

Sandwidi & anor v Burkina Faso & 3 ors (provisional measures) (2020) 4 AfCLR 206

Application 014/2020, *Elie Sandwidi v Burkina Faso & 3 ors*

Application 017/2020, *Burkinabe for Human Rights v Burkina Faso & 3 ors*

Ruling (provisional measure), 25 September 2020. Done in English and French, the French text being authoritative.

Judges: KIOKO, BEN ACHOUR, MATUSSE, MENGUE, MUKAMULISA, CHIZUMILA, BENSAOULA, TCHIKAYA, ANUKAM, and ABOUD

Recused under Article 22: ORÉ

The Applicants in this consolidated matter alleged that the First Applicant was wrongfully dismissed from his job in violation of his rights as guaranteed in the African Charter. The Applicants filed requests for provisional measures asking the Court to order the reinstatement of the First Applicant to his job or award him a sum of money in the alternative. The Court dismissed the application for provisional measures.

Jurisdiction (*prima facie*, 21, 27; retroactive effect of withdrawal of Article 34(6) Declaration, 26)

Admissibility (exhaustion of local remedies not required for provisional measures, 40)

Provisional measures (conditions for grant, 64-65, 72; prejudging the merits, 66; extreme gravity, 72; real risk, 73; irreparable harm, 74; corroborative evidence, 75)

I. The Parties

1. The Applications are filed by:

- i. Mr. Elie Sandwidi (hereinafter referred to as “the First Applicant”), a Burkinabé national, Magistrate, residing in Ouagadougou, Burkina Faso.
- ii. The Burkinabé Movement for Human and Peoples’ Rights (hereinafter referred to as “*MBDHP*” or “the Second Applicant”), a Non-Governmental Organisation (NGO) with Observer Status before the African Commission on Human and Peoples’ Rights (hereinafter referred to as “the Commission”).¹

2. The Applicants allege human rights violations as a result of Elie

¹ This NGO was granted Observer Status by the Commission at its Sixth (6th) Ordinary Session held in Banjul, from 23 October to 4 November 1989.

Sandwidi's unlawful dismissal from his job.

3. The Applications are filed against:
 - i. Burkina Faso, which became a party to the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") on 21 October 1986 and to the Protocol, on 25 January 2004. It also deposited with the Chairperson of the African Union Commission (hereinafter referred to as "the CAUC"), on 28 July 1998, the Declaration prescribed in Article 34(6) of the Protocol (hereinafter referred to as "the Declaration") by which it accepts the jurisdiction of the Court to receive applications from individuals and NGOs.
 - ii. The Republic of Benin, which became a party to the Charter on 21 October 1986 and to the Protocol on 22 August 2014. It also deposited the Declaration on 8 February 2016. On 25 March 2020, it deposited with the CAUC an instrument of withdrawal of its Declaration.
 - iii. The Republic of Côte d'Ivoire, which became a party to the Charter on 30 June 1992 and to the Protocol on 25 January 2004. It also deposited the Declaration on 23 July 2013. On 29 April 2020, it deposited with the CAUC an instrument of withdrawal of its Declaration.
 - iv. The Republic of Mali, which became a party to the Charter on 21 October 1986 and to the Protocol on 20 June 2000. It also deposited the Declaration on 19 February 2010.

II. Subject of the Application

4. It emerges from the initial Applications containing requests for provisional measures that Mr. Elie Sandwidi was recruited as a professional auditor at the Court of Justice of the West African Economic and Monetary Union (hereinafter referred to as "WAEMU - CJ"). He assumed duty on 19 December 2017 and was dismissed pursuant to a decision dated 13 December 2017, which took effect on 19 December 2017.
5. Challenging that decision, he lodged complaints, without success, with the various bodies of WAEMU, one after the other, namely: the Joint Advisory Committee of the WAEMU Commission (hereinafter referred to as "JAC - WAEMA"), the Council of Ministers, the Assembly of Heads of State and Government and the WAEMU - CJ.
6. In their initial Applications, the Applicants allege the violation of the following rights:
 - i. The right to equal protection of the law, enshrined in Article 3(2) of the Charter;
 - ii. The right to the respect for the dignity inherent in a human being, enshrined in Article 5 of the Charter;

- iii. The right to have his cause heard, enshrined in Article 7 of the Charter; and
 - iv. The right to property, enshrined in Article 14 of the Charter.
7. In their requests for provisional measures contained in their applications, the Applicants pray the Court:
- i. To repeal the decision to dismiss Mr Elie SANDWIDI and to order his reinstatement at the WAEMU – CJ;
 - ii. In the alternative, to award Mr Elie Sandwidi the sum of two hundred million (200,000,000) CFA Francs.

