



Neutral Citation Number: [2021] EWHC 929 (Comm)

Case No: CL-2020-00408

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 16/04/2021

**Before :**

**SIR MICHAEL BURTON GBE**  
**SITTING AS A JUDGE OF THE HIGH COURT**

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**Between :**  
**THE REPUBLIC OF SIERRA LEONE**

**Claimant/**  
**Respondent**

**- and -**  
**SL MINING LIMITED**

**Defendant/**  
**Applicant**

**IN THE MATTER OF AN ARBITRATION**  
**WITH ICC CASE NO. 24708/TO**

**Between :**  
**SL MINING LIMITED**

**Claimant in the**  
**Arbitration**

**- and -**  
**THE REPUBLIC OF SIERRA LEONE**

**Respondent in the**  
**Arbitration**

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**James Woolrich** (instructed by **Jenner & Block (London) LLP**) for the **Claimant**  
**Tom Sprange QC** and **Kabir Bhalla** (instructed by **King and Spalding International LLP**)  
for the **Defendant**

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**Approved Judgment**  
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**SIR MICHAEL BURTON GBE :**

**Judgment on application for indemnity costs**

1. This has been a paper application by SL Mining Ltd (SL) for a costs order on an indemnity basis against the Republic of Sierra Leone (Sierra Leone) as a result of Sierra Leone's discontinuance of its second challenge under s67 of the Arbitration Act 1996 to the jurisdiction of the Arbitrators in an ICC arbitration. I refer to my Judgment [2021] EWHC 286 (Comm) dated 15 February 2021 for a detailed account of that arbitration in the context of the first such challenge, which I dismissed, for the reasons there set out.
2. The second s67 challenge by Sierra Leone was by reference to its reliance upon a foreign act of state doctrine, for which it relied upon the decision in **Belhaj v Straw** [2017] UKSC 3 and **Reliance Industries Ltd v The Union of India** [2018] 2 AER (Comm) 1090. Such challenge was to be heard by me on 23 March. Skeletons were to be exchanged on 18 March in advance of the hearing. Notice of discontinuance was served by Sierra Leone on 17 March.
3. It is common ground by reference to CPR Rules 38.6 (1) and 44.9 (1) that “*unless the court orders otherwise*” the party discontinuing is liable for costs on the standard basis, but that indemnity costs may be ordered, which is what SL now seeks, and that I have a wide discretion to do so in the event of my concluding “*in the light of all the circumstances of the case*” (**Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB** [2012] EWHC 749 (Comm) at [13] that there is “some conduct or circumstance which takes the case out of the norm in a way which justifies an order for indemnity costs” (**Stati v Kazakhstan** [2019] Costs LR 1051 at [13]) or, as per Colman J in **National Westminster Bank plc v Rabobank Nederland** [2008] 3 Costs LR 396 at [28] by reference to “*a significant level of unreasonableness or otherwise inappropriate conduct in its widest sense*”.
4. SL relied in support of its application for indemnity costs of the discontinued claim upon the following:
  - i) The persistent and repeated failures by Sierra Leone to comply with orders, including peremptory orders, made by the Arbitration Tribunal and the Emergency Arbitrator both in relation to costs and otherwise, notwithstanding Clause 6.9 (d) of the MLA (referred to by me in paragraph 3 of my Judgment).
  - ii) Non-compliance by Sierra Leone with orders of this Court for payment of costs.
  - iii) The very late service of the notice of discontinuance and the inference to be drawn that Sierra Leone had been pursuing an application which it knew to be hopeless.
  - iv) Other allegations of inappropriate conduct by Sierra Leone, particularly very late allegations of corruption raised by it against SL in the arbitration.
5. The constant failure by Sierra Leone to comply with orders by the Arbitrators, including peremptory orders, resulted in severe criticism of Sierra Leone by the Arbitrators: I note in particular paragraph 20 of Procedural Order No 4, which was a Peremptory Order

dated 13 February 2020, paragraph 149 of their Second Partial Award dated 4 June 2020 and paragraph 18 of Procedural Order no 7 dated 13 July 2020, when they imposed upon Sierra Leone a daily penalty of a maximum of US \$ 50,000 for its failures to comply.

