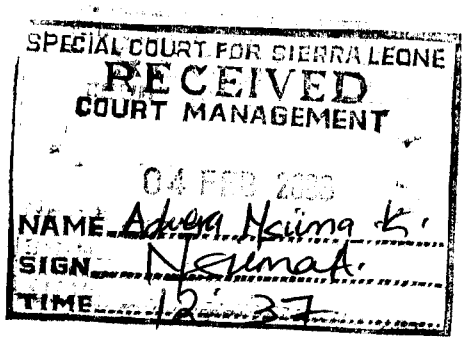
967) SCSL-04-15-T (23932-23942) 23932

THE SPECIAL COURT FOR SIERRA LEONE

Before: Hon. Justice Benjamin Itoe, Presiding
Hon. Justice Bankole Thompson
Hon. Justice Pierre Boutet

Registrar: Mr. Herman von Hebel

Date filed: 4th February 2008



The Prosecutor

-v-

Issa Hassan Sesay
Morris Kallon
Augustine Gbao

Case No: SCSL-2004-15-T

PUBLIC
SESAY DEFENCE APPLICATION FOR A WEEK'S ADJOURNMENT
Insufficient Resources in violation of Article 17(4)(b) of the Statute of the Special Court

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1. On the 5th September 2007 the Sesay Defence applied to the Trial Chamber for Judicial Review of the Registry's Refusal to Provide Additional Funds.[1] This was the culmination of protracted negotiations and repeated attempts by the Sesay Defence to obtain reasonable funds to enable the Defence case to be adequately and properly presented. On numerous occasions since the filing of the Motion the Defence has raised the issue in court[2] and has complained of the unreasonable burden being placed upon Counsel and the legal assistants due to the size and complexity of the defence case and the inadequate resources provided by the Registry.

2. Every attempt to engage the Registry has failed and the aforementioned Motion has not been ruled upon. The Defence has been denied a remedy, notwithstanding repeated attempts to obtain funds to employ an additional lawyer several years before the defence case commenced. The Defence is therefore unable to continue Mr. Sesay's defence case at this time due to (i) the inability to properly identify and prepare viva voce witnesses for immediate trial readiness and (ii) the inability to carry out the remaining associated tasks, given the number of lawyers on the team.

3. **The Defence seeks the immediate intervention of the Trial Chamber. In the event that the Trial Chamber refuses to rule immediately upon the Motion (requesting additional funds) and/or refuses an adjournment the Defence requests an immediate referral of the issues to the Appeal Chamber to enable the Defence to obtain a remedy to the funding crisis and the intolerable working conditions created by the Registry.**

Arguments

4. As noted in the case of *Tadic* at the ICTY, Article 17(1) provides that *"the Trial Chamber shall ensure that a trial is fair and expeditious...."and "equality of arms means that each party must have a reasonable opportunity to defend its interests 'under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent".*[3]

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[1] Application for Judicial Review of the Registry's Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Decision of 26th April 2007 (the 'Sesay Defence Application for Judicial Review'), 5th September 2007, SCSL-04-15-T-817.
[2] See, for example, transcripts of 4th October 2007, pgs 4-5; 11th October 2007, pg 52, line 10 – pg 54, line 54, line 22; 27th November 2007, pg 14-15.
[3] Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Judgement, July 15 1999, paras, 43, 44, 48, and 52.

5. The Appeals Chamber, in the same case held that

"the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. The principle means that the Prosecution and Defence must be equal before the Trial Chamber. The Trial Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request for a party in presenting its case".[4]

6. The Sesay Defence has enjoyed no such consideration. The Application for additional funds has not been ruled upon and the Trial Chamber has not considered its merits.

7. The Defence regrettably applies for an adjournment in order to obtain the "adequate time and facilities for the preparation of his defence" as enjoined by Article 17(4)(b). The Defence have done everything it can to avoid this situation; filing the first Application for additional funds in April 2005 and since that time doing all that was practicable to engage the Registry and the Trial Chamber in the merits of the arguments.

8. The merits of the Defence application have never been considered and have led to the core team consisting of Mr. Jordash. Ms. Ashraph and Mr. Kneitel being forced to work patently unreasonable hours to avoid adjournments. The Defence team is unable to effectively prepare the defence with the current resources and in time to continue without delay. The Defence applies for a one week adjournment. The Defence anticipates that it will require further adjournments within the next few weeks as the existing team continues to struggle to cope with the influx of witnesses, the associated legal tasks and the various legal contingencies which arise.

