



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 2025-077739

In the matter between:

J S MARITIME PARTNERS (PTY) LTD

Applicant

and

**MINISTER OF FORESTRY, FISHERIES AND
THE ENVIRONMENT**

First respondent

**DIRECTOR-GENERAL OF FORESTRY, FISHERIES
AND THE ENVIRONMENT**

Second respondent

REASONS DELIVERED ON 30 SEPTEMBER 2025

VAN ZYL AJ:

Introduction

1. On 12 June 2025 I granted the following order:

1.1. The applicant's non-compliance with the forms, time periods and service requirements of the Uniform Rules of Court is condoned, and

Part A of the application is heard as one of urgency under Rule 6(12).

1.2. Part A of the application is dismissed on the basis that the applicant has not satisfied the requirements for the grant of an interim interdict.

1.3. Each party will pay its own costs in respect of Part A of the application.

2. These are the reasons for the order.

Background

3. The background to these proceedings is essentially common cause. On 11 April 2025 the Department of Forestry, Fisheries and the Environment, published a tender¹ for the appointment of a service provider for the crewing and manning, technical and commercial management of the polar supply and research vessel SA Agulhas II and the environmental and research vessel RV Algoa. The contract was to endure for a period of 60 months. The closing date for bids was 23 May 2025.

4. The current service provider is African Marine Solutions Group (Pty) Ltd ("AMSOL"), whose contract has been extended to September 2025. This was, in fact, the third time that this bid invitation had been issued. AMSOL's contract had previously been extended to March 2025, and it was thereafter extended for a further six months to accommodate the new round of tendering and adjudicating.

5. The two vessels in question are valuable State-owned assets, and the tender for their operation and technical management was published pursuant to the statutory and executive mandates of the respondents in relation to environmental and oceanographic scientific research and the South African Antarctic Expedition ("SANAE") research stations located in Antarctica and the Sub-Antarctic Marion and Gough islands. The effective operation of the

¹ Under Bid Number DFFE-8004.

SANAE research stations is a matter of strategic national interest for South Africa, which is an original signatory to the Antarctic Treaty , signed by twelve countries on 1 December 1959.

6. The vessels are the only South African vessels capable of providing multi-purpose logistics support to the SANA E and dedicated scientific environmental research around the South African coastline. It is imperative that the SA Agulhas II undertake annual relief voyages to the Antarctic region between December and March each year to deliver *inter alia* overwintering supplies for the South African research base in Antarctica, and to provide the transport for the overwintering team and base maintenance personnel.
7. The SA Agulhas was scheduled to depart on its next voyage to the South African scientific research bases on the sub-Antarctic Marion and Gough Islands during September 2025. The SANA E annual relief voyage to the South African research base on the Antarctic ice shelf was scheduled for departure during December 2025, and it was anticipated that both these would be undertaken by a service provider appointed pursuant to the tender.
8. A compulsory briefing session in relation to the tender was held on 23 April 2025. The session was attended by a representative of the applicant, who raised questions orally, and who was requested to direct written questions to the Department. These questions were responded to on 14 May 2025.
9. By the closing date of 23 May 2025 three bids had been received, and the bid prices were made public on 27 May 2025. The tender evaluation processes were ongoing at the time of the institution of this application.
10. The applicant chose not to submit a bid in response to the tender, but instead instituted an application in two parts, of which Part A was before this Court. It sought, in essence, an interdict prohibiting the respondents from awarding the tender pending the outcome of the final relief sought in Part B of the application.

11. Part B entailed an application for judicial review, seeking the setting aside of the tender, alternatively, seeking the following relief:

- "2.1 that the answers provided by the Respondents are declared to be insufficient and are reviewed and set aside;*
- 2.2 that the Respondents' decision to ignore, alternatively reject, the Applicant's Letter of Protest is reviewed and set aside;*
- 2.3 that the Respondents' decision to ignore, alternatively reject, the Applicant's Letter Requesting an Extension of the Closing Date is reviewed and set aside;*
- 2.4 that the Applicant be provided with proper answers to the questions raised by it; as set out in the Founding Affidavit to enable it to Tender;*
- 2.5 that the Closing Date of the Tender be extended to a date to be determined by this Honourable Court to enable the Applicant to Tender;*
- 2.6 that **TENDER DFFE 8004 (25/26) SA AGULHAS II** be remitted to the Respondents for a reconsideration of the point allocations therein contained, upon the consideration of relevant and material factors, as set out in the Founding Affidavit."*

The respondents' points *in limine*

12. The respondents raised three points *in limine* in opposition to the application, part from their opposition on the merits.
13. I refer to each of these points only briefly, as I was of the view that, although there might have been merit in them, it was in the interests of justice that the merits of the application be considered insofar as it entailed the grant of interdictory relief.

Lack of urgency

14. The respondents took issue with the urgency with which the application was brought, but I was of the view that it was sufficiently urgent to warrant determination on the urgent roll.

