

SPECIAL TRIBUNAL FOR LEBANON

المحكمة الخاصة بلبنان

TRIBUNAL SPÉCIAL POUR LE LIBAN

THE CONTEMPT JUDGE

Case No.: STL-14-05/T/CJ

Before: Judge Nicola Lettieri, Contempt Judge

Registrar: Mr Daryl Mundis, Registrar

Date: 3 June 2015

Original language: English

Classification: Public

IN THE CASE AGAINST

AL JADEED [CO.] S.A.L./ NEW T.V. S.A.L. (N.T.V.)
KARMA MOHAMED TAHSIN AL KHAYAT

DECISION ON ADMISSION OF AMICUS'S EXHIBITS

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

Counsel for *Al Jadeed* [CO.] S.A.L./
NEW T.V. S.A.L. (N.T.V.) and
Ms Karma Khayat:
Mr Karim A.A. Khan
Mr Rodney Dixon
Ms Shyamala Alagendra



INTRODUCTION

1. On 25 May 2015, the *Amicus Curiae* Prosecutor (“*Amicus*”) requested the admission into evidence of several exhibits pursuant to Rule 154 of the Rules of Procedure and Evidence (“Rules”).¹ The Defence objects to the Motion.²
2. The *Amicus* sought leave to reply to the Response,³ to which the Defence sought to respond.⁴
3. For the reasons stated below, I deny the Request for Leave to Reply, the Response to the Request for Leave to Reply and the Motion.

APPLICABLE LAW

4. Under Rule 154, evidence may be admitted in the form of a document or other record, consistently with Rule 149 (C) and (D). Pursuant to Rule 149 (C) and (D), a Chamber may admit any relevant evidence which it deems to have probative value; but it may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
5. Rule 146 (B) provides that, “[u]nless otherwise directed by the Trial Chamber in the interests of justice, the evidence at the trial shall be presented in the following sequence:
 - (i) evidence for the Prosecutor;
 - (ii) evidence called by the Trial Chamber at the request of victims participating in the proceedings;
 - (iii) evidence for the defence;
 - (iv) Prosecutor’s evidence in rebuttal;
 - (v) rebuttal evidence called at the request of victims participating in the proceedings;

¹ STL, *In the case against New TV S.A.L. and Khayat*, STL-14-05/I/CJ, F0157, Motion for Admission of Evidence Pursuant to Rule 154, 21 May 2015 (“Motion”). All further references to filings and decisions refer to this case number unless otherwise stated.

² F0159, Defence Response to “Motion for Admission of Evidence pursuant to Rule 154”, Public with Confidential Annexes, 27 May 2015 (“Response”).

³ F0160, Request for Leave to Reply to “Defence Response to “Motion of Admission of Evidence pursuant to Rule 154” dated 27 May 2015, 28 May 2015 (“Request for Leave to Reply”).

⁴ F0161, Defence Response to “Request for Leave to Reply to “Defence Response to “Motion of Admission of evidence pursuant to Rule 154” dated 27 May 2015”, 29 May 2015 (“Response to the Request for Leave to Reply”).

(vi) defence evidence in rejoinder.

DISCUSSION

I. The position of the *Amicus*

6. The *Amicus* seeks the admission into evidence of Ms Mariam Al Bassam's criminal record, requests for assistance sent to the Prosecutor General of Lebanon in 2013 to conduct interviews with actual or former *Al Jadeed* TV staff members and related responses to those requests in rebuttal to the evidence presented by the Defence in its bar table motion⁵ and during trial.⁶

7. The *Amicus* submits that the evidence he intends to rebut with this material only came to his attention during the presentation of the Defence case and in the Defence Bar Table Motion.⁷ He argues, *inter alia*, that the Defence offered no prior notice or disclosure that it intended to present "good character" evidence concerning the corporate Accused, acting through its senior management, including Ms Al Bassam, or that the service of the Pre-Trial Judge's 10 August 2012 Order was defective. He argues further that the Defence Witness List did not include a proper summary of the facts on which each witness was expected to testify.⁸

8. The *Amicus* claims that the evidence he now submits could have been presented through Defence witness Ms Maya Habli. However, the Defence decided not to call this witness. Instead, the Defence tendered evidence through the Defence Bar Table Motion which could have been introduced through Ms Habli or other Defence witnesses.⁹

9. The *Amicus* contends that Ms Al Bassam's criminal record is relevant to rebut the assertions of the Defence as to the good character of the corporate Accused and the service of court orders or legal documents on the Accused.¹⁰ The requests for assistance sent to the Prosecutor-General of Lebanon and related material are relevant, in the *Amicus*'s view, to highlight Ms Al Bassam's refusal to meet with the *Amicus*. This rebuts the Defence's contention that all of *Al Jadeed* TV's managers cooperated with the investigation. The *Amicus* submits that

⁵ F0155 Defence Application for Admission of Evidence pursuant to Rule 154 of the Rules of Procedure and Evidence, Public with Confidential Annex, 18 May 2015 ("Defence Bar Table Motion").