9. Since 7th January 2008, Ms. Ashraph and Mr. Kneitel have re-interviewed/ proofed approximately 45 witnesses coming through the witness house. Witnesses to be heard live in Court were also interviewed by Mr. Jordash. Currently, as the Sesay defence team is expecting 46 witnesses into the witness house for re-interview in order to determine if the witness will be put before the Court, either viva voce or under Rule 92. Of these 46 witnesses,

[4] See footnote 3.

it is currently estimated that 15 will be called live while 20-25 will form the basis of an application under Rule 92. In order to make these decisions, every witness will have to be interviewed concerning their knowledge of the whole conflict in order for the Defence to make sensible and reasoned decisions about the merits of the particular witness. A reasonable observer would not expect this task to be conducted by two lawyers while the third is in Court alone, without necessitating adjournments.

Advance Notice given by the Sesay Defence team to the Registry of the current situation

10. That the current resources of the team – in respect of having 3 qualified lawyers undertaking the witness preparation – were insufficient and would result in an over-worked team and adjournments were brought to the attention of the Registry repeatedly.

11. In April 2005, the Sesay Defence submitted an Application for Exceptional Circumstances to the Registry. After some initial confusion, it was refused. On 25th November 2005, the Sesay Defence team resubmitted the Application for Special Consideration with a plethora of facts and figures supporting its position. In the November 2005 Application, it was stated:

> In our view, the Sesay Defence will require an increased budget *towards the end of the Prosecution case and throughout the Defence case* to allow the present team the funds to work to prepare the case and moreover to employ the extra personnel which will be required.....
>
> It is our firmly held view that, as the defence case approaches, the present team will be unable to cope.... Moreover and more importantly counsel presently instructed will be physically unable to complete the task in the time available. In short there are insufficient hours in the day to complete the tasks necessary. This lack of resource will be exacerbated when the RUF trial session goes full time....
>
> The present team is not able to do all the work necessary to safeguard Sesay's rights pursuant to Article 17 of the Statute and the present budget will not allow for further recruitment of any personnel with appropriate expertise. The funds available are wholly inadequate for a case of this magnitude and seriousness. The issues which we have raised go to the heart of Sesay's rights to a fair trial.

12. As the Trial Chamber will be aware, this application was refused by the Registry and the matter went before an independent arbitrator on 16th April 2007. The Registry has refused to properly consider any arguments concerning defence funding. The fact that the Registry

opposed the Sesay Defence Application for additional funding – without once setting out their reasoning and without offering any rebuttal of the evidence provided by the Defence - for 2 years and in the arbitration hearings could not explain when the Special Consideration clause would in fact apply[5] is indicative of the ongoing lack of bona fides of the Registrar.

13. On 18th April 2007, the Sesay Defence wrote to the Registry in an attempt to resolve issues of funding before the start of the Sesay Defence case. That letter foreshadowed the problems encountered in the team's preparation of its defence case:

> As you will be aware the Sesay Defence team has grave concerns regarding the lack of funding of the defence teams and the impact this may have on the running of the RUF trial..... It is simply not possible to prepare, proof and call up to 100 witnesses (selecting them from a possible 320), with only three people; one of whom will be in court at all times. This cannot be achieved without the real possibility of lengthy court adjournments and without placing intolerable pressures upon each member of my team. I note already before the trial commences that we are all working 7 day weeks and 12 – 15 hour days and this is with the assistance of an international investigator whose contract expires before the first witness will be called (mid June 2007)....
>
> I genuinely believe that my 3 person team is mentally and physically unable to fulfil our duties to our client without more assistance..... The present funding arrangements imply that I will be in court alone (or with an intern) whilst Ms. Ashraph and Mr. Kneitel will be preparing up to 10 witnesses at any one time. In the event that one of us is unable to work due to illness or any other unforeseen contingency I will forced to apply for an adjournment of the proceedings. It ought to be obvious that the cost of an adjournment to the court far outweighs providing us with additional funds from the outset... I note that during the Prosecution case of a similar size the Prosecution relied upon at least four rotating in-court Counsel... as well as a full time Case Manager, several interns and at least 10 investigators. This number of Counsel and investigators enabled the Prosecution to proof and prepare witnesses whilst at the same time other counsel was leading witnesses in court. It enabled them to work in reasonable circumstances, with reasonable working hours and with reasonable breaks.
>
> My team has no such luxury. There will be no rotation in court and no respite for any of my team. In these circumstances illness is not just a possibility it is inevitable. I hardly need to point out the obvious effects of working 7 day weeks and up to 20 hour days in this hardship post. My team and I are already exhausted and we have three months of concentrated work ahead of us. I have no doubt we are at risk of becoming ill and possibly long term ill. It is my ethical duty to protect my team and I respectfully suggest the Registry owes a similar duty of care to the defence, notwithstanding we are sub-contracted to the court.

