



SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE APPEALS PANEL

Case No.: STL-14-05/PT/AP/AR126.1

Before: Judge Janet Nosworthy, Presiding
Judge Walid Akoum
Judge Ivana Hrdličková

Registrar: Mr Daryl Mundis

Date: 22 August 2014

Original language: English

Classification: Public

IN THE CASE AGAINST

NEW TV S.A.L. AND
KARMA MOHAMED TAHSIN AL KHAYAT

**DECISION ON URGENT REQUEST FOR SUSPENSIVE EFFECT OF THE
APPEAL, REQUEST FOR LEAVE TO REPLY AND REQUEST FOR APPEAL
HEARING**

***Amicus Curiae* Prosecutor:**
Mr Kenneth Scott

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Mr Karim A.A. Khan
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I. INTRODUCTION

1. The Appeals Panel is seized with an urgent request¹ filed by the *Amicus Curiae* Prosecutor (“*Amicus* Prosecutor”) under Rule 126 (F) of the Rules of Procedure and Evidence (“Rules”), seeking suspensive effect of the interlocutory appeal² pending before it against the “Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment”³, rendered by Judge Lettieri (“Contempt Judge”). In particular, the *Amicus* Prosecutor requests suspension of the orders set out in the Impugned Decision and a subsequent Scheduling Order issued by the Contempt Judge “until the Appeal has been decided upon”.⁴ The Appeals Panel is also seized with a request made by the *Amicus* Prosecutor to file a reply to the Defence Response to the Request for Suspensive Effect.⁵ The *Amicus* Prosecutor further filed a request asking the Appeals Panel to hold an oral hearing in the Appeal.⁶

II. PROCEDURAL BACKGROUND

2. On 24 July 2014, the Contempt Judge rendered a decision on the jurisdiction of the Tribunal to hold contempt proceedings pursuant to Rule 60 *bis* and to charge legal persons with contempt. He dismissed the charges against *New TV S.A.L.*, having found that the Tribunal has no jurisdiction *ratione personae* to hold contempt proceedings against legal persons. Consequently, he ordered the *Amicus* Prosecutor to file a proposed amended order in lieu of an indictment removing all references to *New TV S.A.L.* as an accused.⁷ Acting *proprio motu*, the Contempt Judge certified for appeal the issue of “whether the Tribunal in

¹ STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PT/AP/AR126.1, F0002, Urgent Request for the Suspensive Effect of the Appeal against the Decision on Motion Challenging Jurisdiction, 31 July 2014 (“Request for Suspensive Effect”). All further references to filings relate to this case number unless otherwise stated.

² F0001, Interlocutory Appeal against the Decision on Motion Challenging Jurisdiction, 31 July 2014 (“Appeal”).

³ STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PT/CJ, F0054, Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, 24 July 2014 (“Impugned Decision”).

⁴ Request for Suspensive Effect, para. 12.

⁵ F0006, Request for Leave to Reply to “Defence Response to Amicus Prosecutor’s ‘Urgent Request for the Suspensive Effect of the Appeal against the Decision on Motion Challenging Jurisdiction’”, 13 August 2014 (“Request for Leave to Reply”).

⁶ F0008, Request for Appeals Hearing, 15 August 2014 (“Request for Appeal Hearing”).

⁷ Impugned Decision, p. 34. The Contempt Judge also declared moot a request by the *Amicus* Prosecutor to amend the Order in Lieu of an Indictment with respect to the correct identification of the Accused *New TV S.A.L.* (*ibid.*).

exercising its inherent jurisdiction to hold contempt proceedings pursuant to Rule 60 *bis* has the power to charge legal persons with contempt”.⁸

3. On the same day, the Contempt Judge issued a Scheduling Order in accordance with Rules 60 *bis* (H), 91 (G) and 91 (I) of the Rules, ordering the *Amicus* Prosecutor to file a pre-trial brief and a list of witnesses and exhibits by 1 September 2014 and the Defence for Ms Khayat to file its pre-trial brief by 22 September 2014.⁹ The Scheduling Order also provided that the Pre-Trial Conference and the subsequent date of the commencement of the contempt trial would be set in due course, after consultation with the Parties.¹⁰

