IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

Reportable

CASE NO: 2025-209746

In the matter between:

OCEAN ARK SHIPPING LTD	First Applicant
ASTRON ENERGY	Second Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Respondent

Coram:	HOLDERNESS J
Heard:	30 January 2026; 2 March 2026
Further submissions:	18 March 2026
Delivered:	24 April 2026

JUDGMENT

HOLDERNESS J

[1] On 22 September 2023, the *MT Essien* (the Vessel), owned by the first applicant, Ocean Ark Shipping Ltd (Ocean Ark) and registered under the flag of Singapore, entered South Africa's territorial waters, under its own power.[1]

[2] Since September 2023, the second applicant has been using the Vessel for coastwise transportation of certain fuel products in South African territorial waters.

[3] On 22 September 2023, the respondent, the Commissioner for South African Revenue Services (the Commissioner) after exercising its discretion to deem the Vessel to be imported, detained and thereafter seized the Vessel.

[4] This urgent application is for the temporary suspension of the Commissioner's decisions pertaining to the detention, seizure, and deemed importation of the Vessel belonging to the first applicant, and for the release of such Vessel, subject to the provision by the second applicant of a guarantee in respect of the value of the Vessel and any Valued-Added Tax (VAT), penalties and interest claimed by the respondent.

[1] The *MT Essien* is a 2013 built products motor tanker of 26827 gross tons which is duly registered on the flag of Singapore and bears IMO number 9617454.

[5] The first applicant, Ocean Ark Shipping Ltd (Ocean Ark) and the second applicant, Astron Energy (Pty) Ltd (Astron Energy) (collectively the applicants), apply for an order directing that the one-month period as contemplated in section 96(1)(a) of the Customs and Excise Act 91 of 1964 (the Customs Act) be reduced to the extent necessary in terms of section 96(1)(c)(ii) of that Act, and that pending the outcome of an application to be instituted by the applicants (within 30 days from the grant of interim relief), to review and set aside:

(i) The decision by the respondent, the Commissioner for the South African Revenue Service (the Commissioner) to detain the *MT Essien*, as communicated in the Commissioner's letter dated 27 March 2025 (the detention decision).

(ii) The decision by the Commissioner to seize the Vessel, as communicated in the Commissioner's letter dated 13 June 2025 (the seizure decision).

(iii) The decision by the Commissioner to determine the date of deemed importation, as communicated in its letter dated 22 September 2025 (the deemed importation decision); and

(iv) The decision by the Commissioner not to release the Vessel, as communicated in its letter dated 22 September 2025 (the section 93 decision); (collectively the administrative or the impugned decisions) and directing that the Commissioner's detention decision; seizure decision, deemed importation decision and section 93 decision are temporarily suspended in terms of section 172(1)(b) of the Constitution.

[6] The applicants further seek an order directing the Commissioner to release the Vessel from detention and seizure, together with all goods and cargo onboard the Vessel, immediately upon payment by the second applicant, Astron Energy, of any reasonable charges that have been incurred in connection with the detention and seizure of the Vessel, and provision by Astron Energy of a guarantee in the amount of R398 378 772.60, being the estimated value of the Vessel, and R124 239 531.95 for any VAT, VAT penalty and interest that may be charged in respect of the alleged importation of the Vessel, as set out by the Commissioner in the correspondence to ST Shipping and Transport Pte Ltd (ST Shipping) of 22 August 2025 issued by Lombard Insurance Company Limited (Lombard Insurance) on behalf of Astron Energy in favour of the Commissioner.[2]

[7] In the alternative, the applicants seek an order directing the Commissioner to release the Vessel from detention and seizure, together with all goods and cargo onboard the Vessel subject to the conditions in prayers 4.1 to 4.2 pending the outcome of an application to be made by the applicants, within 30 days from the grant of interim relief, to review and set aside the impugned decisions.

[8] Mr. Mullins SC, Ms. Pillay SC, Mr. Cooke, and Ms. Muller appeared on behalf of the applicants. Mr. Peter SC appeared for the respondent. I am indebted to counsel for their comprehensive and meticulously researched heads of arguments and additional notes, which have been invaluable to the court in the preparation of this judgment.

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[2] On the terms as set out in Annexure X attached to the Notice of Motion. A revised guarantee was provided after the hearing and is addressed below.

[9] As this is an application for interim relief pending the determination of review proceedings already launched in the Gauteng Division, the court is not required to decide, and does not decide, whether the impugned administrative decisions are ultimately valid. The enquiry is the narrower one: whether the applicants have established a prima facie right to the relief they seek in the review, together with the remaining requirements for an interim interdict.

[10] The legal questions raised, including the proper interpretation of section 10(1)(e) of the Customs and Excise Act, read with General Note F, and the lawfulness of the Commissioner's refusal to release the Vessel under section 93, are genuinely complex and are more appropriately resolved at the hearing of the review. Nothing in this judgment should be read as a definitive finding on any of them.

Factual background

[11] Ocean Ark is the present owner of the Vessel. It bought the Vessel under a contract of sale from Michael 5.

[12] On 30 November 2022 Michael 5,[3] as owner, entered into a time charter agreement with ST Shipping (Singapore),[4] as charterer, in respect of the Vessel for a period of between 12 and 18 months.