15. I agreed with the respondents' argument that the urgency was to some extent self-created. The applicant's complaint lay with the alleged lack of information in the tender documents, which had been available since 11 April 2025, and not with the adjudication of the tender. It waited until 28 May 2025, after receipt of the respondents' answers on 14 May 2025, to bring an urgent application seeking to halt the adjudication process, which application turned out to be voluminous and strenuously opposed despite the extremely tight timelines posed for the delivery of answering papers.
16. It is well-established that a court will first consider whether an applicant has averred facts which, objectively speaking, demonstrate urgency. Where the application lacks the requisite element or degree of urgency, the court may, for that reason, decline to exercise its powers under Rule 6(12)(a).² In other words, where the facts indicate that the urgency is self-created, an applicant will not necessarily be entertained.
17. Essentially, however, the question was whether the applicant demonstrated that it would not be afforded substantial redress at a hearing in due course.³ In the present case that question was answered in the affirmative. This Court had, moreover, considered the papers, and the parties had delivered detailed heads of argument. The matter was, despite the short period within which it proceeded to court, well-ventilated and ready for determination. I was accordingly satisfied that it should be entertained.

Non joinder

18. The applicant, quite obviously, failed to join any of the three bidders who had submitted bids. It appears from the papers that the applicant did not take steps to ascertain the identity of the bidders prior to the issue of non-joinder being raised in the answering papers.

² See *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA) para 9.

³ *East Rock Trading 7 (Pty) Ltd and another v Eagle Valley Granite (Pty) Ltd and others* [2011] ZAGPJHC 196 (23 September 2011) para 6.

19. The legal principles underlying the law on joinder are well-known:

*"The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether .a party that is alleged to be a necessary party has a legal interest in the subject matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned."*⁴

20. No court can make findings adverse to any person's interests, without that person first being a party to the proceedings before it.⁵
21. The applicant contended in reply that its application was distinguishable from that of an interdict pending the review of a tender which had been awarded since, in the latter case, a successful bidder has a direct and substantial interest because if the review is successful, it will no longer be the successful tenderer. The present case, however, sought to review and set aside the whole tender, and potential bidders did not have a direct and substantial interest because they did not have any right to be awarded the tender.
22. I failed to see the logic in this argument because it would deprive the applicant itself of a direct and substantial interest to challenge the bid. It disregarded, in any event, the import of and consequences arising from the interim interdictory relief sought which, if granted, would be to interdict the respondents, pending the determination of the review application, from proceeding with the evaluation and adjudication of the tender. The bidders undeniably had an expectation in relation to the award of the tender.
23. The applicant was remiss in failing to cite the bidders, whose identities could easily have been obtained from the respondents,⁶ and this failure would

⁴ *Gordon v Department of Health: Kwazulu-Natal* 2008 (6) SA 522 (SCA) para 9.

⁵ *Matjhabeng Local Municipality v Eskom Holdings Limited and others; Mkhonto and others v Compensation Solutions (Pty) Limited* 2018 (1) SA 1 (CC) para 92.

⁶ See *Pretoria FM NPC v Chairman of the Independent Communications Authority of South Africa* [2023] ZAGPPHC 18 (16 January 2023) para 23: "... the other applicants in the ITP-R process do have a vested interest in the issues raised and the outcome of this application and should have been joined. The fact that the applicant did not know the identity of the other

undoubtedly loom large during the determination of Part B of the application. The bidders' bid prices had already been disclosed, and the potential reopening of the tender process would thus be prejudicial to them. As to AMSOL in particular the relief sought by the applicant in Part B (quoted above) could arguably be regarded as involving its commercial information, the disclosure of which would obviously affect AMSOL's rights and interests.

24. I was however willing, specifically for the purposes of Part A of the application and in light of the view I took of the merits of the applicant's case, to accept the applicant's submission that the applicant had addressed correspondence to the three bidders notifying them of the application, and therefore that they were aware of the proceedings. One of the bidders indicated that it would not join in the proceedings. Another (AMSOL) reserved its rights but declined to take part in the hearing. The third bidder did not respond.
25. I did not wish to risk elevating form over substance in circumstances where the bidders, if joined, would probably abide, and thus dealt with the application on that basis.

Lack of standing

26. It was clear from the content of the founding and replying affidavits that the applicant essentially sought relief in its own interest, although it indicated that it also acted in the public interest.
27. The respondents argued that, because the applicant had failed to submit a bid, the applicant had no standing to seek the relief sought in either Part A or Part B of its notice of motion.⁷
28. I had doubts as to whether the applicant had made out a case based on

applicants is no excuse and this could have easily been obtained from ICASA."

The court nevertheless proceeded to consider the interim relief sought, in the event that its finding on non-joinder was wrong (at para 24).