4. On 31 July 2014, the *Amicus* Prosecutor submitted both the Appeal and the Request for Suspensive Effect. Following the designation of the Appeals Panel,¹¹ the Defence filed its response to the Appeal on 11 August 2014, requesting that the Appeal be dismissed and the Impugned Decision be upheld.¹² On the same day, the Defence also submitted its response to the Request for Suspensive Effect, arguing that granting suspensive effect is an exceptional relief, which in the circumstances of the present Appeal is not warranted, and that the Request should be dismissed.¹³

5. Responding to *Amicus* Prosecutor’s Request for Leave to Reply to the Response filed on 13 August 2013,¹⁴ the Defence submits that this request should be rejected as improperly filed or otherwise failing to satisfy the test for grant of leave to reply.¹⁵ Subsequently, on 20 August 2014, the *Amicus* Prosecutor filed a motion to clarify and amend his Request for Leave to Reply.¹⁶

⁸ Impugned Decision, para. 83.

⁹ STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PT/CJ, F0055, Scheduling Order for Pre-Trial Briefs, 24 July 2014 (“Scheduling Order”).

¹⁰ Scheduling Order, para. 4.

¹¹ STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/PT/PRES/AR126.1, F0003, Order Designating Appeals Panel, p. 2.

¹² F0005, Defence Response to Amicus Prosecutor’s ‘Interlocutory Appeal Against the Decision on Motion Challenging Jurisdiction’, 11 August 2014.

¹³ F0004, Defence Response to Amicus Prosecutor’s ‘Urgent Request for the Suspensive Effect of the Appeal against the Decision on Motion Challenging Jurisdiction’, 11 August 2014 (“Response”).

¹⁴ See above, fn. 5.

¹⁵ F0007, Defence Response to “Request for Leave to Reply to ‘Defence Response to Amicus Prosecutor’s ‘Urgent Request for the Suspensive Effect of the Appeal against the Decision on Motion Challenging Jurisdiction’”, 15 August 2014 (“Defence Response to Request for Leave to File Reply”), paras 5-12.

¹⁶ F0010, Motion to Clarify and Amend the “Request for Leave to Reply to ‘Defence Response to Amicus Prosecutor’s ‘Urgent Request for the Suspensive Effect of the Appeal Against the Decision on Motion Challenging Jurisdiction’” of 13 August 2014, 20 August 2014 (“Motion to Clarify”), with an Annex entitled “Amended Request for Leave to Reply to “Defence Response to Amicus Prosecutor’s ‘Urgent Request for the

6. On 15 August 2014, the *Amicus* Prosecutor filed a request asking the Appeals Panel to hold an oral hearing on the Appeal.¹⁷ The Defence responds that this request should be dismissed.¹⁸

III. APPLICABLE LAW

7. Pursuant to Rule 126 (F) “[a]n appeal shall not, of itself, have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules”. Under its terms, the Rule makes clear that the suspension of an appealed decision is not automatic but constitutes an exceptional measure. Whether to grant such an exceptional measure is a discretionary decision, which is taken in light of the specific circumstances of each case.¹⁹

8. Given the exceptional nature of a suspension it will only be justified under strict conditions. The Tribunal’s Appeals Chamber, in the context of a request to stay the disclosure of certain documents, and after examining relevant case-law and general principles, has previously identified such conditions. They include the following three requirements:

- a. there is a good cause for the requested suspension;
- b. the duration of the requested suspension is reasonable; and
- c. the appeal itself has reasonable prospects of success on its merits.²⁰

The Appeals Chamber has further held that a party may show “good cause” by demonstrating that suspension is necessary to preserve the object of an appeal.²¹ This is in line with the case-law of other international tribunals, which have held that a suspension should be granted only if the implementation of the decision under appeal would create an irreversible situation that

Suspensive Effect of the Appeal Against the Decision on Motion Challenging Jurisdiction” (“Amended Request for Leave to Reply”).