[13] On 29 August 2023, ST Shipping entered into a time charter agreement with Astron Energy, as charterer, in respect of the Vessel, for an initial period of between 7 and 11 months.

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[3] Michael 5 PTE Ltd, a company registered and based in Singapore (Michael 5).
[4] ST Shipping and Transport Pte Ltd, a company based in Singapore (ST Shipping).

[14] The Vessel was first brought into South African territorial waters, under its own power, in September 2023, to perform coastwise carriage of Astron Energy's goods. It carried no cargo onboard.

[15] On 22 September 2023, the Master of the Vessel submitted a DA1 (inward for ships) and DA4 requesting permission for the Vessel to arrive at the first South African port of call.

[16] On 25 March 2024, ST Shipping and Astron Energy extended their time charter agreement for a further 16 to 19 months.

[17] On 28 March 2024, Michael 5 and ST Shipping extended their time charter agreement for a further 36 months. In terms of the extension, the charterer agreed to cover the costs of additional crew for the Vessel, namely a Deck Officer, Engineer and AB/Watchkeeper, while trading in the South African coastal trade.

[18] On 27 September 2024, Michael 5 entered into a transaction with Ocean Ark embodied in two written documents. The first document was a sale, in terms of which Michael 5 sold the Vessel, then registered in Liberia, to Ocean Ark for the sum of USD 14,560,000. The second was a bareboat charter[5], also styled as a "finance charter", in terms whereof Michael 5 would repay the USD 14,560,000 in 14 quarterly instalments - 11 instalments of USD 735,000 and 3 instalments of USD 285,000, together with interest, with the balance being paid on termination of the agreement. Michael 5 had an obligation to purchase the Vessel on maturity. The time charter arrangements remained intact.

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[5] 'A bareboat or demise charter is a species of charterparty by which a shipowner grants the entire possession of a ship to a charterer. The charterers are "*handed over the possession of the ship …to put his servants and crew upon her and to sail her for her own benefit."* (Jones et al *Bareboat Charters* at 1.

[19] On 27 March 2025, the Commissioner detained the vessel and the fuel on board in terms of section 88(1)(a) of the Customs Act.[6]

[20] It is not disputed that at no stage was due entry of the Vessel ever made declaring the Vessel to be imported for home consumption, declaring its value, and that no payment of the VAT on the import value was made.

[21] On 13 June 2025, the Commissioner seized the Vessel in terms of section 88(1)(c) of the Customs Act,[7] on the basis that the Vessel is liable to forfeiture as contemplated in section 87 of the Customs Act.

[22] The Commissioner has not raised a tax debt yet but has conveyed an intention to hold ST Shipping liable for import VAT of approximately R94 million, together with interest and penalties of approximately R30 million (totalling R124 million).

[23] The estimated value of the Vessel, for purposes of forfeiture, is approximately R400 million. The total of taxes and the value of the Vessel is therefore approximately R524 million.

[24] On 4 July 2025, both Astron Energy and Ocean Ark sought return of the Vessel in terms of section 93 of the Customs Act which provides that:

> '(1) The Commissioner may, on good cause shown <u>by the owner</u>[8] thereof, direct that any ship, vehicle container or other transport equipment, plant, material or other goods detained or seized or forfeited under this Act be delivered to such owner,

[6] Section 88(1)*(a)* provides that: 'An officer, magistrate or member of the police force may detain any ship, vehicle, plant, material or goods at any place for the purpose of establishing whether that ship, vehicle, plant, material or goods are liable to forfeiture under this Act.'
[7] Section 88(1)*(c)* provides that: 'If such ship, vehicle, plant, material or goods are liable to forfeiture under this Act the Commissioner may seize that ship, vehicle, plant, material or goods.'
[8] Own emphasis.

subject to— (a) payment of any duty that may be payable in respect thereof; (b) payment of any charges that may have been incurred in connection with the detention or seizure or forfeiture thereof; and (c) such conditions as the Commissioner may determine, including conditions providing for the payment of an amount not exceeding the value for duty purposes of such ship, vehicle container or other transport equipment, plant, material or goods plus any unpaid duty thereon.'

[25] On 10 July 2025, the Commissioner requested further information from Ocean Ark. Ocean Ark responded to the request on 23 July 2025.

[26] On 15 July 2025, the Commissioner advised Astron Energy that it would not be appropriate for the Commissioner to engage further with Astron Energy in terms of section 93 of the Customs Act as Astron Energy was not the owner of the Vessel.

[27] On 31 July 2025, Astron Energy sent a letter in which it accused the Commissioner of refusing, without any basis, to engage meaningfully with Astron Energy's section 93 proposal. Astron Energy stated that in the absence of a positive response by close of business on 5 August 2025, it would have no alternative but to proceed with urgent court proceedings to protect its interests.

[28] On 14 August 2025, Astron Energy gave notice in terms of section 96 of the Customs Act[9] of its intention to institute legal proceedings, by way of urgency to challenge the validity of the seizure and seek the release of the Vessel. Astron Energy sought truncation of the one-month period to 10 days**.**

[9] In terms of s 96(1)(a)(i): 'No process by which any legal proceedings are instituted against the State, the Minister, the Commissioner or an officer for anything done in pursuance of this Act may be served before the expiry of a period of one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action, the name and place of abode of the person who is to institute such proceedings (in this section referred to as the "litigant") and the name and address of his or her attorney or agent, if any.'

