REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 28948/2020

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

_____ _____

DATE SIGNATURE

In the matter between:

THE COMMISSIONER OF THE SOUTH AFRICA REVENUE SERVICE APPLICANT

IN RE:

WALTER ELEAZAR CYRIL FIRST APPLICANT

LETISHA CYRIL SECOND APPLICANT

and

THE ADDITIONAL MAGISTRATE, MAGISTRATES COURT FOR THE REGION OF ALEXANDER FIRST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION, GAUTENG LOCAL DIVISION, JHB SECOND RESPONDENT

JUDGMENT

MAHALELO J

[1] This is an opposed application for leave to intervene by the applicant in a review application brought by the respondents against the decision of the Magistrate to admit certain evidence in their trial. The evidence in question was obtained by the applicant's officials during a statutory inspection. The respondents claim that the applicant's inspection was unlawful. They further alleged that a proper interpretation of the Constitutional Court order in *Gaertner*[1] retrospectively invalidates all the applicant's inspections conducted in terms of section 4(4) of the Customs and Excise Act 9 of 1964 ("CEA") in "all matters that had not yet been finalised prior to the declaration of invalidity". They have also accused the applicant and its officials of heavy handedness, bad faith and of undermining the administration of justice.

[2] The applicant contends that it has a direct and substantial interest in the review application hence the application by it to for leave to intervene.

BACKROUND FACTS

[3] Mr and Mrs Cyril are the former directors of CEW Logistics CC and Tish Maritine CC respectively. They shall be referred to collectively as the respondents or the first and second respondent if necessary and the applicant will be referred to as SARS.

[4] The present proceedings arose from a criminal trial in which the respondents are charged with various offences. The criminal proceedings are still pending in the Magistrates' Court. The charges against them are as a result of the following circumstances:

[1] *Gaertner and Others v Minister of Finance and Others* 2014 (1) SA 442 (CC).

(a) The first respondent imported cigarettes, mainly from Zimbabwe which were cleared through customs and stored free of duty and VAT in the bonded warehouse owned by Tish Maritine CC.

(b) The respondents alleged that the cigarettes were then exported by road via the Lebombo Border Post, from the bonded warehouses of Tish Maritine to entities in Mozambique. SARS officials conducted an inspection and found out that no exports ever happened. The respondents and some officials of SARS were then charged with offences under the CEA. The officials of SARS allegedly affixed their custom stamps to the clearance documents of the respondents, despite knowing that the bills of entry were never processed on SARS systems. This then allegedly allowed the cigarettes to be sold within South Africa without any duties or VAT being paid by the respondents.

(c) The respondents are charged with offences relating to 41 consignments of cigarette including: (a) 41 counts of fraud; (b) 41 counts of contravention of section 18A(9) read with section 80(1)(o) of the CEA, for diverting the cigarettes without the payment of duties or VAT and by doing so causing actual prejudice to SARS; (c) 41 counts of contravention of section 84(1) of the CEA, for making false declarations as if the cigarettes were exported to Mozambique; and (d) 41 counts of contravention of Section 83(a) read with Section 47A of the CEA, for unlawfully and intentionally causing goods which had not been entered for home consumption, to be removed and/or dealt with without the payment of duty and VAT.

[5] During the course of their trial in the Magistrate's Court the respondents objected to the admissibility of the evidence obtained during an inspection by SARS of the bonded warehouse of Tish Maritime CC. The Magistrate, after holding a trial within a trial, ruled that the evidence was admissible.

[6] The respondents have applied to this Court to review that ruling and set it aside. They contended that: -

(a) The Magistrate misconstrued and misapplied the Constitutional Court judgment in *Gaertner*. On their own version, the Constitutional Court declared section 4(4) of the CEA unconstitutional and invalid with retrospective effect in matters that had not, when *Gaertner* was decided, yet been finalised. According to the respondents, the Constitutional Court invalidated any inspections undertaken in respect of such matters and for this reason, SARS conducted the inspection "on the basis of an unconstitutional and invalid law".

(b) The Magistrate failed to apply the correct constitutional and legal test under Section 35(5) of the Constitution for the admission of evidence obtained in a manner that violates the Constitution, in that: -

I. SARS failed to establish the integrity of the chain of evidence; and

II. Their arrest on 8 November 2011 demonstrates that SARS officials were intent on acting in a heavy handed and ruthless manner.

[7] The respondents raise two objections to SARS intervention application. They say that: -

(a) the review emanates from a criminal trial, and as a general rule, interested parties are not admitted in criminal matters except where there are compelling reasons to do so.

(b) SARS delayed unreasonably in seeking leave to intervene having indicated its intention to do so in April 2021, but only applied on 3 June 2021 after pleadings had closed, which has resulted in an alleged inequality in arms in the litigation.

TEST FOR INTERVENTION

[8] The procedure to follow in applications of this nature is set out in Rule 12 of the Uniform Rules of the High Court (the Rules*).* It provides as follows: -

"Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply to intervene

as a plaintiff or defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as it may seem meet".

[9] An applicant for leave to intervene must show that it has a direct and substantial interest in the subject-matter of the litigation, in the form of a legal interest that may be prejudicially affected.[2]

[10] While an applicant for intervention must demonstrate that it has a right adversely affected or likely to be affected by the order sought, it is not required to satisfy the court at the stage of intervention that it will succeed. It need only make allegations which, if proved, would entitle it to succeed – that is, a *prima facie* case or defence.[3] Therefore, in assessing the intervener's standing, the court must assume that the allegations it advances are true and correct.[4]

[11] The Constitutional Court has articulated the test for intervention as follows:[5]

"It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief."