¹⁷ See above, fn. 6.

¹⁸ F0009, Defence Response to Amicus Prosecutor’s “Request For Appeals Hearing”, 19 August 2014 (“Response to Request for Appeal Hearing”).

¹⁹ See ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11 OA 5, Decision on the request for suspensive effect, 20 August 2013, para. 6; ICC, *Prosecutor v. Ngudjolo Chui*, ICC-01/04-02/12-12 OA, Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect, 20 December 2012, para. 18; see also Lebanese Court of Cassation, Civil Chamber 5, Decision n° 2004/13, 29 January 2004.

²⁰ STL, *In the matter of El Sayed*, CH/AC/2011/01, Order on Urgent Prosecution’s Request for Suspensive Effect Pending Appeal, 12 September 2011 (“*El Sayed* Suspension Order”), para. 8.

²¹ *Id.* at para. 9 referring to ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR65.5, Decision on Prosecution’s Consolidated Appeal Against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković and Čorić, 11 March 2008, para. 11; ICTY, *Prosecutor v. Stanišić and Simatović*, IT-03-69-AR73, Decision on Interlocutory Appeals From Decision of Trial Chamber to Stay Provisionally Release, 29 September 2004, paras 25, 27.

could not be corrected; would lead to consequences that would be very difficult to correct and may be irreversible; or could potentially defeat the purpose of the appeal.²²

9. The Appeals Panel notes that under Lebanese law an appeal generally stays the enforcement of the appealed decision.²³ However, certain appeals against specific types of decisions do not have such suspensive effect and a stay must then be requested.²⁴ In such cases, Article 577 of the Lebanese Code of Civil Procedure²⁵ provides the following:

If a decision for summary implementation is appealed, the Court of Appeal may in any event decide, at the request of the party concerned, to stay summary implementation if it is evident that the effects arising therefrom would surpass reasonable limits vis-à-vis the circumstances of the case, or if the grounds of the appeal make it likely that the judgement will be overturned [...].

This is in line with the principles set out above.

IV. DISCUSSION

A. The Request for Leave to Reply

10. In his Request for Leave to Reply, the *Amicus* Prosecutor seeks permission to advance further arguments on the relevant legal standards related to his Request for Suspensive Effect. He states that allowing him to advance such arguments would be in the interests of justice and because the issues at stake are fundamental to the fair and expeditious conduct of the proceedings.²⁶ The Defence opposes the Request, primarily arguing that it does not identify any new issues in the Response that warrant a further filing.²⁷

²² ICC, *Prosecutor v. Gaddafi and Al-Semussi*, ICC-01/11-01 OA 6, Decision on request for suspensive effect and the request to file a consolidated reply, 22 November 2013, para. 14 (referring to ICC, *Prosecutor v. Katanga*, ICC-01/04-01/07-3344 OA13, Decision on the request for suspensive effect of the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court, 16 January 2013, para. 6); *see also* ICTY, *Prosecutor v. Prlić et al.*, IT-04-74-AR73.17, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Refusal to decide upon evidence tendered pursuant to Rule 92 bis, 1 July 2010, para. 47.

²³ Art. 219 of the Lebanese Code of Criminal Procedure.

²⁴ *El Sayed* Suspension Order, paras 5-7.

²⁵ The Lebanese Code of Civil Procedure ("LCCivP") is also applicable in criminal proceedings where no provisions provide to the contrary in the Lebanese Code of Criminal Procedure (*see* Art. 6 LCCivP).

²⁶ Amended Request for Leave to Reply, paras 6-7. The Appeals Panel notes *Amicus* Prosecutor's Motion to Clarify but considers that the proposed changes to the Request for Leave to Reply are minor in nature and akin to a corrigendum and did not require leave of the Panel (*see, e.g.*, ICTY, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-A, Decision on Boškoski Defence Corrigendum to Respondent Brief, 16 April 2009, p. 3).