⁷ With reference to *Areva NP Incorporated in France v Eskom Holdings Soc Limited and others* 2017 (6) SA 621 (CC) para 36.

standing in the public interest, given the requirements in that regard as enunciated in, for example, *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others*.⁸ That is an issue that will have to be considered by the review court as far as Part B of the application is concerned.

29. For the purposes of Part A, I accepted that the applicant *prima facie* had standing on the principles set out in *SMEC South Africa (Pty) Ltd v City of Cape Town and others; SMEC South Africa (Pty) Ltd v City of Cape Town and others*:⁹

“[92] There are cases in which vagueness, ambiguity or inconsistency in tender documents has led to the award of tenders being set aside at the suit of disappointed bidders. While there is no reason to doubt that a disappointed bidder may seek to impeach an award on this basis, the argument in those cases did not focus attention on whether the reviewable decision is simply the award of the tender or whether such a review necessarily encompasses an attack on the decision to issue the tender on terms suffering from vitiating vagueness, ambiguity or inconsistency. This question is important, having regard to the time-limit for review proceedings laid down section 7(1) of PAJA. ACSA¹⁰ is an example of a case where the decision to issue the tender was explicitly challenged. In principle, it seems undesirable that a bidder should be at liberty to “take a chance” in the hope that it will be awarded the tender, keeping in reserve an attack on the validity of the tender terms should it be unsuccessful in winning the bid. However, in view of the conclusion I have reached on other aspects, I need not finally decide this point.”

30. I accordingly determined the relief sought in Part A on that basis.

The requirements for the grant of interim relief

31. The requirements for the grant of an interim interdict are the following:¹¹

⁸ 1996 (1) SA 984 (CC) para 234.

⁹ [2022] ZAWCHC 131 (23 June 2022) para 92.

¹⁰ *Airports Company South Africa SOC Ltd v Imperial Group Ltd and others* 2020 (4) SA 17 (SCA).

¹¹ See *Prest Interlocutory Interdicts* (1993) at 54-86.

- 31.1. A *prima facie* right – this need not be shown on a balance of probabilities, but is sufficiently proved if *prima facie* established though open to some doubt. The stronger the right is, the less need there is for the balance of convenience to be considered.
- 31.2. A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted – this is a harm that a reasonable person might entertain on being faced with certain facts, and is an objective test.
- 31.3. A balance of convenience favouring the grant of the interim relief – the Court must weigh the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice to the respondent if it is.
- 31.4. The absence of any other satisfactory remedy in the circumstances.
32. The proper approach in determining whether to grant an interim interdict is to take the facts set out by the applicant, together with any facts set out by the respondents which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial.¹²
33. All of these requirements must be met by an applicant seeking an interim interdict, and even if they are all met, the Court still has the discretion to refuse to grant the interdict sought. By contrast, if an applicant fails to satisfy all four requirements mentioned above, the Court has no discretion to grant an interdict.
34. An important consideration in the present matter is that it is common cause that tender for the operation and management of the vessels has been published pursuant to the respondents' executive and statutory mandates in

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Gool v Minister of Justice 1955 (2) SA 682 (C) at 688D-E.

relation to research underlying the functions of the vessels. The effect of the interim relief sought would constitute a restraint on the exercise of these statutory and executive powers and mandates.

35. A court may grant a temporary restraining order against the exercise of statutory or executive powers only in exceptional cases, and when a strong case for that relief has been made out.¹³ The Court must recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation, and dissemination of public resources. The question is thus not merely whether an interim interdict against a state functionary is competent, but also whether it is constitutionally appropriate to grant the interdict.¹⁴ The Court must be satisfied that the applicant for an interdict in these types of cases has good prospects of success in the main review, based on strong grounds which are likely to succeed.¹⁵
36. In the present matter, I did not think that the applicant cleared the hurdles posed, firstly, by the requirements for the grant of the relief sought and, secondly, by the prospects of success requirement. I consider this in the course of the discussion below.

Did the applicant demonstrate a *prima facie* right?

37. At a basic level, I did not consider that the applicant had shown a *prima facie* right. It sought to rely on its right to lawful, reasonable, and procedurally fair administrative action under section 33 of the Constitution¹⁶ as the basis for its application to review and set aside what it referred to as "*administrative law decisions*".
38. An applicant can, however, not rely on a professed right to review the

¹³ *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) paras 41-45.

¹⁴ *National Treasury supra* para 66.

¹⁵ *Economic Freedom Fighters v Gordhan* 2020 (6) SA 325 (CC) para 42.

¹⁶ The Constitution of the Republic of South Africa, 1996.

impugned decisions based on section 33 of the Constitution. The *prima facie* right that must be established for an interim interdict is not simply an applicant's right to approach the court for a review:¹⁷

"Under the Setlogelo test, the prima facie right a claimant must establish is not .merely the right to approach a court in order to. review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite."