6. In response to SL's application for security for costs before this Court, in Mr Yardley's third witness statement on behalf of Sierra Leone he asserted that Sierra Leone had good reasons not to comply with the Arbitrators' orders, but asserted that

*"None of these reasons would apply to a costs order of this court... It is a serious allegation that a democratically elected and friendly government intends deliberately to flout the orders of the court"*.

However Sierra Leone has not complied with the orders made by this Court:

- i) By the Order of 15 February, which was agreed between the parties, I ordered that (by paragraph 2) Sierra Leone should pay SL's costs of the s67 application which had been before me, summarily assessed in the sum of £177, 500, by 12 March 2021 and (by paragraph 3) that should Sierra Leone fail to comply with that order it should pay the sum of £90,000 in respect of security for costs, in respect of the second challenge, into court by 19 March 2021.
- ii) By an email dated 12 March 2021, Mr Yardley wrote : "*We are instructed that the costs payment has taken longer than anticipated to process, but that it is in train and our clients expect it to be received for value by the middle of next week*". By that time Sierra Leone was already breaching the deadline under paragraph 2 of the Order.
- iii) By email dated 17 March 2021 Sierra Leone's solicitors wrote:

*"We understand that our client is facing logistical challenges that render it unlikely to be able to meet the stipulated deadline of 19 March 2021 to provide the security required under paragraph 3... Accordingly... please find enclosed by way of service a notice of discontinuance."*

The £177,500 still remains unpaid.

7. I am satisfied that I am entitled in my discretion to take into account as part of "*all the circumstances of the case*" the very regrettable failure by Sierra Leone to comply with orders, including peremptory orders, by the Arbitrators, leaving SL substantially out of pocket, and the more so since it was asserted that the orders of this Court would be duly complied with, putting its subsequent conduct plainly under a spotlight.
8. Although an account as to such non-compliance with the Order of 15 February has been given by Mr Yardley and by Mr Osman Kanu, a legal adviser at the office of the Attorney-General and Ministry of Justice of the Republic of Sierra Leone, as to the difficulties of making payment, I note that:

- i) The deadlines of 12 and 19 March 2021 were agreed by Sierra Leone and incorporated into the order of 15 February in the knowledge of any impact of Covid, and in the light of the imminent hearing of the arbitration itself between 1 and 12 March 2021, for which Sierra Leone's solicitors were plainly put in funds, which do not seem to have encountered any similar difficulties.
  - ii) The pursuit of the second jurisdiction challenge (after the dismissal of the first) was plainly regarded as a lesser or of no priority.
  - iii) The challenge to the Arbitrators' jurisdiction, said in some way to justify or explain Sierra Leone's persistent non-compliance with their orders, has now been dismissed (first challenge) and discontinued (second challenge). Not only have the £177,500 costs not been paid, but the agreed sanction for such non-payment, namely the obligation to provide security for costs in respect of the second challenge, has been evaded.
9. As late as 12 March it was said that the funds would be provided. Neither when the notice of discontinuance was served on 17 March, nor indeed subsequently, has any apology for the non-compliance with the Court Order been given nor application for relief sought, which is particularly surprising in the light of Mr Yardley's assertions in his witness statement, referred to above.
10. I conclude that this regrettable and persistent conduct is sufficient for me to exercise my discretion to order indemnity costs. I do not need in those circumstances to consider SL's third or fourth grounds, set out in paragraph 4 above.
11. SL has asked for a summary assessment for costs. In the light of the matters raised by Sierra Leone, and in all the circumstances, I do not propose to make an order for summary assessment, and I shall make an order for interim payment on account. Having considered the schedule of costs presented by SL, totalling £248,521, and noting that in December SL estimated that its costs would be some £190,000, I conclude that on an indemnity basis the appropriate order for costs on account is £210,000. I shall invite the parties to agree an order and if possible an appropriate time for payment of those costs, in the absence of which agreement, I shall fix such time.
12. The parties are now agreed that this short judgment can be made public.