[29] On 4 September 2025, Ocean Ark gave notice in terms of section 96 of the Customs Act of its intention to institute legal proceedings to challenge the validity of the seizure and similarly sought a truncation of the one-month period to 10 days, giving notice that it would be joining in the urgent application foreshadowed in Astron Energy's section 96 notice.

[30] On 22 September 2025, the Commissioner decided not to release the Vessel under section 93 of the Customs Act.

[31] The applicants launched these proceedings by way of urgency on 5 November 2025, seeking interim relief pending the final determination of a review application in which, inter alia, the validity of the seizure would be challenged in proceedings to be instituted within 30 days from the grant of the interim relief.

[32] On 12 December 2025, the applicants launched their application for the review and setting aside of the administrative decisions in the High Court, Gauteng Division, Pretoria.[10] In turn, the respondent delivered its notice of intention to oppose and filed a rule 53 record on 15 January 2026.

[33] The applicants claim to have strong prospects of success in the review and allege that they have met the requirements for interim interdictory relief, pending the outcome of the review challenge against the administrative decisions. In the alternative, the applicants seek an order temporarily suspending the Commissioner's administrative decisions in terms of section 172(1)(b) of the Constitution.

[10] Under case number 245199/2025.

[34] The applicants say that despite their strong prospects in challenging the respondent's decisions, for purposes of these urgent proceedings, they have crafted a remedy that permits the Commissioner to substitute its statutory security (the detention and seizure of the vessel and its cargo) with a form of liquid security in the form of a guarantee, on considerations of justice and fairness.[11]

[35] For the purposes of this application, what matters most is this: the Vessel entered South African waters in September 2023 under a foreign flag, operating under its own power, and performed coastwise trade for Astron Energy's benefit. No due entry was made, and no import VAT was paid.

[36] The Commissioner detained the Vessel in March 2025, seized it in June 2025, and declined to release it under section 93 in September 2025. The applicants contest all four decisions in the review proceedings. Their case in brief is that the Vessel was never lawfully imported for customs purposes, and that even if it was, the Commissioner's enforcement response has been disproportionate and procedurally flawed. The Commissioner's case is that the Vessel was imported in September 2023 and that its continued detention is fully justified. What remains to be worked out — by the review court, not this one — is who is right.

Statutory framework

[11] The applicants seek in prayer 4 of the notice of motion the release of the Vessel and cargo against payment by Astron Energy of any reasonable charges that have been
incurred in connection with the detention and seizure of the Vessel, and a guarantee provided by Astron Energy for an amount equal to the estimated value of the Vessel (+-R400 million) and the alleged VAT
penalty and interest payable in respect of the alleged importation (+-R124 million), totalling an amount of +-R524 million.

[37] In terms of section 38 of the Customs Act, every importer of goods is required, within seven days of the date upon which such goods are, in terms of section 10 deemed to have been imported, to make due entry of those goods as contemplated in section 39 of the Customs Act.[12]

[38] An "importer" is defined in section 1 of the Customs Act to include any person who, "at the time of importation", (a) owns the goods imported; (b) carries the risk of any goods imported, (c) represents that or acts as if he is the importer or owner of the goods, (d) actually brings the goods into the Republic, (e) is beneficially interested in any way whatever in any goods imported; or (f) acts on behalf of any person listed in (a) to (e).

[39] Section 13(1) of the Value-Added Tax Act 89 of 1991 (the VAT Act) provides that 'goods shall be deemed to be imported into the Republic on the date on which the goods are in terms of the provisions of the Customs and Excise Act deemed to be imported…'.

[40] A bill of entry in the prescribed form and payment of the duties on the goods must be delivered[13], and a number of requirements for a valid entry, including, inter alia, a declaration of the true value of goods and payment of the correct duty must be complied with.[14]

[41] The Commissioner is empowered[15] to make rules, inter alia, as to the importation and exportation, transit or coastwise carriage of goods, the entry of goods and the payment of charges and fees.

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[12] Section 39(1) requires the delivery of a bill of entry in the prescribed form and payment of duties on the goods.
[13] Section 39(1) of the Customs Act.
[14] Section 40(1) of the Customs Act.
[15] Section 120 of the Customs Act,

[42] Rule 7.01 of the Customs Act Rules requires a report in terms of section 7(1) of the Customs Act of the arrival of a foreign going ship to be made on a form DA 1.[16]

[43] Rule 8.01 defines "enter" in relation to the Republic in the case of the Vessel as when the Vessel crosses into the territorial waters of the Republic.

[44] Section 87 of the Customs Act provides that goods imported or otherwise dealt with contrary the provisions of the Act shall be liable to forfeiture.

[45] An officer of the Commissioner may detain goods for the purposes of establishing whether such goods are liable to forfeiture[17], and the Commissioner is empowered[18] to seize goods liable to forfeiture under the Act and section 89(1) of the Customs Act provides that where proceedings are instituted to claim goods that have been seized, such claim must be instituted by the person from whom they were seized or the owner or the owner's authorised agent.

