

ICTR-07-91-T
(3280-3277)

11-03-09

3280
B.M.N



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 11 March 2009

THE PROSECUTOR

v.

Léonidas NSHOGOZA

Case No. ICTR-07-91-T

2009 MAR 11 P 12:01
APD/gm 11/03/2009
JUDICIAL RECORDS ARCHIVE
RECEIVED

**DECISION TO SANCTION THE DEFENCE FOR FAILURE TO COMPLY WITH
THE CHAMBER'S ORDERS**

Rules 46, 54, 73 (F), and 77 of the Rules of Procedure and Evidence

Office of the Prosecutor:

Richard Karegyesa
Abdoulaye Seye
Dennis Mabura
Marie Ka

For the Accused:

Allison Turner

INTRODUCTION

1. On 23 February 2009, after having twice ordered the Defence to reduce its list of witnesses, the Chamber ordered the Defence to reduce the number of witnesses that it would call to give oral testimony to a maximum of ten.¹ The Defence was to file its reduced list of witnesses by 25 February 2009. The Defence did not file its reduced list of witnesses – but rather, on 25 February 2009, sought reconsideration of the Chamber's 23 February 2009 Order.² On 26 February 2009, the Chamber issued a Decision denying the Defence request for reconsideration, and ordered the Defence to file the reduced list of no more than ten witnesses to give *viva voce* testimony, in addition to the Accused, should he decide to testify.³

2. The Defence did not file the list of ten witnesses.⁴ On 2 March 2009, the Defence filed a list containing twenty-two witnesses whom the Defence intends to call to testify, and several other witnesses whose written statements the Defence will seek to have admitted pursuant to Rule 92 *bis* of the Rules of Procedure and Evidence ("Rules").⁵

3. As Defence Counsel had continued to fail to comply with the Chamber's orders, on 3 March 2009, the Chamber issued an Order for the Defence to comply with the Chamber's 23 February 2009 Order and the Chamber's Decision of 26 February for the Defence to reduce its list of witnesses, and to file such reduced witness list no later than 4 March 2009 ("Order to Comply").⁶ In the Order to Comply, the Chamber issued a warning to Defence Counsel for failing to comply with its orders, and advised that if Defence Counsel continued to disregard the Chamber's orders, that the Chamber may consider imposing sanctions.⁷

DISCUSSION

The Applicable Law

4. Rule 46 (A) of the Rules allows the Chamber to impose sanctions against counsel, after a warning, "if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice." Under Rule 46 (B), "a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in his State of admission...."

5. In addition to sanctions under Rule 46, Rule 73 (F) allows a Chamber to impose sanctions against Counsel "if Counsel brings a motion...that, in the opinion of the Chamber,

¹ *Prosecutor v. Nshogoza*, Case No. ICTR-07-91-T, Further Order for the Defence to Reduce its List of Witnesses, 23 February 2009.

² *Nshogoza*, "Defence Request for Reconsideration of the 'Further Order for the Defence to Reduce its List of Witnesses'," filed 25 February 2009.

³ *Nshogoza*, Decision on Defence Motion for Reconsideration of the Chamber's Further Order for the Defence to Reduce its Witness List, 26 February 2009.

⁴ As of close of business on Friday 6 March 2009, the Defence had not filed the list as ordered.

⁵ *Nshogoza*, "Defence Strictly Confidential List of Witnesses," filed 2 March 2009.

⁶ *Nshogoza*, Order for the Defence to Comply with the Chamber's Order of 23 February 2009 and the Chamber's Decision of 26 February 2009 for the Defence to Reduce its List of Witnesses, 3 March 2009.

⁷ Order to Comply, p. 3.

is frivolous or an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof."

Sanctions against Defence Counsel

6. The Order to Comply was the first time the Chamber issued a written directive instructing Defence Counsel to comply with the Chamber's orders and warning Defence Counsel that she may be sanctioned for failure to comply. However, it is not the first time that Defence Counsel has disregarded the Chamber's orders,⁸ nor is it the first time that the Chamber has considered it necessary to sanction Defence Counsel.