III. Summary of the Procedure before the Court

8. The two initial Applications containing the requests for provisional measures were registered at the Registry on 3 March 2020 and 11 May 2020, respectively.
9. The two Applications filed, on the one hand, by the first Applicant, and on the other hand, by the second Applicant were both served on the Respondent States on 15 May 2020. The Registry requested the Respondent States, in respect of each of the Applications, to submit their responses on the provisional measures within fifteen (15) days from the date of receipt thereof.
10. On 3 June 2020, the Registry received the Republic of Mali's response to the requests for provisional measures.
11. The time limit for Burkina Faso, the Republic of Benin and the Republic of Côte d'Ivoire to file their responses to the requests for provisional measures expired on 6 June 2020 for the first two States and on 4 June 2020 for Côte d'Ivoire. As of those dates, the Registry had not received any response from the said States.
12. On 19 June 2020, the Registry received from the Republic of Benin two similar submissions dated 8 June 2020, constituting responses to the two requests for provisional measures.
13. On 10 July 2020, the Registry received from Burkina Faso two similar submissions dated 1 July 2020 in response to the two requests for provisional measures.
14. Although the submissions from Benin and Burkina Faso were filed after the deadline, the Court decided, in the interests of justice, to deem them as duly filed.
15. On 15 July 2020, the Court ordered a joinder of the two initial Applications and duly notified the Parties.

IV. *Prima facie* jurisdiction

16. The Republic of Benin contends that this Court lacks jurisdiction in that, when seized of a request for provisional measures, it

verifies if the matter concerns a violation of human rights which may constitute the basis of its material, personal and territorial jurisdiction.

17. It further contends that, in the instant case, however, the Court lacks material jurisdiction because the situation described by the Applicant is not covered by any provision of the Charter, insofar as it is a labour dispute that has been definitively resolved by a community court in accordance with Article 141 of the WAEMU – CJ Staff Regulations.
18. The Republic of Benin also argues that the fact that a candidate recruited at a position with a probationary period is notified of the termination of his appointment during the probationary period is neither a dismissal nor a violation of human rights within the meaning of the Charter. Nor does an unfavourable opinion or an unfavourable administrative decision constitute such violation.
19. The other Respondent States have not raised an objection relating to the jurisdiction of the Court.
20. For their part, the Applicants submit that the Court has jurisdiction to hear their Applications, as they relate to the protection of human rights enshrined in the Charter.

21. When seized of an Application, the Court must conduct a preliminary examination of its jurisdiction pursuant to Articles 3 and 5 of the Protocol. However, for the purpose of issuing an Order for Provisional Measures, the Court need not conclusively establish that it has jurisdiction on the merits of the Application, but must simply satisfy itself that it has *prima facie* jurisdiction.²
22. Article 3(1) of the Protocol provides that: “The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation or application of the Charter, this Protocol or any other relevant human rights instrument ratified by the States concerned”.
23. Hence the fact that a dispute arises from the termination of a labour contract is not sufficient to exclude the jurisdiction of the Court. The Court may nevertheless exercise its jurisdiction

2 *Ghati Mwita v United Republic of Tanzania*, ACTHPR, Application 012/2019, Order of 9 April 2020, (provisional measures) §13.

insofar as it is seized by an Applicant or Applicants of violations of human rights protected by the Charter or by any other human rights instrument ratified by the Respondent State(s).

24. The Court notes that the dispute before it concerns the application or interpretation of the Charter, insofar as the Applicants raise violations of rights enshrined in the said Charter.
25. Furthermore, the four (4) Respondent States have ratified the Charter and have also made the Declaration.
26. The Court also recalls its jurisprudence according to which withdrawal of the Declaration has no retroactive effect on cases pending at the time of deposit of the instrument relating thereto and takes effect only within a period of twelve (12) months.³ The Court stresses this position in the Order for Provisional Measures rendered in *Houngue Eric Noudéhouenou v Republic of Benin*⁴ and in the Judgment rendered in *Suy Bi Gohoré Emile & ors v Republic of Côte d'Ivoire*,⁵ and specifies that withdrawal of the Declaration takes effect, for both Respondent States, only on 26 March 2021 and 30 April 2021, respectively.
27. In light of the foregoing, the Court finds that it has *prima facie* jurisdiction to consider the request for provisional measures.