[5] The independent arbitrator noted "the apparent inability of the Respondents to posit the circumstances in which the Special Consideration Clause would apply", para 7.16 of the Arbitration Judgment, 26th April 2007.

> I would respectfully ask that you consider these issues and properly review the current state of staffing in my team. My team is prepared to work long hours (with a percentage of those hours provided pro bono) but the present situation endangers the fairness of the trial, the smooth running of the court, the health of my team and the reputation of the court. In relation to the final point I would point out to you that the disparity of resources will be more than obvious to any observer during the currency of our defence case since I will be on my feet alone facing four opposing lawyers while the Defence Office is replete with many more. I hope that you will look again at these issues.

14. The letter was copied to the Trial Chamber. The Registrar has never responded to this letter and has continued to be hostile to any arguments advanced at any time by the Defence concerning the equality of arms and funding for the defence. The letter is annexed (D) to the Sesay Reply to the Submission by the Registrar opposing reasonable funding.[6]

Example of the work required thus far

15. Mr. Jordash, Ms. Ashraph and Mr. Kneitel have been working on Mr. Sesay's Defence case for 2-5 years. In the October – December 2007 trial session (inclusive of weekends), Mr. Jordash and Ms. Ashraph had 2 days' without any work while Mr. Kneitel had 3 days without work. In the current trial session which has been running since 10th January 2008, Mr. Jordash and Ms. Ashraph have worked 7 days a week, every week, while Mr. Kneitel has had one day off. During the week, it is estimated that the aforementioned work 12-18 hr days while on weekends, they work 6-10 hr days. Notwithstanding we are unable to prepare witnesses to be ready for court today or for the next week.

16. No other personnel at the Special Court is expected to work under such working periods for such extended periods of time and the working conditions are taking a toll on the physical and mental well-being of our team members. The Sesay Defence is no longer prepared to work at a rate which places the health of its members at risk. The conditions placed upon the team are those which would be unacceptable for any other staff or contractor at the Special Court and have been wholly disregarded by the SCSL. The Registrar refuses to consider the patent inequalities between both the Defence and the Prosecution and the remainder of the court

[6] Defence Reply to the Submission by the Registry in Relation to Sesay team's "Application for Judicial Review of the Registry's Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Decision of 26th April 2007, 24th September 2007, SCSL-04-15-T-823.

employees. The Registrar approach to funding would lead a reasonable observer to conclude that he has intentionally implemented a payment scheme to disadvantage the defence in breach of Article 17(4)(b) of the Statute.

Insufficient team members of sufficient experience to prepare witnesses

17. The long hours worked by Mr. Jordash, Ms. Ashraph and Mr. Kneitel are a direct consequence of the denial of a remedy to the complaint of insufficient resources and the Defence attempt to avoid adjournments. As the Trial Chamber is aware, it is the long-held position of the Sesay Defence team that is has too few qualified lawyers to properly identify which witnesses out of its witness list of 321 witnesses will be called viva voce and to proof those viva voce witnesses before testifying. Even given the untenable working hours of the qualified lawyers on the team, it has not been possible to re-interview witnesses for later viva voce testimony and for the purposes of an application under Rule 92 while also proofing witnesses on the current witness call order. Hence no witnesses are available today.

18. It should also be borne in mind that the preparation of witnesses for Court sits alongside the other tasks that the Sesay Defence team which include: the drafting of motions, responses and replies, conferences with the Accused, groundwork on the closing brief submissions, inspection of prosecution witnesses statements (which in the case of large insider witnesses can take 2-3 hrs each for 2 team members), preparing material for the military expert, supervising the work of legal assistants/ interns in relation to legal research and analysis of documents as well as the myriad of administrative tasks.

19. The Defence does not intend to reiterate its arguments which are a matter of court record and which already run to nearly a hundred pages of argument and proof of the insufficiency of funding. However the following is worth noting.

20. On 26th April 2007, the independent arbitrator held that

> Having regard to material, arguments and circumstances put forward by the Claimant and the apparent inability of the Respondents to posit the circumstances in which the Special Consideration Clause would apply and my own assessment of the case made by the Claimant, I do find that the case of the

> Claimant falls within the Special Consideration Clause and accordingly answer the Second Question as follows:
>
> That the case against Issa Sesay on its own and/ or in relation to the other cases at the Special Court, is sufficiently serious, complex or sizable to amount to exceptional circumstances as to warrant the provision of additional resources under the special consideration clause in the Legal Service Contract

21. As the Trial Chamber is aware, this resulted in the Sesay Defence Application for Judicial Review. This was filed on 5th September 2007 and has not yet been ruled upon.