39. The nature of the *prima facie* right asserted by the applicant was described in the founding papers either as *"the right or reasonable apprehension of a right to be, alternatively a legitimate interest in being, appointed as the preferred bidder"*, a *prima facie* right *"to tender once it has been provided with the information reasonably required to do so"*, or a right based on the notion that the applicant *"...has been unlawfully, unduly and unfairly excluded from the tender process."*
40. I agreed with the respondents' submission that none of these bases on which the applicant asserted its *prima facie* right were ultimately sustainable. The applicant approached the *prima facie* right enquiry squarely by focusing on the grounds on which it suggested that it had good prospects of success in the review application. This was not the correct approach for determination of the first requirement underpinning the grant of an interim interdict. The question was not whether the applicant had established the existence of a *prima facie* right on the basis of its alleged prospects of success in the review (although its prospects fell to be considered given the impact of the interdict sought),¹⁸ but rather whether the applicant had demonstrated that it had a

¹⁷ *National Treasury supra* para 50.

¹⁸ See, for example, *Economic Freedom Fighters v Gordhan supra* para 54: *"...The interim interdict test, which has been developed through case law – culminating in the OUTA test – is sound and has sufficient safeguards to ensure that the Public Protector is not denuded of her*

prima facie right which was threatened by irreparable pending or imminent irreparable harm. This the applicant had not done.

41. It seemed to me, in any event, that the applicant did not have good prospects of success on review. I say this mindful of the fact that the final determination of the merits of the review application lies with the review court, and therefore discuss the main grounds of review only briefly.

The alleged undue influence issue

42. The applicant made allegations regarding irregularities in the tender process without laying a factual foundation therefor. The applicant's main contention was that it believed the tender process to have been unduly influenced to favour AMSOL, the incumbent service provider.
43. Apart from the fact that AMSOL was not cited as a respondent to the application and thus did not respond to these accusations, the applicant's case in this respect was speculative. It alleges that the conduct of the Department "*reflects conduct made for an ulterior purpose and in bad faith as a direct-result of undue influence.*" There is no factual basis for this contention in the founding affidavit and, despite an invitation to provide the require=site detail by the respondents in their answering papers, none in the replying affidavit.
44. The respondents pointed out that the procurement process relating to the bid specifications in the terms of reference of the tender had been independently vetted and subjected to quality assurance review by an external firm specializing in internal audit, forensics, and related advisory work. This firm's advice had been sought and implemented prior to the advertisement of the tender. The internal verification and vetting process were also explained.

powers when an interim order is granted against her. In light of OUTA, it is evident that the interim interdict test must be informed by the normative scheme and democratic principles buttressed by the Constitution. This test is broad and supple enough to take into account the constitutional role and functions of the Public Protector and to ensure that she is not inadvertently stripped of her powers."

None of the respondents' statements regarding the independent external vetting of this procurement process and its internal approval processes relating to the tender specifications were meaningfully disputed in reply.

45. There was no basis on which undue influence, a form of corruption, could be inferred from the allegations in the founding affidavit. The drawing of inferences must be based on admitted or proven facts, not matters of conjecture or speculation.¹⁹

The attendance register issue

46. This was a storm in a teacup. The applicant complained that an attendance register completed at the compulsory briefing session on 23 April 2025 had been altered afterwards. The respondents provided a full explanation in this respect, which was not disputed in reply.

The respondents' alleged failure (adequately) to respond to the applicant's questions

47. The applicant complained that the respondents failed to respond to its questions, which it regarded as being crucial for the completion of its tender. The response ultimately given was too late.
48. It was common cause that the Department did respond to the applicant's questions on 14 May 2025, nine days before the closing date for the tender. The tender documents and detailed terms of reference had already been published a month prior, on 11 April 2025. The applicant did not explain, whether in its founding or its replying affidavit, precisely why it had not been able to prepare *any* aspect of a bid in response to the tender before 14 May 2025, or in the nine days thereafter.
49. Notably, two other bidders (as well as AMSOL) received the same tender documentation, and were able to submit bids by the tender closing date of 23

¹⁹ *A M and another v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA) para 21.

May 2025. The applicant placed much emphasis on the vast price differentials between those bidders, arguing that that showed that their bids were inaccurate – but that was an aspect to be determined by the Department in the evaluation of the bids in due course. It appeared that the applicant required commercial data in the form of the historical-spend data and the planned maintenance system of the incumbent service provider prior to submitting a bid.