²⁷ Defence Response to Request for Leave to File Reply, paras 8-12.

11. The Appeals Panel first notes that in his Request the *Amicus* Prosecutor already developed the arguments he intends to put forward in a reply. Such practice is to be discouraged. Pursuant to Rule 8, a party must obtain leave before filing a reply. To put further substantive arguments on the record without waiting for such leave is an impermissible circumvention of the Rule.²⁸

12. With respect to permitting a reply in this case, the Appeals Panel recalls that the granting of leave to reply “must generally be limited to circumstances where new issues arise out of the respondent’s brief”.²⁹ The Appeals Chamber held further that a reply is not “a vehicle for an appellant to simply reiterate or refine the arguments made in the appeal”.³⁰ Here, the *Amicus* Prosecutor has not identified any new issue arising from the Response. Indeed, the requirements of Rule 126 (F) are already discussed in his Request for Suspensive Effect. Moreover, the Appeals Panel considers that it is fully briefed on the matter and there are no special circumstances that would justify granting leave to reply despite the fact that no new issue has been identified. Therefore, the Appeals Panel dismisses the Amended Request for Leave to Reply.

B. The Request for Suspensive Effect

13. The *Amicus* Prosecutor requests the Appeals Panel to grant suspensive effect to the Appeal, and to suspend the orders set out by the Impugned Decision and related Scheduling Order issued by the Contempt Judge, until the Appeals has been decided upon. He submits that the Appeals Panel will determine if one or two accused will face trial in this contempt case. Depending on the outcome of the Appeal, the case might be fundamentally altered for both the *Amicus* Prosecutor and the Defence, and the parties could be prejudiced by the submissions contained in their pre-trial briefs if the Impugned Decision is reversed.³¹

²⁸ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.3, F0009, Decision on Appeal by Legal Representative of Victims Against Pre-Trial Judge’s Decision on Protective Measures, 10 April 2013, para. 5; *In the case against Akhbar Beirut S.A.L. and Al Amin*, STL-14-06/PT/CJ, Decision on the Request for Certification to Appeal Decision on Assignment of Counsel, 17 July 2014, para. 8, fn. 20.

²⁹ STL, *The Prosecutor v. Ayyash et al.*, STL-11-01/T/AC/AR126.7, F0012, Order by Judge Rapporteur on Request for Leave to File a Reply, 8 May 2014, para. 4 (with reference to other case-law); *see also* STL, *Prosecutor v. Ayyash et al.*, STL-11-01, Transcript of 2 December 2013, p.26 (EN) (“[R]epplies must [...] be confined to any new issues that have arisen in a response”).

³⁰ STL, *The Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.1, Order on Defence Request for Leave to File a Reply, 8 October 2011, para. 3 (referring, *inter alia*, to ICC, *Prosecutor v. Katanga et al.*, ICC-01/04-01/07, Decision on the Application of the Defence for Germain Katanga to File a Reply (Regulation 24 of the Regulations of the Court), 27 March 2009, paras 2-3.

³¹ Request for Suspensive Effect, paras 5-7.

14. The Appeals Panel notes that *Amicus* Prosecutor requests a stay of both the orders of the Contempt Judge in the Impugned Decision and his subsequent Scheduling Order on the filing of pre-trial briefs. These two distinct matters will be addressed in turn.