V. Objections to admissibility

28. Burkina Faso prays the Court to declare the request for provisional measures inadmissible because the Applicant is not an employee of the Respondent State and has failed to exhaust local remedies.

A. Objection to the admissibility of Mr. Elie Sandwidi's application, owing to the fact that he is not an employee of Burkina Faso

29. In its submissions of 1 July 2020, Burkina Faso raised an objection to the admissibility of the application on grounds that the Applicant is not an employee of the state.
30. To buttress its position, Burkina Faso argues that Elie Sandwidi was recruited by an intergovernmental organisation, (hereinafter

3 *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction), (03 Juin 2016), 1 AfCLR, 562 § 67.

4 *Houngue Eric Noudéhouénou v Republic of Benin*, ACtHPR, Application 003/2020, Order of 05 May 2020 (provisional measures) § 5.

5 *Suy Bi Gohore & ors v Republic of Côte d'Ivoire*, ACtHPR, Application No 044/2019, Judgment of 15 July 2020 (merits and reparations), § 68.

referred to as “IGO”), notably, WAEMU, to work in the Court of Justice which decided to dismiss the Applicant.

31. It adds that in terms of Article 9 of the WAEMU treaty, this IGO has a legal status and is subject to international law just like states, with the difference that it was established by the latter through a treaty, whereas the foundation of any state is the constitution and the constitution alone.
32. According to Burkina Faso, it follows that there can be no confusion between the staff of an IGO, such as the WAEMU, and those of a state and, therefore, a Member State of an IGO cannot be brought before this Court for a matter between the IGO and one of its staff because the Member State is not his employer.
33. Furthermore, pursuant to Rule 33 (1) of the Rules, which highlights entities which are entitled to bring cases before the Court, even though Elie Sandwidi and the MBDHP are entitled to seize the Court, the grievances raised are not imputable on Burkina Faso as a Respondent State.
34. In Burkina Faso’s opinion, Elie Sandwidi’s Application is inadmissible and should be dismissed since it is not his employer.

B. Objection to the admissibility of the application due to failure to exhaust local remedies.

35. Pursuant to Articles 56 (5) of the Charter and 6 (2) of the Protocol, Burkina Faso contends that the Applicant has not adduced any evidence of exhaustion of local remedies or of attempts to exhaust the said remedies before seizing the Court.
36. It further notes that such a hypothesis cannot be envisaged in the instant case because for obvious reasons relating to the legal status already referred to, the matter between Mr Sandwidi and the WAEMU neither concerns Burkina Faso nor the other Member States of this organisation.
37. It underscores that the issue at stake is whether, in other words, the matter filed by the Applicant before the WAEMU Court may be considered as an internal remedy which, suffices in itself to free the Applicant from exhaustion of local remedies.
38. According to Burkina Faso, the response is “no” as it emerges from the jurisprudence of this Court that “local remedies referred to in Article 56 (5) of the Charter are remedies filed before judicial

courts”.⁶

39. It therefore prays the Court to dismiss the request for provisional measures.

40. The Court notes that in regard to provisional measures, neither the Charter nor the Protocol provided conditions for admissibility, consideration of the said measures is subject only to a prior determination of the *prima facie* jurisdiction of the Court which has already been determined in this matter.
41. The provisions and arguments raised by Burkina Faso are issues of admissibility which are immaterial as regards a request for provisional measures.⁷
42. Accordingly, the Court dismisses the objections raised by Burkina Faso on the admissibility of the request.

VI. Provisional measures requested

43. The Applicants pray the Court to take all the necessary measures to cause the President of the WAEMU Commission to take an immediate decision, repealing the decision to dismiss Mr Elie Sandwidi and reinstating him in his duties as professional Auditor at the WAEMU - CJ, with effect from 19 December 2017, and also reinstating his salary forthwith.
44. In the alternative, the Applicants request the Court to order the Respondent States, jointly and severally, to pay Mr Elie Sandwidi the sum of two hundred million (200,000,000) CFA Francs to enable him to settle his debts and to live in dignity with his family, pending the final decision of the Court.
45. To buttress their requests, the Applicants plead, as a matter of urgency, the miserable situation in which Mr Elie Sandwidi unjustly finds himself and the fact that, despite the situation, he

6 *Tanganyika Law Society, The Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania* (merits) (14 Juin 2013), 1 AfCLR 34.