50. If the tender and its terms of reference were as vague and unclear as the applicant held them out to be, the other two bidders would no doubt have directed similar questions to the Department. There was, however, no evidence of confusion on their part. The applicant's complaint that by the time it had been provided with answers to its questions it was too late to submit a bid thus had a hollow ring to it.
51. It had to be kept in mind that an invitation for the services required under the tender had initially been issued in October 2023, but it was cancelled in February 2024. It was re-issued in April 2024, with bidders being given 21 days to submit their bids. This process was cancelled in October-2024 and the tender was issued again in April 2025. In the 2025 process, potential bidders were given 42 days to submit a bid. There was no dispute that this period was double the 21 days minimum period that the National Treasury prescribed for bids to remain open.
52. It was also undisputed that various of the questions which the applicant claimed were insufficiently answered by the Department on 14 May 2025, had been asked by the applicant's representative (and answered) at the previous round in 2024 when the tender was not awarded. I accept the applicant's submission to the effect that those questions had been asked by a different representative as part of a different joint venture, and I do not know whether the two tenders were in all respects similar. Nevertheless, given the nature of the services required, there must have been some overlap. Why the applicant was unable to submit a bid on the most recent remained essentially unanswered, especially as bidders had been invited to indicate the bases on

which they determined their pricing - this was not a tender that would automatically be awarded to the lowest bidder. The applicant did not dispute that it knew of the submitted bids and prices tendered for the tender when had been advertised during 2023 and 2024.

53. The functionality criteria stipulated in the terms of reference, which were common cause, made it clear that this tender was one for the appointment of an experienced and qualified service provider who would be able to provide a complete suite of services on all operational and logistical aspects relating to the crewing, manning, technical administration, and enabling infrastructure necessary for the vessels safely and effectively to perform their functions. The functionality criteria included the bidders' experience and track record in the field of ship management, technical management, crew management, and commercial management services, including the qualifications and experience of the project team leader assigned to the project, existing enabling support structure of the bidder, and the bidder's experience and track record with successfully completed projects.
54. The experience and qualifications of potential service providers should thus logically be taken into account when assessing the reasonableness of a complaint by a bidder that a tender document was vague and failed reasonably to provide information necessary for the submission of a bid. The applicant regarded itself, quite correctly so, qualified and experienced in the subject matter of the tender. It was common cause (although not disclosed in the founding affidavit) that the applicant owns and operates the SA Agulhas I, the vessel previously commissioned by the South African government to supply the SANAE research bases located in Antarctica and the Sub-Antarctic Marion and Gough islands. The applicant had previously purchased and refitted the SA Agulhas I for the purpose of performing similar functions to the SA Agulhas II, and it is currently available for charter as a fully operational research vessel for polar and offshore supply and support. The applicant strenuously emphasized the differences between the vessels and the fact that the information application to the one would not apply to the other. Its argument in this respect did not, however, detract from the fact of its

experience and knowledge in the field.

55. The Department, in responding to the applicant's queries regarding the tender, accordingly pointed out that bidders with adequate experience in managing vessels should use their experience to articulate the assumptions underlying their bids. For example, in relation to questions regarding historical true spend and crew requirements, the Department stated that the applicant should use its experience to estimate and extrapolate in its bid. Assumptions made during the bidding and in their proposals should be clearly articulated. These were the types of answers that the applicant took umbrage at. There is, however, nothing unlawful or irrational about a tender process which evaluates a bidder's proposal for services on the basis of clearly articulated assumptions provided by that bidder.
56. It must be kept in mind that the applicant had exercised its right to seek clarification and submit questions in respect of any of the requirements of the tender process at the compulsory briefing session on 23 April 2025, and it had the chance to clarify the meaning of any clause in the tender about which it was unclear prior to completing and submitting a bid, as long as this was done, in terms of the tender document, prior to the 10 days preceding the bid. In responding to the applicant's questions, the Department was obliged to treat all potential bidders equally and fairly. Had the Department made special enquiries with one bidder, for example AMSOL, regarding factual data relating to the pricing of AMSOL's operations or its bid, this could well have deprived the tender process of the essential fairness element of competitiveness. An extension of the period for the submission of bids at the behest of one potential tenderer could have resulted in accusations of undue influence or bias from other bidders.
57. Procedural fairness in tender processes depends on the circumstances of each case. The essential attributes of fairness, transparency, competitiveness and cost effectiveness of the tender process have to be

maintained.²⁰ The applicant could accordingly not rely on a right to be given an opportunity to be provided with as much information as it subjectively considered sufficient to submit a bid for the tender. Whilst vagueness can render a procurement process procedurally unfair, the test for vagueness is reasonable certainty, not absolute certainty or perfect lucidity.²¹

58. The review court will no doubt analyse the Department's responses to all of the questions posed by the applicant to determine whether the tender process was unlawful because of vagueness or insufficient information. I do not intend doing so. Suffice it to say on consideration of the evidence on record that there was, on the information provided by the Department, no clear explanation as to why the applicant could not have submitted a bid. The applicant was not excluded from the bid process – it chose not to submit a bid. I was constrained to agree with the respondents' submission that, shorn of verbiage, the applicant's actual complaint was not that the information provided by the Department was insufficient, but that the applicant disagreed with the technical evaluation criteria adopted by the respondents and how those criteria were to be assessed.
59. The determination of bid evaluation criteria and their weighting are, however, matters of discretionary executive policy determination, and court will not readily interfere. Where a functionary is entrusted with a discretion (in this case, the determination of bid evaluation criteria) the manner of their assessment and the relative weight to be attached to particular factors, is a matter for the functionary to decide. As long it acts in good faith, reasonably and rationally, a court cannot interfere.²²

The incumbent's "unfair advantage"

60. The applicant's grounds of review relied heavily on its argument that AMSOL's

²⁰ *Metro Projects CC v Klerksdorp Local Municipality* 2004 (1) SA 16 (SCA) para 21.