7. In this case, the Chamber has, on three occasions, imposed sanctions on Counsel by directing the Registrar to withhold payment of fees associated with the filing of a motion pursuant to Rule 73 (F) of the Rules because the Chamber considered the motion to be frivolous.⁹ Prior to the warning to Defence Counsel in the Order to Comply, the Chamber warned Defence Counsel for misrepresenting information to the Chamber in one of her motions.¹⁰ In addition, during the course of the proceedings, the Chamber has found it necessary to caution Defence Counsel that her tone and language in addressing the Bench was not acceptable, and that she should proceed in a manner that is not insulting.¹¹ Further, the Chamber has, during the course of the proceedings, had to repeat its orders before Defence Counsel has done as instructed.¹²

8. During the proceedings on 9 March 2009, the Chamber ordered the Defence to file its reduced witness list as ordered by 4:00 p.m. that day. In response, Defence Counsel stated that if she is required to comply with the Chamber's order to submit a list of ten witnesses, she will submit her resignation. According to Defence Counsel, she cannot comply with the Chamber's order because the Accused has instructed her not to file a list of ten witnesses because it will compromise his defence.¹³ After hearing from the Parties, the Chamber adjourned the proceedings to enable the Defence to file its list of ten witnesses as previously ordered. In spite of this specific direction to obey the Chamber's Order, the Defence failed to file the reduced list as directed.¹⁴

⁸ On 17 February 2009 the Chamber issued the *Ex Parte* Order for the Defence to Further Reduce its List of Witnesses, in which it ordered the Defence to further reduce its witness list no later than 18 February 2009. When the Defence failed to comply with the 17 February Order, and failed to seek an extension of time to comply, the Chamber made an Oral Order on 19 February 2009 for the Defence to file such list as ordered not later than 20 February 2009.

⁹ *Nshogoza*, Decision on Defence Application for Judicial and Administrative Deferral in Favour of the ICTR, 5 November 2008; Decision on Defence Motion to Examine on Affidavit, 20 November 2008; Decision on Defence Motion for Clarification and Request for an Extension of Time, 3 February 2009. Rule 73 (F) provides: "[i]n addition to sanctions envisaged by Rule 46, a Chamber may impose sanctions against Counsel if Counsel brings a motion...that, in the opinion of the Chamber, is frivolous or an abuse of process. Such sanctions may include non-payment, in whole or in part, of fees associated with the motion and/or costs thereof."

¹⁰ *Nshogoza*, Decision on Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Challenge the Indictment, 17 December 2008. The Chamber warned Defence Counsel and reminded her of her obligations under the Code of Professional Conduct for Defence Counsel.

¹¹ *Nshogoza*, T. 19 February 2009, p. 42; T. 9 March 2009 pp. 8, 12, 13.

¹² See generally, for example, T. 9 February 2009 and T. 9 March 2009.

¹³ T. 9 March 2009 p. 10.

¹⁴ *Nshogoza*, "Defence Submissions Further to the Trial Chamber's Oral Order of 9 March 2009," filed 9 March 2009.

9. The Chamber considers that the Defence's failure to file the reduced list of witnesses amounts to flagrant disregard for its orders, obstructs the proceedings, and is contrary to the interests of justice.

FOR THESE REASONS, the Chamber hereby

SANCTIONS Defence Counsel, pursuant to Rule 46 (A), by imposing a fine of \$5000.00 (Five Thousand Dollars); and,

DIRECTS the Registrar, accordingly, to retrieve the said amount from Defence Counsel; and,

FURTHER DIRECTS the Registrar, pursuant to Rule 46 (B) of the Rules, to seek the President's approval to communicate Defence Counsel Allison Turner's misconduct to the professional body that regulates the conduct of counsel in her State of admission.

Arusha, 11 March 2009



Khalida Rachid Khan
Presiding Judge



Lee Gacuiga Muthoga
Judge



Aydin Sefa Akay
Judge

[Seal of the Tribunal]