1. The request for suspension of the Impugned Decision

15. In the Impugned Decision, the Contempt Judge ordered that the charges against *New TV S.A.L.* be dismissed and that the *Amicus* Prosecutor accordingly file an amended Order in Lieu of Indictment.³² In his Request for Suspensive Effect of the Appeal, the *Amicus* Prosecutor seeks a stay of these orders. He submits that it would be “unjustifiably time and resource consuming” to file the amended order in lieu of an indictment without knowing the outcome of the Appeal.³³ He also asserts that the Appeal has an “undeniable chance of success” by relying on the fact that the President of the Tribunal, as the prior Contempt Judge, had already decided that the Tribunal could exercise its jurisdiction over the legal persons, and that the current Contempt Judge granted certification to appeal the Impugned Decision without any of the parties having made a request to do so.³⁴

16. In its Response, the Defence submits that the Request fails to establish the conditions necessary for the grant of suspensive effect of the Appeal to be justified. It argues that the Request’s “assertions of prejudice and waste of significant time and resources [...] are greatly exaggerated”.³⁵ In particular, the filing of a proposed amended order in lieu of an indictment does not create an irreversible situation, irrevocable harm, or risk to the preservation of the object of the appeal.³⁶

17. The Appeals Panel finds that the *Amicus* Prosecutor has failed to show good cause for the grant of the suspension with respect to the Contempt Judge’s decision to dismiss the charges against *New TV S.A.L.* and his order to the *Amicus* Prosecutor to file an amended Order in Lieu of an Indictment. In particular, the *Amicus* Prosecutor does not demonstrate how the filing of such an amended proposed order in lieu of an indictment, excising references to *New TV S.A.L.* as an accused, would defeat the purpose of the Appeal, or would create an irreversible situation or a situation that would be difficult to correct, should the

³² Impugned Decision, p. 34.

³³ Request for Suspensive Effect, paras 8-9.

³⁴ *Id.* at para. 11.

³⁵ Response, para. 15.

³⁶ *Id.* at para. 17.

Appeal succeed on its merits. The same applies to the Contempt Judge's decision to dismiss the charges against *New TV* S.A.L.

18. Indeed, if the Appeals Panel were to grant the Appeal, the charges against New TV would simply be reinstated. The *Amicus* Prosecutor's unsubstantiated contention that the filing of an amended Order in Lieu of an Indictment in the meantime would be time and resource-consuming is unconvincing, given that the Order in Lieu of an Indictment is a three-page document. In sum, his arguments do not meet the high threshold for the grant of suspensive relief.

2. The request for suspension of the Scheduling Order

19. Following the Impugned Decision, the Contempt Judge issued a Scheduling Order, setting out the dates on which the parties must file their pre-trial briefs.³⁷ The *Amicus* Prosecutor argues that this order should also be stayed. He claims that should the Impugned Decision be reversed the need for new pre-trial briefs could cause unpredictable delays in the proceedings, and there will have to be an additional, entirely separate trial, with substantial resource requirements, if the proceedings go forward without *New TV* S.A.L. According to the *Amicus* Prosecutor, it would also be "impractical and contrary to principles of judicial economy to hold a Pre-Trial Conference [...] without knowing if *New TV* S.A.L. is an Accused in this case."³⁸

20. The Defence rejects most of the *Amicus* Prosecutor's arguments as speculative and unsupported. In its view the *Amicus* Prosecutor has not shown how matters that essentially concern the Contempt Judge's management of the trial meet the high standard required for the grant of suspensive relief.³⁹

21. The Appeals Panel first observes that granting suspensive effect to an appeal only affects the enforcement of the decision against which the appeal is directed and potentially any further orders taken to implement that decision. Such enforcement may be suspended in full or in part, depending on the object of the appeal. However, the scope of the granted suspension of an appeal does not normally cover a stay of the entire proceedings before the Judge or Chamber that issued the impugned decision. Indeed, a decision for suspension of an

³⁷ Scheduling Order, p.2.

³⁸ Request for Suspensive Effect, para. 8.

³⁹ Response, paras 13, 16, 18-19.

appeal aims only at preserving the *status quo ante*, *i.e.* preserving the situation existing prior to the issuance of the impugned decision.

