against Four Rivers until receipt of Four Rivers' answering affidavit. Cybko Security and Four Rivers shall be liable for their own costs in respect of the application brought against Four Rivers after receipt of Four Rivers' answering affidavit.

[39] The costs of 19 September 2016 has stood over for later adjudication. All the parties were ready to argue the matter on that date, but unfortunately one of the judges' application papers were not 100% in order, causing them to decline to hear the matter as we were informed by counsel. The parties are *ad idem* that they should accept responsibility for payment of their own costs wasted in the process.

IX <u>ORDERS</u>

[40] Therefore the following orders are made:

1. First respondent's decision to award a tender to third respondent for the provision of physical security services for a period three years under contract number MUN03/2015 is reviewed, declared unlawful and set aside.
2. The service level agreement concluded between first and third respondents in execution of the decision in paragraph 1 *supra* is declared unlawful and set aside.
3. First respondent is directed to re-advertise the aforesaid tender in respect of security services within 60 days from the date of this order.

4. The orders of invalidity in paragraphs 1 and 2 *supra* are suspended until completion of the tender process contemplated in paragraph 3 *supra*, where after it will take effect.
5. Each party is responsible for the payment of its own costs in respect of the events of 19 September 2016.
6. First and third respondents shall pay applicant's costs of the application, including the costs incurred in its application against second respondent until receipt of second respondent's answering affidavit, such costs to be paid jointly and severally, the one to pay the other to be absolved.
7. Applicant and second respondent shall be liable for their own costs pertaining to the application brought against second respondent, except for the costs order made in paragraph 6 *supra*.

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J. P. DAFFUE, J

I concur

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S. CHESIWE, AJ

On behalf of applicant: Adv. S. Grobler
Instructed by:
Willers Attorneys

BLOEMFONTEIN

On behalf of 1st respondent: Adv. F.W. Botes SC
Instructed by:
Phatsoane Henney Attorneys
BLOEMFONTEIN

On behalf of 2nd and 3rd Respondent: Adv. W. J. Groenewald
with Adv. C.D. Pienaar
Instructed by:
Kramer Weihmann & Joubert

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