7 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, ACtHPR, Application No 062/2020, Order of 17 Avril 2020 (provisional measures), § 30.

must provide for his dependants.

46. In response, the Republic of Mali submits that the requests for provisional measures should be dismissed and that such measures can be granted only in exceptional circumstances, having regard to Rule 51 of the Rules. In that light, it further submits that the Applicants must show that Mr. Elie Sandwidi would be exposed to a real risk of serious and irreparable harm if the measures sought were not ordered.
47. The Republic of Mali further submits that the Applicants must, in particular, set out in detail the facts on which the alleged fears are based, the nature of the risks alleged and the provisions of the Charter that are alleged to have been violated.
48. Furthermore, the Republic of Mali points out that prior to his recruitment, Mr. Elie Sandwidi was working in the Burkinabè public service as a Magistrate and asked for secondment in order to join WAEMU, as is customary with the civil servants to go on secondment to regional and sub-regional organisations. Subsequent to his non-tenure decision, Mr. Elie Sandwidi undoubtedly resumed duty in the public service of his country and must justify his current position.
49. The Republic of Mali also contends that the reinstatement sought would prejudice the merits of the case, given that reinstatement is the Applicants' core substantive prayer.

50. For its part, the Republic of Benin submits that the Court should dismiss the requests for provisional measures on the ground that there is no case of urgency or of extreme gravity or of irreparable harm.
51. As regards gravity and extreme urgency, the Republic of Benin submits that by "urgency" is meant a situation that is likely to lead

to irreparable harm if quick action is not taken to redress it,⁸ while by “extreme gravity” is meant a situation of exceptional mounting violence that warrants the Court to take interim measures to avoid it.

52. The Republic of Benin further submits that provisional measures are “urgent measures that are taken only when there is an imminent risk of irreparable harm”.⁹
53. It further contends that the situation referred to the Court has none of these characteristics, especially since being a career magistrate, on secondment to the WAEMU – CJ, Mr. Elie Sandwidi has returned to his duties as a civil servant in Burkina Faso, such that his professional situation was unimpeded.
54. With regard to irreparable harm, the Republic of Benin submits that it differs from harm for which reparation is difficult and, rather, refers to acts, the consequences of which cannot be erased, repaired or compensated for by any means whatsoever, even by awarding damages, since irreparable harm and irreversible harm are inextricably linked.
55. The Republic of Benin further contends that Mr. Elie Sandwidi, who maintains his position in the Burkinabè magistracy and who experienced only one hitch in an application for a position for which he does not meet the technical requirements, cannot, as a result, claim to be in a situation of irreparable harm.

56. For its part, Burkina Faso notes that in the instant case, there is neither urgency nor irreparable harm and that the interests of Mr. Sandwidi are not entirely compromised, especially as he alleges in his submission on the merits, the violation of his fundamental rights which he wants to be cured.
57. According to Burkina Faso, the Applicant avers that the decision not to retain him dates back to 8 December 2017 while the judgment of the WAEMU – CJ which upheld the said decision dates back to 12 February 2020 whereas the applications were

8 Vocabulaire juridique, Gérard Cornu, PUF, 8th edition.

9 *Mamatkoulov and Askarov v Turkey* [GC], No.s 46827/99 and 46951/99, ECtHR, 4 February 2005, §104; *Aoulmi v France*, No. 50278/99 §103, 17 January 2006 and *Paladi v Moldova* [GC], No. 39806/05, ECtHR, 10 March 2009 §§ 86-90.

filed in 2020, that is, more than two (2) years after the decision not to retain him in the Court. This has had no effect on the life or physical integrity of Mr. Sandwidi, neither has it put his life in jeopardy.

58. Burkina Faso submits that based on the jurisdiction of the Court, provisional measures refer to “a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons who are the subjects of the application, in particular, their rights to life and to physical integrity as enshrined in the Charter.”¹⁰
59. It concludes that there is no urgency to justify ordering provisional measures especially in the case of Burkina Faso which is not in any way involved in the matter between Mr. Sandwidi and the WAEMU.
60. It therefore follows that the requests for provisional measures should be dismissed.
61. The Republic of Cote d'Ivoire did not make any submissions.