22. In this case, the order of the Contempt Judge to set dates for the filing of pre-trial briefs may be said to flow directly from the Impugned Decision. Unless otherwise ordered, the pre-trial briefs must comply with the directions in the Impugned Decision, *i.e.* address only Ms Khayat as an Accused in this case, but not *New TV S.A.L.* However, the *Amicus* Prosecutor fails to show how the filings of such pre-trial briefs and the witnesses and exhibits lists would defeat the object of the appeal, or would create a situation that would be difficult to correct, or cause an irreparable harm. Furthermore, as correctly noted by the Defence, the request to suspend the scheduling of a Pre-Trial Conference is premature, since no date has been set.

23. The Appeals Panel also considers that it “needs to weigh the delay that a suspension would cause against the impact that continuing the proceedings before the Trial Chamber based on the Impugned Decision could have [...]”.⁴⁰ Here, suspension of the Impugned Decision would result in the Parties having to prepare for trial involving both a legal person (*New TV S.A.L.*) and a natural person (Ms Khayat). In this case, the impact on both *Amicus* Prosecutor’s and Defence counsel’s preparations would be immense. It would also create potential for delays. On the contrary, the implementation of the Impugned Decision would not lead to consequences that would be irreversible or difficult to correct, nor would it defeat the purpose of the Appeal.

3. Conclusion

24. In conclusion, the Appeals Panel dismisses the Request for Suspensive Effect. This is without prejudice to the Appeals Panel’s decision on the merits of the *Amicus* Prosecutor’s Appeal.

C. The Request for Appeal Hearing

25. The *Amicus* Prosecutor requests an oral hearing in the Appeal, first because “oral hearings provide the best opportunity for the parties to respond to the Appeals Panel’s specific questions” and second because “oral hearings permit the parties to respond to and

⁴⁰ ICC, *Prosecutor v. Germain Katanga*, ICC-01/04-01/07 OA 13, Decision on the request for suspensive effect of the appeal against Trial Chamber II’s decision on the implementation of regulation 55 of the Regulations of the Court, 16 January 2013, para. 8.

correct any misstatements of their positions by the opposing side.”⁴¹ He submits further that the Appeal “raises fundamental question about the Tribunal’s power and jurisdiction, and its ability to police the integrity of its own proceedings.”⁴² The Defence responds that a hearing in this case is not necessary.⁴³

26. Pursuant to Rule 187 “[a]ppeals may be determined entirely on the basis of written briefs”. The Appeals Chamber has already held that interlocutory appeals will, as a general rule, be decided on the basis on the written briefs of the parties, unless it is shown that the issues on appeal cannot be effectively addressed through those briefs.⁴⁴ Here, the *Amicus* Prosecutor has not demonstrated why the single issue on appeal cannot be sufficiently and effectively addressed through the written briefs. In addition, the Appeals Panel retains the power to put specific questions to the Parties; it can do so through a written order. Furthermore, it is not the purpose of oral hearings on appeal to give the Parties an opportunity for further replies to the arguments of the other side.

27. In sum, the Appeals Panel is not convinced that an appeal hearing in this matter is necessary. Consequently, we reject the Request for Appeal Hearing.

⁴¹ Request for Appeal Hearing, para. 5.

⁴² *Id.* at para. 8.

⁴³ Response to Request for Appeal Hearing, para. 1.

⁴⁴ STL, *Prosecutor v. Ayyash et al.*, STL-11-01/PT/AC/AR126.2, F0008, Decision on Appeal against Pre-Trial Judge’s Decision on Motion by Counsel for Mr Badreddine Alleging the Absence of Authority of the Prosecutor, 13 November 2012, para. 8 (with further references to other case-law).

V. DISPOSITION

FOR THESE REASONS,

PURSUANT to Rule 126 (F);

THE APPEALS PANEL, deciding unanimously;

DISMISSES the Request for Suspensive Effect;

REJECTS the Request for Leave to Reply and the Amended Request for Leave to Reply;

DISMISSES the Request for Appeal Hearing.

Done in Arabic, English and French, the English version being authoritative.

Leidschendam, 22 August 2014.



Janet Nosworthy, Presiding Judge



Walid Akoum, Judge



Ivana Hrdličková, Judge

