

# Does Sars have a right to intervene in review applications stemming from criminal proceedings?

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Does the South African Revenue Service (Sars) have a direct and substantial interest in the evidence admitted in a review application stemming from criminal proceedings? It does, according to Commissioner: South Africa Revenue Service, in the matter of *Cyril and Another v Additional Magistrate, Magistrates Court for Region of Alexander and Another*.



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The facts, briefly, are that the respondents, Mr Cyril (First Respondent) and Mrs Cyril (Second Respondent) are the former directors of CEW Logistics CC and Tish Maritime CC respectively. The First Respondent imported cigarettes that were cleared through customs and stored free of duty and VAT in a warehouse owned by Tish Maritime CC. The cigarettes were then alleged to have been exported by the respondents to Mozambique. However, when Sars officials conducted an inspection, they discovered that no exports had occurred. This deception was achieved with the assistance of Sars officials, who were also subsequently charged with offences under the Customs and Excise Act, 9 of 1964 (CEA).

This inspection led to criminal proceedings, wherein the respondents were charged with an impressive array of offences including 41 counts of fraud, and 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 so doing, causing actual prejudice to Sars. During the proceedings in the Magistrates' Court, the respondents objected to the admissibility of the evidence obtained during Sars' inspection of the warehouse owned by Tish Marine CC. The Magistrate, however, ruled it admissible.

The respondents appealed, contending that Sars had conducted the inspection "on the basis of an unconstitutional and invalid law". They objected to Sars' intervention application on the basis that the review emanated from a criminal trial

(where parties are not generally admitted unless compelling reasons exist to do so), and furthermore argued that Sars had delayed unreasonably in seeking leave to intervene, resulting in alleged inequality of arms in the litigation.

## Test for intervention

Rule 12 of the Uniform Rules of the High Court (Uniform Rules) provides the procedure for an intervention. According to *SA Riding for the Disabled Association v Regional Land Claims Commissioner [2017]* (CC), an applicant for leave to appeal must show a "direct and substantial interest in the subject matter of the litigation, in the form of a legal interest that may be prejudicially affected". It is not a requirement to prove that the application will be successful, what is required is for the applicant to establish a *prima facie* case or defence — to make allegations that would lead to a successful application if proven. The Court referred further to *Peermont Global (KZN (Pty) Ltd t/a Sibiya Casino and Entertainment Kingdom and Others [2020]* (KZP) (Peermont Global), in which the Court held that "where a party has shown a direct and substantial interest in the subject matter of a case, the court has no discretion".

## Direct and substantial interest

Sars' direct and substantial interest in the outcome of the review application was based on the fact that one of the key issues to be determined in the review application is the ambit of Sars' powers under the CEA. Were the review application decided in favour of Mr and Mrs Cyril, it would invalidate all of Sars' inspections conducted under section 4(4) of the CEA since 14 November 2013 which, according to the respondents, was when the Constitutional Court declared section 4(4) of the CEA unconstitutional and invalid with retrospective effect. The Court again confirmed the principle 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 this is at issue. The Court did not entertain any suggestion that a party may not intervene in proceedings ancillary to a criminal trial, where they can show a direct and substantial interest.

## Unreasonable delay

The respondents had additionally argued that Sars had delayed unreasonably in seeking leave to intervene resulting in prejudice to them, as Sars had only applied for leave to intervene after they had already filed their replying affidavit in response to the Director of Public Prosecutions.

The Court referred to Uniform Rule 12 which contains no time limit and expressly makes provision for an application for intervention may be made "at any stage of the proceedings". The court accordingly found that there was no basis for the argument that the close of pleadings imposes a time bar on an intervention application.

## Order

Sars was accordingly granted leave to intervene in the main application.

## Key takeaways

This case is notable as it confirms that Sars has a direct and substantial interest in the evidence admitted in a review application stemming from criminal proceedings under the CEA. Furthermore, it confirms that there is no time limit for intervention applications, which can occur at any stage of the proceedings including after a judgment or final order has been granted.

## ABOUT THE AUTHOR

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