[46] In terms of section 89(2), notice must be given in terms of section 96 within 90 days after the date of seizure, before the service of any process for instituting legal proceedings. Section 89(3) of the Customs Act requires that the proceedings must be instituted within 90 days of such notice.

[47] In certain instances, including where proceedings as contemplated in section 89 have not been instituted, the goods concerned are deemed to be condemned and forfeited.[19]

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[16] Rule 00.05 replaced, with effect from 1 October 2006, the various bills of entry forms DA 500 – DA 614 and CCA1 with an appropriate SAD form. The first of which is the SAD 500 customs declaration form, to be completed as prescribed for the clearance of goods for different purposes.

[17] Section 88(1)(a) of the Customs Act.
[18] Section 88(1)(c) and (d) of the Customs Act.
[19] Section 89(4) of the Customs Act.

[48] The Commissioner has a discretion, in terms of Section 93 of the Customs Act, on good cause shown by the owner, to direct that goods detained, seized or forfeited be delivered to such owner.

[49] When goods are seized and, in consequence of the seizure, delivery under section 93 is refused, and no proceedings are instituted challenging the seizure (or have been instituted and have been dismissed in a final judgment of the High Court or the Supreme Court of Appeal) the goods concerned shall, in terms of section 89(4), *'be deemed to be condemned and forfeited'*.

[50] Section 96(1)(a) of the Customs Act provides that no process by which any legal proceedings are instituted may be served before the expiry of one month after delivery of a notice in writing setting forth clearly and explicitly the cause of action and certain other details.[20]

[51] Nowhere in the Customs Act is the court vested with a power or discretion to condone non-compliance with the mandatory provisions in section 96. The express provisions of section 96(1)(c) empower the court to reduce the time period of one month that commences from the giving of the notice. The applicant cannot however ask for reduction of the period, where no notice was given.

[52] The Commissioner referred the court to the decision of the Supreme Court of Appeal (the SCA) in *Commissioner for the South African Revenue Service and Others v Dragon Freight (Pty) Ltd and Others* (*Dragon Freight),*[21] where the court reiterated that section 96(1)(a)(i), on its plain language,

[20] In terms of section 96(1)(c) of the Customs Act, the State, Minister or Commissioner is permitted, on good cause shown, to reduce the period by agreement with the litigant. Only in the event of a refusal to reduce the period is the High Court given the power to reduce such period where the interests of justice so require.
[21] *Commissioner for the South African Revenue Service and Others v Dragon Freight (Pty) Ltd and Others* [2022] 3 All SA311 (SCA).

proscribes the institution of any proceedings unless one-month's written notice is given,[22] to allow the Commissioner to investigate and review the merits of the intended legal proceedings and decide what position to adopt in relation thereto before the institution of legal proceedings, so as to avoid unnecessary and costly litigation at the public expense.[23]

[53] This is aimed at promoting the economic use of resources in accordance with the basic values and principles set out in section 195 of the Constitution.[24]

[54] The court in *Dragon Freight* found that the giving of such notice and the period of one month, or a reduction of such period by either the Commissioner or the court are jurisdictional conditions precedent for the giving of relief, and that there is no power in the Customs Act to condone the non-compliance with this provision requiring the giving of notice.[25]

[55] A court will ultimately have to decide whether any contraventions of the Customs Act have occurred (as alleged by SARS and denied by the applicants); whether any import VAT, interest and penalties are payable (and the amount thereof); whether forfeiture (if at all) is justified and, if justified, the proportionality thereof, and, whether SARS' decision not to release the Vessel in terms of section 93 is liable to be set aside. This court is to make a finding in the interim, regarding the urgent relief sought.

Astron Energy's standing

[56] Turning briefly to Astron Energy's standing. Section 93 of the Customs Act allows the Commissioner to release detained or seized goods to the owner,

[22] Ibid para 31.
[23] Ibid para 33.
[24] Ibid para 34.
[25] Ibid para 38.

and section 89(1) confines the right to institute proceedings to the person from whom the goods were seized, the owner, or the owner's authorised agent.

[57] Astron Energy is none of these things, strictly speaking, and the Commissioner was correct to decline to engage with it under section 93. But that does not mean Astron Energy has no standing in these proceedings. As the time charterer of the Vessel, it has a direct contractual interest in its availability and suffers ongoing monthly losses as a consequence of the detention.

[58] These interests are sufficient to ground locus standi in terms of the general principles applicable to any litigant with a direct and substantial interest in the subject matter of the dispute. Its participation in this application — including its provision of the guarantee — is consonant with that interest. I proceed accordingly.

The requirements for an interim interdict

[59] The requirements for an interim interdict are trite. An applicant must establish (a) a *prima facie* right, even if open to some doubt; (b) a reasonable apprehension of imminent and irreparable harm if the interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other remedy.

[60] The court has a general and overriding discretion to grant or refuse an application for interim relief.[26]

[61] The court, in considering whether to grant an interim interdict, seeks to ensure that, insofar as it is reasonably possible, the party who is ultimately

[26] *Knox D 'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 361H-362E.

successful will receive effective relief. The court should seek to protect the integrity of the proceedings in the main case.[27]

Prima facie right

[62] The applicants must show that they have a *prima facie* right that warrants protection pending the outcome of the review, even if '*open to some doubt*.'[28]

[63] This court is not called upon to determine the merits of the review at the interim stage. However, there must be a reasonable probability that the applicant's legal position is both valid and enforceable.