²¹ *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others* 2014 (1) SA 604 (CC) para 87.

²² *MEC for Environmental Affairs and Development Planning v Clairisons CC* 2013 (6) SA 235 (SCA) para 22.

current operation of the two vessels gave it an unfair advantage over competitors when it came to bidding. It must however be clear to anyone involved in public procurement that there is always an incumbent who might wish to bid afresh for the relevant contract. The applicant's position was not special in that respect.

61. The applicant contended that the *"Incumbent Supplier has access to all the information as they have been managing these vessels for more than 10 years. That fact in itself gives them an unfair advantage and it would be impossible to compete with that level of institutional knowledge. This creates a situation whereby no new entrant will ever have a fair opportunity to enter the market. This by default makes the tender process fundamentally flawed as it creates a barrier to the possibility of any new entrants into this sphere. This results in the situation whereby one service provider has access to all relevant information and the other bidders are forced to guesstimate for their costing which essentially guarantees their estimates to be more factual as they are based on actual data rather than assumptions."*
62. This argument did not, in my view, give rise to a basis for review, but was a complaint about how the world works. Inevitably, whenever a contract comes to an end and a government department issues a tender, there would be an incumbent who had previously rendered the service which forms the subject matter of the tender. This does not entitle any new bidder effectively to a handbook on how the incumbent elected to fulfil the relevant service. The mere fact that an incumbent service provider has the benefit of previously having performed the services does not render a subsequent procurement process in which that service provider participates irrational, unfair, or unlawful.
63. The purpose of the trite requirement that a tender document must be reasonably clear is to ensure that a tenderer knows what information is expected of it for the merits of its bid fairly to be assessed. The purpose is not to ensure that a tenderer is given all information it requires from the procuring entity to enable such bidder to submit its most advantageous tender. The

applicant did, in any event, not submit a bid at all.

64. The respondents referred to the position adopted in other jurisdictions, in particularly in European Union ("EU") law. The approach of the European Court of Justice ("ECJ") on the question of incumbent advantage in public procurement is instructive. It has held that the principle of equal treatment in procurement processes would be infringed by a blanket exclusion of incumbent service providers from future bidding for the same service. In *Fabricom SA v Belgian State (Cases- C21/03 and C-34/03)*,²³ for example, the ECJ endorsed the view that the principle of equal treatment is infringed by a rule that prohibited an economic operator from bidding for a public contract where such an entity had been involved in preparatory works leading to the tender in question.
65. In *Evropaiki Dynamiki v Commission of the European Communities*,²⁴ the ECJ dealt with the issue of an alleged inherent *de facto* advantage of an incumbent service provider bidding in a subsequent procurement process . The ECJ held as follows:

"... The principle that tenderers should be treated equally does not place any obligation upon the contracting authority to neutralise absolutely all the advantages enjoyed by a tenderer where the existing contractor is a subcontractor of that party. To accept that it is necessary to neutralise in all respects the advantages enjoyed by an existing contractor or a tenderer connected to that party by virtue of a subcontract would, moreover, have consequences that are contrary to the interests of the service of the contracting institution in that such neutralisation would entail additional cost and effort for that institution. Nevertheless, in order to comply with the principle of equal treatment in this particular situation, a balance must be struck between the

²³ Judgment of the ECJ (Second Chamber) of 3 March 2025.

²⁴ Judgment of the Court of First Instance (Third Chamber) of 12 March 2008 paras 72-74. See also *Proof IT SIA v European Institute for Gender Equality (Case T-10117)*, Judgment of the ECJ (Third Chamber) dated 16 October 2018 para 187: *"... the alleged advantage of the successful tenderer ... is not the consequence of any conduct on the part of the contracting authority. Unless such a contractor were automatically excluded from any new call for tenders or, indeed, were forbidden from having part of the contract subcontracted to it, it is in fact inevitable that an advantage will be conferred upon an existing contractor or the tenderer connected to that party by virtue of a subcontract. since that is inherent in any situation in which a contracting authority decides to initiate a tendering procedure for the award of a contract which has been performed, up to that point. by a single contractor."*

interests involved. Thus, in order to protect as far as possible the principle of equal treatment as between tenderers and to avoid consequences that are contrary to the interests of the service of the contracting institution, the potential advantages of the existing contractor or a tenderer connected to that party by virtue of a subcontract must none the less be neutralised, but only to the extent that it is technically easy to effect such neutralisation. where it is economically acceptable and where it does not infringe the rights of the existing contractor or the said tenderer."