[12] In *Peermont Global* the Court has also clarified that where a party has shown a direct and substantial interest in the subject matter of a case, the court has no discretion. It is required to grant the intervention. Quoting from the decision in *Greyvenouw,*[6] the Court confirmed that:

---

[2] *SA Riding for the Disabled Association v Regional Land Claims Commissioner* (*SA Riding*) 2017 (5) SA 1 (CC).

[3] Peermont Global (KZN) (Pty) Ltd v Afrisun KZN (Pty) Ltd t/a Sibiya Casino and Entertainment Kingdom and Others (*Peermont Global*) [2020] 4 ALL SA 226 (KZP).

[4] Id.

[5] *SA Riding* above n 2 at para 9.

[6] Nelson Mandela Metropolitan Municipality v Greyvenouw CC 2004 (2) SA 81 (SE).

"In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests."

[13] In the matter of *Judicial Service Commission and another v Cape Bar Council and another*[7] the SCA said the following regarding non-joinder:

"It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see e.g. *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) para 21). There were facts that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that the other parties should have been joined to the proceedings, has thus been held to be a limited one (see e.g. *Burger v Rand Water Board* 2007(1) SA 30 (SCA) para 7; Andries Charl Celliers , Cheryl Loots and Hendrick Christoffel Nel, Helistein and Van Winser, *The Civil Practice of the High Court of South Africa* 5 ed vol 1 at 239 and the cases there cited).

[14] The first basis for SARS' direct and substantial interest in the outcome of the review application is that one of the key issues to be determined in the review application is the ambit of its powers under the CEA. In the review application, the applicants contended that the Constitutional Court's declaration of invalidity in *Gaertner* applies retrospectively to all investigations that had not, when *Gaertner* was decided, yet been finalised. If their argument were to succeed, it would have ramifications for SARS. It would mean that any inspections conducted under section 4(4) of the CEA in respect of matters that were not concluded prior to 14 November 2013 (when *Gaertner* was decided) were, in the applicants' words, conducted *"on the basis of an unconstitutional and invalid law.*

[15] The Constitutional Court has repeatedly held that where a party is likely to be affected by the interpretation or invalidity of a statutory provision, it has a right to intervene in proceedings where the validity or interpretation of the provision

[7] 2013 (1) SA 170 (SCA).

is at issue. In *Minister of Justice and Constitutional Development and Others v Prince*,[8] a case which concerned a declaration of constitutional invalidity, the Court granted leave to intervene to three individuals who were plaintiffs in another trial before the High Court, in which the validity of the same statutory provisions was at issue. The Court held that they had a direct and substantial interest because if the Court confirmed the order of constitutional invalidity, they may be acquitted.

[16] The applicants rely on what they describe as a "*general rule*" against intervention in criminal proceedings. They rely for the alleged rule on the Constitutional Court decision in *Institute for Security Studies In Re: S v Basson.*[9] This case was not about intervention. It was concerned with the admission of an *amicus curiae*. It was in this context that the Constitutional Court, in a concluding remark, observed that "a *court should be astute not to allow the submissions of an amicus to stack the odds against an accused person.*"

[17] There can be no serious suggestion that third parties may not intervene in proceedings ancillary to the criminal trial, such as a review or a constitutional challenge, where they can show a direct and substantial interest.

[18] The applicants complain that SARS delayed unreasonably in seeking leave to intervene, and that because SARS applied for leave to intervene after they had filed their replying affidavit in response to the Director of Public Prosecutions ("DPP"), they have been prejudiced.

[19] Uniform Rule 12 contains no time limit. It says expressly that an application to intervene may be made "*at any stage of the proceedings*". Indeed, our courts routinely permit intervention applications after pleadings and affidavits have been exchanged,[10] and even after judgment, because "*the fact that a judgment or final order has already been issued is not a bar to leave to*

---

[8] 2018 (6) SA 393 (CC).
[9] 2006 (6) SA 195 (CC).
[10] *Shapiro v South African Recording Rights Association Ltd (Galeta Intervening)* 2008 (4) SA 145 (W)

intervene being granted."[11] There is therefore no basis for the respondents' suggestion that the close of pleadings imposes a time-bar on an application to intervene. Having considered the whole matter, I am satisfied that the applicant has met the requirements for intervention.

[20] In the result, I make the following order:

1. SARS is granted leave to intervene as the third respondent in the main application;
2. Its conditional answering affidavit is admitted and shall stand as SARS' answering affidavit in the main application;
3. The applicants are directed to pay the costs of this application, including costs of two counsel.

_____

M B MAHALELO

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was delivered electronically by circulation to the parties' legal representatives by e-mail and uploading onto CaseLines. The date and time of hand down is 25 October 2022 at 10h00.

APPEARANCES:

Counsel for SARS:	Adv. Steven Bundlender SC.
Instructed by:	VDT Attorneys
Counsel for applicants:	Adv. Anton Katz SC
Instructed by:	M Attorneys Inc

Counsel respondents

[11] *Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In Re Sizwe Development v Flagstaff Municipality* 1991 (1) SA 677 (TK) at 679C.

in the intervention application:	Adv Kessler Perumalsamy
Instructed by:	M Attorneys Inc
Date of Hearing:	12 May 2022
Date of Judgment:	25 October 2022