[64] The applicants must accordingly adduce credible evidence to persuade the court that their review has a strong chance of success, and that they are entitled to temporary relief until a final determination of the review proceedings.

[65] At the interim stage, it is neither necessary nor appropriate to resolve the competing interpretations of section 10(1)(e) and General Note F. I have noted that the Commissioner's argument, that General Note F only specifies a time of importation once the vessel acquires South African nationality under the Ship Registration Act, and that the third limb of General Note F is unfulfilled here, leaving the residual seventh time specification operative, is a textually strong one.

[66] The applicants' contrary argument, tying importation exclusively to the registration trigger and thereby excluding the Commissioner's residual

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[27] *Pikoli v President of the Republic of South Africa* 2010 (1) SA 400 (GNP) (*Pikoli)* at 404A-E.
[28] *Eskom Holdings SOC Limited v Vaal River Development Association (Pty) Ltd and Others* 2023 (5) BCLR 527 (CC) para 253.

discretion, is less compelling on the text, but it cannot be dismissed as unarguable. The question is genuinely difficult, and the answer will have significant implications beyond this case.

[67] Both constructions merit serious consideration at the review. That is sufficient for present purposes: the applicants have cleared the prima facie threshold, even if their case on this point is open to more than a little doubt. I add that the prima facie right is not carried by the importation argument alone.

[68] The lawfulness of the Commissioner's refusal to release the Vessel under section 93, including whether adequate security was tendered and refused without proper consideration, raises its own arguable basis for review. So too does the proportionality of the forfeiture in circumstances where the VAT liability is approximately R124 million, but the asset seized is worth approximately R400 million.

[69] In *Eskom Holdings SOC Limited v Vaal River Development Association Ltd and Others,* the Constitutional Court affirmed that whether an applicant is entitled to interim relief *'is decided upon* a *consideration of the applicant's prospects of success in obtaining final relief'.*[29]

[70] The Constitutional Court in *National Treasury v Opposition to Urban Tolling Alliance*[30] held that a *prima facie* right 'is a right to which, if not protected by an interdict, irreparable harm would ensue' (the so-called *OUTA* test).

[71] The applicants assert that they enjoy strong prospects on review of showing that the Commissioner acted unlawfully and irregularly.

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[29] Ibid para 67.
[30] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) ("*OUTA*") para 50.

[72] Ocean Ark contends that it has the right, in terms of section 25 of the Constitution, not to be deprived of its property arbitrarily.

[73] Astron Energy relies on the right to trade, in terms of section 22 of the Constitution as well as its proprietary interests in the time charterparty.[31] It contends that in the absence of a decision by the Commissioner on forfeiture and mitigation of forfeiture, it will continue to suffer the substantial losses, and that the interdict will serve to secure the Commissioner's interests, whilst also mitigating damages for Astron Energy.

[74] For the purposes of the current proceedings, nothing much turns on this. In any event, in my view, it is doubtful whether, in these circumstances, Astron Energy enjoys the guarantee provided by section 22 of the Constitution. [32]

[75] The applicants further argue that Ocean Ark should be protected as an "innocent owner" and refer in this regard to a letter dated 22 September 2025 addressed by the Commissioner to Bowmans, the attorney's acting for Ocean Ark, stating that it refuses to release the Vessel, without affording Ocean Ark an opportunity to make submissions in respect of its intended action.

[76] The Commissioner does not contend that Ocean Ark was involved in any of the alleged contraventions. Relying on *Secretary for Customs and Excise v Tiffany's Jewellers (Pty) Ltd* (*Tiffany's Jewellers),*[33] the applicants argued that an owner who acquired property legally and for value, without knowing or having reason to suspect it would be used in a contravention of a statute, may avail

[31] The dispute regarding the VLSFO (the cargo which was aboard the Vessel) has been resolved by the parties and was discharged on mutually acceptable terms. It no longer needs to be dealt with in these proceedings.
[32] Section 22 guarantees the right to freedom of trade exclusively to a *citizen* of the Republic. If one reads *citizen* as used in sections 19 and 20 of the Constitution, it appears that the term speaks specifically to a *natural person* who is legally recognised as a *citizen* of the Republic.
[33] *Secretary for Customs and Excise v Tiffany's Jewellers (Pty) Ltd* 1975 (3) SA 578 (A) *(Tiffany's Jewellers)*.

itself of the innocent owner defence, including under the Customs Act, as a defence against forfeiture.[34]

[77] Whether Ocean Ark enjoys what might loosely be called an innocent owner defence under the Customs Act is doubtful. The current section 87(2) does not carry the knowledge-or-consent qualification that was present in the version of the section considered in *Tiffany's Jewellers*. As the provision now reads, goods are liable to forfeiture regardless of the owner's knowledge or involvement.

[78] Whether the constitutional proportionality requirement imports such a qualification by the back door is a matter for the review court. I am not able to decide it here, and I do not attempt to.