66. This approach is, with respect, sensible. An incumbent provider will inevitably have an advantage that other tenderers will not. This is because they will have knowledge of the subject matter of the contract. Such an inherent advantage does not render the procurement process unfair.
67. In the present case the tender document, read together with the information provided by the respondents to potential bidders at the compulsory briefing session, created a level playing field by setting out in advance the criteria on which their proposals would be judged. There is no evidence that the tender terms of reference have been deliberately skewed in favour of a particular bidder, or that the outcome of the tender process was a foregone conclusion.
68. The applicant was of the view that a technical inspection of the vessel would have assisted in the formulation of its bid in relation to crew, maintenance, fuel rates, and insurance. However, the factors that inform these issues were in the bid documentation and within the applicant's knowledge and experience, and not on the vessels. In the circumstances, I do not regard the applicant as having a reasonable prospect of succeeding on this ground of review.

A reasonable apprehension of harm?

69. An applicant seeking an interim interdict must show that, without the interdict being granted, it can reasonably expect to be prejudiced irreparably. The applicant's case was weak on this requirement.

70. Its main contention in this respect was of a conclusory nature, namely that *"unreasonable delays in the granting of the interdict sought by the Applicant would result in losses and damages being suffered and would accordingly occasion significant hardship and prejudice, not only for the Applicant but for the people of South Africa, the State and the related governmental departments that are the subject of the tenders."*
71. The applicant provided no factual basis for the alleged *"losses and damages being suffered"* or the feared *"significant hardship and prejudice"*. its allegations were in any event contradictory: on the one hand, the applicant claimed that the continuation of the tender process would result in it suffering unspecified losses and damages; on the other hand, the applicant did not claim that it would be entitled to be awarded the tender if it succeeded in its Part B relief. At the core of it the applicant contended, on its own version, for allegedly irreparable harm on a hypothetical or speculative scenario, in which it *"would"* suffer unspecified *"losses and damages"*. This is an obvious hurdle in the way of the applicant satisfying this second requirement for the grant of interim relief.
72. This is of course not the end of the enquiry. An applicant must also show that it has no other way of addressing the harm it fears. The applicant chose not to submit a bid, and had no right to be awarded the tender. It could hardly lay the blame for the harm and for the remedies (or lack of remedies) it had at its disposal at the respondents' door.
73. I was accordingly in agreement with the submission made by the respondents' counsel that the applicant failed to show compliance with this requirement for interdictory relief, which in the present instance could only be granted *"in the clearest of cases"*, on such a tenuous basis.

The balance of convenience

74. If I was wrong in the determination of the first two requirements (in particular, the view that the applicant failed to demonstrate the existence of a *prima facie*

right (even a weak one) or a reasonable prospect of success on review), then I considered that an interim interdict should not be granted because the balance of convenience did not favour the applicant.

75. This requirement is to some extent linked with the *prima facie* right for the grant of an interim interdict, and highlights the discretion a court has in the grant of interim relief:²⁵

"In every case of an application for an interdict pendente lite the court has a discretion whether or not to grant the application. It exercises this discretion upon consideration of all the circumstances and particularly upon a consideration of the probabilities of success of the applicant in the action. It considers the nature of the injury which the respondent, on the one hand, will suffer if the application is granted and he should ultimately turn out to be right,' and that which the applicant, on the other hand, might sustain if the application is refused and he should ultimately turn out to be right. For though there may be no balance of probability that the applicant will succeed in the action, it may be proper to grant an interdict where the balance of convenience is strongly in favour of doing so, just as it may be proper to refuse the application where the probabilities favour the applicant if the balance of convenience is against the grant of interim relief. The exercise of the court's discretion usually resolves itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less the need for such balance to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour him."

76. The applicant alleged in its founding affidavit that the balance of convenience favoured it because "...the interdicting of the tender process does not cause any undue prejudice to the State." It half-concedes, nevertheless, that in the event that there may be any prejudice to the State, "... such prejudice is justifiable in the circumstances." The exact nature of such justification is unclear.
77. It appeared from the answering papers that the grant of an interim order would stop the current procurement process, and would prejudice the

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Prest *The Law and Practice of Interdicts* (1996) at 79. My emphasis.

respondents' responsibility to ensure that a qualified service provider was appointed to manage its vessels before they depart on the missions scheduled for September and December 2025. I agreed with the respondent that the prejudice was obvious. There was an urgent need for the services to be provided. The public interest would not be served by a suspension of the tender process for a third time, which could result in delays in the execution of the planned 2025 projects. Apart from the time wasted, the entire process would be vitiated and would for different reasons be rendered unfair given that the pricing of bidders (apart from the applicant, who did not bid) would have been disclosed.