⁶ Motion, para. 3.

⁷ *Id.* at para. 5.

⁸ *Ibid.*

⁹ *Id.* at para. 6.

¹⁰ *Id.* at para. 7-9.

the interests of justice demand that the truth not be misrepresented by the Defence and that the Court be fully informed that, in fact, Ms Al Bassam did not cooperate with the investigation.¹¹

10. The *Amicus* contends he filed the Motion as soon as practicable following the closure of the Defence case and the filing of the Defence Bar Table Motion.¹²

II. The position of the Accused

11. The Defence argues that the *Amicus* has not shown a proper basis for presenting rebuttal evidence after the close of the Defence case, nor demonstrated good cause to vary my order on the conduct of proceedings.¹³ Following the practice of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the Defence avers that rebuttal should only be allowed with respect to significant issues arising directly out of defence evidence which could not reasonably have been anticipated.¹⁴

12. As regards the “good character” evidence, the Defence argues this type of evidence is not significant enough to permit a rebuttal.¹⁵

13. With respect to the *Amicus*’s allegation that the Defence did not properly disclose the evidence it intended to tender at trial, the Defence responds that the *Amicus* failed to raise this issue in a timely manner.¹⁶ Indeed, the *Amicus* has not made any applications with respect to purported disclosure violations.¹⁷ The Defence submits that the Motion should be denied on this basis.¹⁸ The Defence avers further that it complied fully with its disclosure and notice obligations.¹⁹ It is under no obligation to provide the *Amicus* with a detailed outline of each potential argument and submission for its case and need not call witnesses for the purpose of permitting the *Amicus* to tender evidence through them.²⁰

¹¹ Motion, para. 10.

¹² *Id.*, at para. 11.

¹³ Response, paras 2-3, 9-10.

¹⁴ *Id.* at para. 8.

¹⁵ *Id.* at para. 22.

¹⁶ *Id.* at paras 11-14.

¹⁷ *Id.* at para. 4.

¹⁸ *Id.* at para. 14.

¹⁹ *Id.* at para. 16.

²⁰ *Id.* at paras 16-17.

14. Contrary to the *Amicus*'s assertions, the Defence argues that it provided notice in its Pre-Trial Brief and opening statement that it challenged the service of the Pre-Trial Judge's 10 August 2012 Order and that it intended to present good character evidence with respect to the corporate Accused.²¹ The *Amicus* should have fully lead evidence on service in its case-in-chief.²² Moreover, good character evidence is, according to the Defence, not a formal defence requiring special notice under Rule 112.²³

15. Further, in the Defence's view, the *Amicus* should not be permitted to present Ms Bassam's criminal record at this stage because it is neither relevant to nor probative of the Accused's good character or the issue of service; and any limited probative value is substantially outweighed by the need to ensure a fair trial.²⁴ As for the requests for assistance and related documents, the Defence argues that the narrative regarding the Accused's willingness to cooperate with the Tribunal is plainly set out in the *Amicus*'s evidence and the prejudicial impact of admitting this material at this stage would heavily outweigh any probative value

16. Finally, the Defence states that it has received instructions from its clients that contradict the assertions of the *Amicus* with respect to Ms Al Bassam's unwillingness to meet with the former *Amicus Curiae* Investigator and requests the *Amicus* to contact current and former members of the *Amicus* team to clarify this issue.²⁵

III. Discussion

A. Reply

17. In his Request for Leave to Reply, the *Amicus* notes that, in the Response, the Defence includes a copy of an email sent by the Defence to the *Amicus* conveying the Defence's version of certain facts and asking the *Amicus* to confirm the Defence's position. He submits that, in doing so, the Defence goes far beyond addressing the requirements for admission of evidence and makes factual assertions and arguments on the merits of the related issues. The *Amicus* argues that he should be permitted to reply to the Defence's assertions by filing into the record

²¹ Response, paras 18-19.

²² *Id.* at para. 18.

²³ *Id.* at para. 19.

²⁴ *Id.* at paras 5, 20-24; F0159/A01, Confidential Annex A, Confidential, 27 May 2015.