[79] This does not mean that Ocean Ark's evident lack of any involvement in the alleged contravention counts for nothing. It has a bearing on two issues:

(a) First, to the Commissioner's exercise of discretion under section 93: the refusal to release is a discretionary decision, and the owner's good faith — or absence of bad faith — is plainly a relevant consideration in that exercise.

(b) Second, and relatedly, to the proportionality enquiry under section 25 of the Constitution: permanently depriving a party of a R400 million asset when that party did not know of and was not involved in the alleged contravention, and when the underlying tax liability is approximately R124 million, raises a serious question about whether the resulting deprivation is arbitrary.

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[34] *Fazenda NO v Commissioner of Customs and Excise* 1999 (3) SA 452 (T*)* at 462.

[80] I return to these considerations in the balance of convenience analysis below. I do not use them to shortcut the forfeiture question itself.

Irreparable harm

[81] In relation to irreparable harm, the applicants highlight the critical financial and operational consequences of the ongoing detention of the Vessel by the Commissioner, and that the ensuing harm is not merely theoretical but represents an ongoing and irreparable loss for multiple parties across a complex maritime chartering chain.

[82] The applicants emphasised the disproportionate nature of this harm when compared to the regulatory infraction, specifically focusing on the massive capital at risk and the potential for a wider economic impact.

[83] Ocean Ark, as the registered owner of the Vessel, faces the most significant potential loss, with the Vessel's value estimated at approximately R400 million. The ownership of the Vessel by Ocean Ark functions as a form of real security within a financing arrangement, a common practice in maritime law (according to the applicants).

[84] If the Vessel is forfeited, Ocean Ark would be permanently deprived of this asset. Furthermore, the forfeiture would trigger a domino effect of financial defaults across the chartering hierarchy, causing Michael 5, ST Shipping, and Astron Energy to lose their respective hire payments and contractual benefits.

[85] The complexity of these interlinked agreements makes it impossible to predict the full extent of the financial fallout, but the risk of such harm is described by the applicants as catastrophic.

[86] For Astron Energy specifically, the continued detention and seizure results in direct monthly losses of approximately R31 million.

[87] These costs are broken down into several categories, including the continued payment of charter hire for a vessel it cannot use, the necessity of hiring expensive substitute vessels on the volatile spot market to keep its refinery operational, and the costs associated with maintaining safety standards for the detained fuel.

[88] The applicants' irreparable harm argument extends beyond what is mentioned above and highlights a severe threat to public infrastructure and regional energy security, as Astron Energy's refinery supplies roughly 75% of the jet fuel required by Cape Town International Airport.

[89] According to the applicants', the detention of the Vessel disrupts refinery operations, creating a tangible risk of fuel shortages that could cripple aviation in the region.

[90] The applicants contend that these losses cannot be recovered. The ongoing seizure is described as a direct hindrance to Astron Energy's right to trade, creating a burden that far outweighs any prejudice the fiscus might suffer if the Vessel were released against the proposed security.

[91] In the circumstances I am satisfied that on a balance the applicants have shown that irreparable harm will ensue if the interim relief is not granted.

Balance of convenience

[92] The balance of convenience inquiry, in the context of this application, resolves largely into a question about the guarantee.

[93] The Commissioner's genuine and legitimate concern is one of enforcement: if the Vessel is released, it sails under a foreign flag, and once it clears South African waters, the Commissioner's practical ability to enforce a judgment is significantly diminished. That is a real risk, and I do not minimise it. It is, however, a risk that the revised guarantee is designed to address. I have found the guarantee adequate.

[94] With that finding in place, the Commissioner's enforcement exposure if interim relief is granted materially reduces its claim against the Vessel is exchanged for a claim against Lombard Insurance in an equivalent amount.

[95] On the other side of the scale, the prejudice to the applicants is ongoing, quantified, and irrecoverable. Astron Energy loses approximately R31 million each month as a direct result of the detention.

[96] Ocean Ark faces the potential permanent loss of an asset valued at R400 million, an asset it acquired from Michael 5 without, on the evidence before me, any knowledge that the Vessel's customs status was disputed.

[97] The disruption to Astron Energy's refinery operations carries a broader public dimension. The supply of approximately 75% of the jet fuel to Cape Town International Airport is linked to the Vessel's availability, though I am careful not to overstate this as the shortage has not yet materialised, and the risk should not be treated as a certainty. It is, however, a genuine risk that adds public-interest weight to an already compelling private-interest case.

[98] These losses, once incurred, cannot be unwound. A favourable outcome for the applicants in the review will not reimburse the monthly charter costs already paid, nor repair the commercial relationships strained by the detention.

[99] An unfavourable outcome for the Commissioner in the review, with an adequate guarantee in place, leaves it fully protected. For these reasons, the balance of convenience firmly favours the applicants, provided, and this qualification is important, the guarantee is adequate. Since I have found that it is, the balance of convenience requirement is satisfied.

No alternative remedy

[100] I am satisfied on the evidence placed before me, specifically the correspondence exchanged between the parties prior to the launching of this application, that the applicants have exhausted all attempts to resolve the disputes with the Commissioner and there is no other suitable remedy available.

Has the Vessel been forfeited?

[101] I turn briefly to consider the issue of whether the Vessel has *ex lege* been forfeited.