78. The applicant did not dispute that the respondents' current contract with the incumbent service provider was in force until September 2025, or that a new vessel management company had to be appointed and in place by then as the next voyage of the SA Agulhas II was scheduled shortly thereafter. It was common cause that the tender process itself had to be finalised by the end of June or July 2025 to allow for a sustainable handover period, ideally a period of three months, to any new service provider before the termination of the current contract. There was, notably, no dispute that if an interdict was granted, the ensuing review proceedings would probably not be finalised by July 2025.
79. The only real response by the applicant to the respondents' allegations regarding the prejudice that would follow if the interim interdict were to be granted, was that the respondents could extend the current service provider's contract. This attitude, for what it is worth, indicated that the applicant had been aware of AMSOL's legal interest in the relief sought, and still failed to join it to this application. It was in any event not an answer to the respondents' case on prejudice.
80. There could be no guarantee of such an extension, which would have had to be agreed. An extension would also incur additional expenditure by the respondents beyond the existing contractual terms of the agreement with AMSOL, with a knock-on effect on the departmental budget. An extension

would, moreover, not address the prejudice to the respondents arising from the time wasted if the entire process thus far was effectively vitiated because the pricing of the bidders had already been disclosed, and the applicant ultimately failed in its review application. This would prejudice not only of the respondents but also the current bidders.

81. I was therefore not convinced that the applicant had demonstrated the greater potential harm should its interdict application be rejected. The balance of convenience did not favour it when compared to the respondents' position.

No other satisfactory remedy

82. The applicant accordingly failed to satisfy the first three requirements for the grant of an interim interdict. It was, in the circumstances, not strictly necessary to consider whether it had any other satisfactory remedy at its disposal.
83. The applicant argued that, were the tender allowed to proceed, it would enjoy no claim for damages other than for out-of-pocket expenses, and thus did not have an alternative remedy. This contention was not entirely correct, because the applicant would possibly have a claim for compensation in relation to a loss of profits under the Promotion of Administrative Justice Act 3 of 2000 should it establish its standing, and if it were to be successful in the review and in establishing some form of undue influence or corruption in the tender process as it implies in its founding affidavit.²⁶

“[54] ... Loss is sustained relative to the hypothetical situation in which the defendant does not commit the delict. Had the respondent lawfully evaluated and awarded the tender, the opportunity that the applicant claims it lost – the tender – would not have become a nullity. And, assuming that causation is established, it would have been able to realise that opportunity through the award of the tender and would thus have accrued profits. Relative to this hypothetical situation, therefore, the applicant did

²⁶ See the detailed discussion in *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2023 (2) SA 31 (CC) paras 28-56. My emphasis.

sustain loss. Put differently, the applicant is economically worse off than it would have been had the tender been lawfully adjudicated. The nullity of a tender process does not foreclose the possibility of a compensatory claim for loss of profit.

[55] In short, therefore, a tenderer in the position of the applicant is, in appropriate circumstances, entitled to recover its lost profits in terms of PAJA. Generally, an order setting aside a decision and remitting it to the decision-maker for a fresh determination or, in exceptional circumstances, an order of substitution will suffice to vindicate the interests of both the public and the aggrieved tenderer. But that will not always be the case. The relief available in terms of section 8 is exemplary rather than exhaustive. This is apparent from the language of section 8(1) which provides that a court may grant “any order that is just and equitable, including” the relief detailed in that section. Undue weight should therefore not be accorded to the fact that section 8(1)(c)(i), which provides for remittal, is framed disjunctively from section 8(1)(c)(ii)(bb), which provides for compensatory relief. Likewise, the fact that section 8(1)(c)(ii)(aa), which provides for substitution, is framed disjunctively from section 8(1)(c)(ii)(bb), does not mean that an order of substitution is, in all cases, a true alternative to a compensatory order.”

84. In any event, in the light of my findings in relation to the other requirements for the grant of an interim interdict, it is not necessary to debate this aspect.

Costs

85. Costs are in the discretion of the Court. This was constitutional litigation, and I was of the view that, for the purposes of Part A and despite the applicant litigating with a commercial motive, it would be fair that each party pay its own costs.²⁷

Conclusion

86. In the circumstances, I did not consider that the applicant had satisfied the requirements for the grant of the interim interdictory relief sought in

²⁷ *Nu Africa Duty Free Shops (Pty) Ltd v Minister of Finance and others* 2024 (1) SA 567 (CC) paras 149, and 279-281.

circumstances where the “clearest of cases”²⁸ was required, and I granted the order set out at the beginning of these reasons.

P. S. VAN ZYL
Acting Judge of the High Court

Appearances:

For the applicant:

Mr M. Nowitz and Mr M. Williams, instructed
by Dirk Kotze Attorneys

For the respondents:

Ms N. Bawa SC and Mr S. Magardie,
instructed by the State Attorney

²⁸ See *Economic Freedom Fighters v Gordhan supra* paras 40 and 48.