22. Since the commencement of the Sesay Defence case the inequalities between the parties have been obvious to a reasonable observer. During the Prosecution case the Prosecution had up to 7 lawyers to lead a similar number of witnesses. The Prosecution currently has four full time lawyers engaged in cross examining the Sesay Defence witnesses. The lawyers rotate so that each lawyer has to cross examine one witness out of four. It is noteworthy that the only team who can afford to have only one lawyer in court at any one time is the Sesay team. This is grossly unfair and sets a new low for defence facilities when compared to the ICTY and the ICTR.

23. The Defence has had to belatedly rely upon the good will of personal relationships. In January 2008, it became apparent that it was not going to be possible to identify up to 60 viva voce and Rule 92 witnesses while proofing and taking witnesses on the call order in court without additional assistance even with the 3 qualified lawyers working 7 days a week. Consequently, Mr. Jordash contacted a friend and colleague of 15 yrs' call at the British Bar who agreed to come to Sierra Leone for a month to assist with the preparation of the Rule 92 witness. The funding arrangements allow for this senior lawyer to be paid at a rate below P3 level *without DLA.*

The position of the Sesay Defence team

24. It is an embarrassment that the Sesay Defence has been obliged to depend upon personal relationships to be able to continue thus far. Notwithstanding this generosity this assistance is too little and too late. Without proper funding and an adjournment the Accused will be denied a fair trial. The Defence requires facilities which do not put him at a disadvantage compared

to both the other accused and the Prosecution. At the very least the accused requires a proper consideration of the Motion for funding and a proper consideration of the merits of this application for an adjournment.

25. The Sesay team is no longer willing to act as "band-aid" for the inevitable consequences of the Registry's lack of commitment to providing adequate resources to the Defence, particularly given the high personal cost to the team, the current working hours resulting from the intolerable working conditions.

26. The Bar of the England and Wales does not require barristers to work unreasonable hours in order to properly prepare a case. Consequently, the Sesay Defence team from henceforth will refuse to work for more than 12 hours per day on weekdays and for one 8 hour day at the weekend. It should be noted that this grossly exceeds the working hours of the vast majority of Court personnel and also exceeds the funding available. The Defence is not willing to place its personnel at risk of serious long term illness brought upon by exhaustion and adverse working conditions.

27. Given the Sesay Defence team's commitment to reasonable work hours on the grounds of the need to protect the health of its team members, it is compelled to alert the Trial Chamber that it is likely that 3 qualified lawyers working the hours set out in paragraph 26 above will not be able to properly identify and prepare viva voce and Rule 92 witnesses alongside the other necessary tasks a defence team must undertake to ensure effective preparation in the defence of its client, without further adjournments.

Conclusion

28. Over the course of 4 years, the Sesay team has sought additional resources for the hiring of an additional Counsel to assist in the preparation of Mr. Sesay's defence. On numerous occasions, the Registry has been informed that it will not be possible to properly prepare Mr. Sesay's defence case without adjournments with only 3 qualified lawyers preparing the witnesses, given that one will have to be present in Court. The Registry was alerted to the unreasonable working conditions the defence team would have to work in an effort to

properly prepare the defence case. Following the Registry's refusal, the matter was placed before the Trial Chamber in September 2007.

29. The Defence have been denied a remedy in breach of Article 17(4)(b). The remedy it now seeks is (i) an immediate one week suspension of the proceedings to allow for the current team to prepare the next witnesses without subjecting itself to unreasonable working hours (ii) an immediate consideration of the Motion for additional funding so that the assistance of the lawyer referred to above in paragraph 23 can be maintained at a reasonable rate of remuneration and (iii) a proper consideration of any further application for an adjournment to ensure effective representation and proper facilities for the accused.

Dated 4th February 2008

Wayne Jordash

Sareta Ashraph

BOOK OF AUTHORITIES

1. Application for Judicial Review of the Registry's Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Decision of 26th April 2007, 5th September 2007, SCSL-04-15-T-817.

2. Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Judgement, July 15 1999.

3. Defence Reply to the Submission by the Registry in Relation to Sesay team's "Application for Judicial Review of the Registry's Refusal to Provide Additional Funds for an Additional Counsel as Part of the Implementation of the Arbitration Decision of 26th April 2007, 24th September 2007, SCSL-04-15-T-823.