

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

MAHER BEN MOHAMED TAHER ZAYD

v.

TUNISIAN REPUBLIC

APPLICATION No. 005/2022

ORDER (PROVISIONAL MEASURES) OF 16/12/2022

DISSENTING OPINION

1. I do not share the Court's finding in its above-mentioned Ruling and the reasons proffered, with regard to the dismissal of the Application seeking an Order for the Respondent State to postpone the organization of the legislative elections slated for 17 December 2022 until examination of the case on the merits.
2. It is therefore my wish to write this dissenting opinion because I am convinced that the Court should have declared the request well-founded for the simple reason that it meets the requirements of urgency, warranting provisional measures.
3. In this regard, Article 27 of the Protocol in its paragraph 2 clearly provides that "In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".
4. Rule 59 paragraph 1 of the Rules of Court also clearly provides that "Pursuant to Article 27(2) of the Protocol, the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application".
5. Hence, it emerges from a reading of the above two Rules that the requirements governing provisional measures remain the urgency or the gravity of cases and the need to avoid irreparable harm.

6. In paragraph 26 of its Ruling, the Court declares that urgency, which is consubstantial with extreme gravity, means that an irreparable and imminent risk will be caused if it does not grant the request, before it renders its final judgment.
7. It further provides in paragraph 27 of the Ruling that the risk in question must be real, which excludes a purely hypothetical risk.
8. With respect to irreparable harm, the Court considers, in paragraph 28 of the Ruling, that there must be a reasonable probability of occurrence having regard to the context and the Applicant's personal situation.
9. It is noteworthy that the Application seeking the suspension of the legislative elections of 17 December 2022 was filed before the Court on 7 November 2022 with the prayer on the merits, over one (1) month before the elections.
10. The Applicant is an elected Member of Parliament, a fact not denied by the Respondent State, and the term of the current parliament will expire in 2024.
11. It is apparent from the same alleged facts which the Respondent State does not contest, because although notified, it did not respond to the Applicant's claims, that the suspension of Parliament resulted in the suspension of the allowances of its members and all that arises from the loss of the status of Member of Parliament.
12. It emerges from the Applicant's claims on the merits that he alleges the violation of Article 20 of the Charter for flagrant attack on the will of the people by suspending the assembly of its democratically elected representatives and dissolving it completely, and the right of the people to self-determination by calling legislative elections whereas the term of the legally elected parliament runs until October 2024.
13. It is clear from the request for provisional measures that the Applicant at no time requested, as provisional measure, the **annulment** of Presidential Decree No. 2022/710 of 15/09/2022 by which the President called legislative elections, contrary to what is stated in paragraph 32 of the Ruling . In fact, the Applicant only sought the **suspension** of the elections. This request in itself remains a provisional and, therefore, temporary measure which should not have brought the Court to consider the merits of the case pending the emergence of a new fact which could be the

judgment on the merits rendered by the Court or another measure taken by the Respondent State to vacate the measure.

14. It is clear that there is a situation of urgency... insofar as holding elections while substantive claims are pending before the Court would completely destroy the meaning of the said claims and prejudice the decision of the Court on the merits!
15. As for real harm, it is noteworthy that the Applicant being a sitting member of the current parliament, the suspension thereof and the loss of benefits attached thereto (salary, allowances, etc.) certainly constitute real harm that cannot be restored to the initial state if the Court were to declare the actions taken by the Respondent State in breach of the principles enshrined in the Charter,
16. Indeed, holding elections which will put in place a new parliament, could in no way restore the Applicant's rights and would make it impossible to execute any decision of the Court rendered in favour of the Applicant.
17. Furthermore, in paragraph 35 of its Ruling , the Court considers that it would risk delving into the merits, if it were to grant the Applicant's request to stay elections in the instant case.
18. In my opinion, prayers for provisional measures must be considered against the backdrop of the nature of the request itself!
19. A request for **suspension** of an act can in no way be considered as a request relating to the merits insofar as it is temporary and only a request for annulment of the act can be determined by a Judge on the merits, because it meets the requirements in terms of form and the merits.
20. In my opinion, therefore, the Court should have declared the request for suspension well-founded as it was not only provisional but temporary and urgent, given that the event of holding elections was imminent and unequivocally prejudicial to the Applicant.

Judge Bensaoula Chafika