[102] The Commissioner submits that forfeiture is a self-executing event that occurs by operation of law in terms of section 89(4), requiring no decision by SARS. I am not persuaded that this is so.

[103] Section 89(4) deems goods 'condemned and forfeited' only in two circumstances: where no proceedings have been instituted to claim them, or where such proceedings have been instituted but dismissed in a final judgment. Neither condition is met here.

[104] The applicants instituted review proceedings in the Gauteng Division on 12 December 2025. Those proceedings are before the court and are alive. Until

they are finally determined, the deeming provision in section 89(4) has not been triggered, and the Commissioner's discretion under section 93 to release the Vessel on good cause shown remains available.

[105] The Vessel has not been forfeited, and the Commissioner cannot treat it as though it has.

Is the revised guarantee adequate?

[106] The issue that effectively determines this application is whether the revised guarantee, provided by the applicants after the Commissioner's note to the Court set out its objections to the first guarantee, provides equivalent security, in all material respects, to the continued physical detention of the Vessel.

[107] If it does, the Commissioner's central concern , that releasing the Vessel may put it beyond the reach of enforcement, is met, and the balance of convenience falls squarely in the applicants' favour.

[108] If it does not, the application cannot succeed regardless of the merits of the underlying review.

[109] The Commissioner advanced three objections to the first guarantee. I deal with them in turn.

[110] The first objection is that the guarantee is not a true on-demand instrument but is conditional: payment is triggered only by a final court order in SARS's favour or by a settlement between the parties. This is factually accurate. The guarantee is not payable on demand alone, without qualification. But the conditionality does not make it inadequate. SARS could not, in any event,

access the proceeds of the Vessel before the dispute is resolved, either by judgment or settlement.

[111] The trigger conditions in the revised guarantee replicate the position SARS already occupies with respect to the detained Vessel. There is no diminution in SARS's substantive entitlement. The guarantee substitutes liquid security for a physical asset, but the moment the security becomes available to SARS is the same in both cases.

[112] The second objection is that Astron Energy gives the guarantee as the named Customer, and Astron Energy is not the importer and may not be the party ultimately liable to SARS.

[113] The concern is that if the wrong party is the Customer, the guarantee may not properly cover SARS's claim. In my view there is no merit to this objection. The applicable principle is the autonomy principle applicable to demand guarantees, confirmed by the SCA in *First Rand Bank Ltd v Brera Investments CC*.[35]

[114] Lombard Insurance's obligation is determined by the terms of the guarantee itself, and not by the underlying dispute between SARS and the parties to the transaction. Lombard cannot refuse to pay on the basis that Astron Energy is not the importer.

[115] What matters is whether a valid Demand can be made and honoured under the revised guarantee's own terms, irrespective of who ultimately bears the liability.

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[35] *First Rand Bank Ltd v Brera Investments* CC 2013 (5) SA 556 (SCA).

[116] In the revised definitions, the Forfeiture Claim is defined by reference to SARS's claim 'arising from the forfeiture of the Vessel', with no reference to Astron Energy's liability. Clause 4 requires only a valid Demand from SARS. The Customer's identity does not defeat the guarantee.

[117] A related point arises from clause 5, which permits SARS to make multiple demands for amounts that the Customer has conceded. The Commissioner raised the prospect that Astron Energy, not being the liable party, might concede nothing, leaving clause 5 empty and restricting SARS's ability to make successive demands. This reading does not persuade me.

[118] Clause 5, read in context with clause 4, governs the mechanics of how demands may accumulate up to the guaranteed cap. It does not condition Lombard's payment obligation on Astron Energy's formal acceptance of any liability. Clause 4's irrevocable and unconditional undertaking is the operative provision; clause 5 regulates the arithmetic of successive demands within the cap. The clause should not be read to detract from clause 4.

[119] The third objection goes to quantum. The Commissioner did not seriously press the point that the monetary cover is insufficient, and rightly so.

[120] The guarantee covers the estimated value of the Vessel at R398 378 772.60 and the full amount of alleged VAT, penalties, and interest at R124 239 531.95, for a total of R522 618 304.55. This exceeds the Commissioner's own stated exposure.

[121] Having carefully worked through the revised guarantee, I am satisfied that it provides the fiscus with security that is equivalent, in all material respects, to continued physical possession of the Vessel. The Commissioner's objections are properly raised but ultimately do not render the guarantee

inadequate. Release against the guarantee appropriately and adequately protects the Commissioner's position.

Does the OUTA 'clearest of cases' test apply?

[122] The applicants contend, correctly in my view, that the *OUTA* test, in terms of which interdicts against public power should only be granted in the 'clearest of cases' does not apply to the present matter, as it involves a standard application of statutory discretion, a high-level, polycentric policy decision.

[123] The applicants emphasise that the impugned administrative decisions are the type of 'stock standard' administrative decisions which fall outside the ambit of the *OUTA* 'clearest of cases' or 'exceptional circumstances' principle, which applies to cases which lie 'in the heartland of executive-government function and domain'[36] and inevitably involves 'policy laden and polycentric decision making'.[37]

[124] In *Precision Meters (Pty) Ltd v South African National Accreditation System and Another,*[38] a recent decision of this division, Hofmeyr AJ found[39] that on a proper reading of *OUTA* (as later interpreted by the Constitutional Court in *Eskom*), for an organ of State to bring itself within the "clearest of cases" test in *OUTA*, it should, at a minimum, set out the following:

(a) What aspect of executive or legislative power will be impacted by the interim interdict sought.