²⁵ Response, Confidential Annex B, para. 28.

his response to the Defence's email²⁶. In the Response to the Request for Leave to Reply, the Defence requests that both the email from the Defence and the *Amicus*'s response be filed into the record.²⁷

18. The Appeals Chamber has held that a reply "must generally be limited to circumstances where new issues arise out of the [response]".²⁸ I find that this is not the case here. The *Amicus* simply objects to the Defence's interpretation of certain facts. However, I am competent to identify whether the Defence, in its Response, has misrepresented any of the *Amicus*'s submissions or made "inappropriate" arguments and, if so, to account for such in making a determination. Therefore, the *Amicus* does not identify any new issues arising out of the Response. Nor does the *Amicus* demonstrate any exceptional basis justifying a reply. I therefore reject the request for the filing of an email in the Request for Leave to Reply, and consequently, the counter requests in the Response to the Request for Leave to Reply.

B. Merits

19. With regard to the admissibility of the *Amicus*'s rebuttal evidence, I find that it is proper to be guided by the well-established practice of the ICTY. The ICTY Appeals Chamber has established that "rebuttal evidence must be highly probative and must relate to a significant issue arising directly out of Defence evidence which could not have been reasonably anticipated. The Prosecution cannot call additional evidence merely because its case has been met by certain evidence to contradict it".²⁹ In cases where the Prosecution argues that the evidence had not been in his hands, this fact is not sufficient by itself to render it admissible as rebuttal evidence. It merely puts it into the category of fresh evidence, to which a different standard of admissibility applies. For fresh evidence to be admissible, it must be shown that 1) it was not in the possession of the Prosecution at the time of the conclusion of its case, and 2) by the exercise of all reasonable diligence, the Prosecution could not have obtained the fresh evidence during the presentation of its case-in-chief.³⁰

²⁶ Request for Leave to Reply, para. 5.

²⁷ Response to the Request for Leave to Reply, para. 6.

²⁸ See STL, *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.

²⁹ ICTY, *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Judgement, 3 May 2006, para. 258.

³⁰ ICTY, *The Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, paras 276, 283.

20. I find that the *Amicus* has not demonstrated that the evidence is admissible as rebuttal evidence. In particular, I am not persuaded by his arguments that the Defence did not provide adequate disclosure or notice that it would introduce “good character” evidence with respect to the corporate Accused acting through its senior management, including Ms Al Bassam, or that it would challenge the legality of the service of the Pre-Trial Judge’s 10 August 2012 Order. As the Defence points out, it has submitted, both in its Pre-Trial Brief and during its opening statement, that the Accused had maintained the highest standards of professionalism and journalistic independence.³¹ The Defence further argued that neither of the Accused was aware of the 10 August 2012 Order and that it was incumbent on the *Amicus* to prove the service of the Order.³² Finally, in its opening statement, the Defence argued that *Al Jadeed* S.A.L. personnel, including Ms Khayat, cooperated with the investigation in this case.³³

21. Based on these assertions, it would have been reasonable for the *Amicus* to anticipate that the Defence, if it decided to present a case, would tender evidence addressing these issues. Therefore, the *Amicus* had the opportunity to submit evidence to challenge these defences during his case-in-chief or through the cross-examination of the Defence’s witnesses. The evidence therefore does not qualify as rebuttal evidence.

22. I also reject the *Amicus*’s argument that when the Defence decided not to call Ms Maya Habli to testify, it deprived him of the possibility to submit this evidence in court.³⁴ I agree with the Defence that it is not the Defence’s obligation to present evidence that helps the *Amicus* prove his case.³⁵ This is the *Amicus*’ responsibility.

23. Finally, the *Amicus* has also not demonstrated that the alternative requirement for the admission into evidence of rebuttal evidence is met, *i.e.* that the evidence submitted qualifies as admissible fresh evidence. It is unclear from his submissions when he received the evidence he now wants to tender. In any event, he has failed to show that, having exercised all reasonable diligence, he could not have obtained it prior or during the presentation of his case-in-chief.

³¹ F0071, Amended Defence Pre-Trial Brief, Confidential, 23 October 2014, para. 6; Transcript of 16 April 2015, p. 32-36.

³² *Id.* at para. 25.

³³ Public Transcript of the Opening Statements held on 16 April 2015, p. 43.

³⁴ Motion, paras 5-6.

³⁵ Response, para. 17.

DISPOSITION

FOR THESE REASONS,

PURSUANT to Rules 60 *bis* (H), 65, 66, 149 (C)-(D) and 154 of the Rules;

I

REJECT the Request for Leave to Reply;

REJECT the Response to the Request for Leave to Reply;

and

REJECT the Motion.

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

Dated 3 June 2015

Leidschendam, the Netherlands



Judge Nicola Lettieri
Contempt Judge