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[36] *OUTA* para 67.
[37] Ibid para 68.
[38] *Precision Meters (Pty) Ltd v South African National Accreditation System and Another* (2025/135243) [2025] ZAWCHC 500 (28 October 2025).
[39] At paras 55-56.

(b) How the exercise of that power involves policy-laden or polycentric decision-making.

(c) What specific constitutional or statutory obligations or powers of the organ of State will be compromised if the interdict is granted; and

(d) How those obligations or powers will be impacted by the temporary relief sought.

[125] The respondent here did not seek to make out such a case. What the Commissioner did here is different in kind to *OUTA.* He applied specific provisions of the Customs Act to a specific vessel to reach specific conclusions about detention, seizure, and deemed importation. The administrative decisions are neither polycentric nor policy laden.

[126] It therefore appears that the applicants do not have to meet the *OUTA* threshold and that the ordinary requirements for an interim interdict apply.

Section 172 – Just and equitable relief

[127] As the same conclusion would follow under this claim for relief, it is not necessary to make a separate determination in this regard.

Urgency

[128] The Commissioner argues that the urgency is self-created, pointing out that the applicants first threatened urgent proceedings in August 2025 but did not launch until 5 November 2025 — a period of some ten weeks.

[129] I accept that there was a delay, and it requires explanation. The explanation is, however, in the papers.

[130] During the period from August to October 2025, the applicants maintained sustained correspondence with the Commissioner, seeking an accommodation that would avoid litigation altogether.

[131] The Commissioner's final and definitive refusal to release the Vessel was communicated on 22 September 2025. From that date, the applicants gave notice under section 96 of the Customs Act, finalised their papers, and launched on 5 November 2025, approximately six weeks later.

[132] Given the legal complexity of the matter and the volume of documentation required, I do not regard this as unreasonable. I also consider that in the law of admiralty, the detention of a commercial vessel is, by its nature, treated as a matter carrying some inherent urgency.

[133] The financial consequences of immobilising a ship of this kind compound with every passing day. Astron Energy cannot recover the charter costs it continues to pay for a vessel it cannot use, and Ocean Ark watches a R400 million asset depreciate while sitting idle. The urgency is not self-created. The matter could not have obtained substantial redress at an ordinary hearing on the roll.

Costs

[134] Costs ordinarily follow the result, and there is nothing here that would justify departing from that rule. The applicants have succeeded in obtaining the interim relief they sought.

[135] The question is whether Scale C is appropriate. I think it is, for the following reasons.

[136] The matter raised genuinely novel questions of customs and maritime law. The interaction between section 10(1)(e) and General Note F has not, to my knowledge, been considered in a reported judgment in the context of foreign flag vessels engaged in coastwise trade.

[137] The constitutional dimensions of the forfeiture question added further complexity. Counsel on both sides produced comprehensive heads of argument and detailed supplementary notes following the hearing, at the court's request. Two hearings were required. The matter proceeded with teams of two senior counsel on each side.

[138] In all the circumstances, the novelty of the issues, the volume of the work, and the financial magnitude of the dispute, Scale C is warranted. The respondent is accordingly ordered to pay the applicants' costs, including the costs consequent upon the engagement of two counsel on Scale C.

Order

[139] The following order shall issue:

(a) The application is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court, dispensing with the ordinary forms and service provided for in these Rules.

(b) Pending the outcome of the review application instituted by the applicants in the High Court Gauteng Division (Pretoria) under case number 245199/2025, it is directed that the respondent's detention decision; seizure decision, deemed importation decision and section 93 decision (as defined in paragraph 3 of the notice of motion) are temporarily suspended.

(c) Pending the final determination of the review application, and subject to any directives by the review court in respect of the control of the Vessel, the respondent is directed to release the Vessel, the MT Essien, to the applicants subject to the following conditions:

(i) Payment by the second applicant of any reasonable charges that have been incurred in connection with the detention and seizure of the Vessel.

(ii) Provision by the second applicant of a guarantee in the amount of R398 378 772.60, being the estimated value of the Vessel, and R124 239 531.95 for any VAT, VAT penalty and interest that may be charged in respect of the alleged importation of the Vessel, as set out by SARS in the correspondence to ST Shipping and Transport Pte Ltd of 22 August 2025 issued by Lombard Insurance on behalf of the second applicant in favour of the respondent (on the terms as set out in **Annexure X1** hereto).

(d) The respondent is to pay the costs of this application, such costs to include the costs occasioned by the employment of two counsel on Scale C.

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M HOLDERNESS

JUDGE OF THE HIGH COURT

Appearances

Applicants:	Adv S Mullins SC, Adv K Pillay SC, Adv D Cooke, Adv E Muller
Instructed by	
First Applicant:	Bowman Gilfillan Inc.
Second Applicant:	Webber Wentzel
Respondent:	Adv J Peter SC
Instructed by:	MacRobert Attorneys