62. The Court notes that Article 27(2) of the Protocol 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.”
63. Furthermore, pursuant to Rule 51(1) of the Rules, “The Court may, at the request of a party, the Commission or on its own accord, prescribe to the parties any interim measures which it deems necessary to adopt in the interest of the parties or of justice.”
64. In view of the aforesaid, the Court can order provisional measures *pendente lite* only if the basic requirements, namely extreme gravity or urgency and the prevention of irreparable harm to persons are met.
65. The Court emphasises, however, that it is only required to ascertain the existence of these basic conditions if it is established that the

10 *African Commission on Human and Peoples' Rights v Libya* (provisional measures) (25 Mars 2011) 1 AfCLR18 § 22.

measures sought do not prejudice the merits of the Applications.

A. Repeal of the decision to dismiss Mr Elie Sandwidi and his reinstatement in his job at the WAEMU - CJ, with immediate reinstatement of his salary

66. The Court considers that a request for provisional measures prejudices the merits of an Application where the subject of the measures sought in the request is similar to the subject of the measures sought in the Application, where its purpose is to achieve the same result or, in any event, where it touches on an issue which the Court will necessarily have to adjudicate upon when examining the merits of the Application.¹¹
67. The Court recalls, on the one hand, that the Applicants mainly requested the Court to order the WAEMU Member States “to take all the necessary measures to cause the President of the WAEMU Commission to take an immediate decision repealing Mr SANDWIDI Elie’s dismissal decision and granting him tenure in his duties as Professional Auditor at the WAEMU - CJ, with effect from 19 December 2017, with immediate reinstatement of his salary».
68. The Court notes, on the other hand, that in their requests on the merits, the Applicants, in view of the would-be established violations of their rights, prayed the Court to order “the WAEMU Member States named in the Application to take all the necessary measures for the immediate restoration of Mr. SANDWIDI Elie’s rights, by ensuring that the President of the WAEMU Commission takes a decision to repeal his dismissal decision and to reinstate Mr. SANDWIDI Elie in his job, after reclassification and payment of his salary arrears [...]”.
69. The Court notes that the primary request for provisional measures also forms part of the request on the merits, in that it seeks to “repeal Elie SANDWIDI’s dismissal decision and his reinstatement” at the WEAMU - CJ. The Court will of necessity have to adjudicate on this request on the merits.
70. It follows that the Court cannot, given that the subject of the main request for provisional measures is similar to the subject of the

11 *Jean de Dieu Ngajigimana v United Republic of Tanzania*, ACtHPR, Application 024/2019, Order of 26 September 2019 (provisional measures), § 25.

requests on the merits, order the measure sought.

71. Accordingly, the Court dismisses the request for the said provisional measure.

B. Award of the sum of two hundred million (200,000,000) CFA francs

72. The Court reiterates that urgency, consubstantial with extreme gravity, means that there is a real and imminent risk that irreparable harm will be caused before the Court renders its final decision. There is urgency whenever acts liable to cause irreparable harm can occur at any time, before the Court renders a final decision in the case before it.¹²
73. In this regard, the Court stresses that the risk in question must be real, which excludes a purely hypothetical risk, and explains the need for immediate relief.¹³
74. As regards irreparable harm, it requires a “reasonable probability of materialisation,” having regard to the context and the personal situation of the Applicant.¹⁴
75. Where these conditions are not established, the Court cannot grant an order for provisional measures.¹⁵
76. The Court notes that, to characterise the urgency, the Applicants invoked “the material situation in which he (Elie Sandwidi) unjustly finds himself “ as well as the need to “settle his debts, live with his family in dignity” and cater for his dependants”.
77. The Court notes that the Applicants have failed to prove the reality of the alleged material situation, which would expose Mr. Elie Sandwidi to a real and imminent risk, the effects of which would cause him irreparable harm.
78. As a matter of fact, there is no corroborative evidence on the record to show and no demonstration that the first Applicant is destitute, such that he can neither settle his debts, nor live with his family in dignity and cater for his dependants.
79. Such lack of cogent evidence is reinforced by the personal situation of the First Applicant. In both Applications he is presented

12 *Sébastien Germain Marie Aïkoué Ajavon v Republic of Benin*, ACtHPR, Application 062/2019 Order of 17 April 2020 (provisional measures), § 61; *Guillaume Kigbafori Soro & ors v Republic of Côte d’Ivoire*, Application 012/2020, ACtHPR, Order of 22 April 2020 (provisional measures), § 33.

13 *Sébastien Ajavon v Benin* (provisional measures), op.cit. § 62.

14 *Ibid.* § 63.

15 *XYZ v Republic of Benin*, Application 010/2020, ACtHPR, Order of 3 April 2020 (provisional measures) § 27.

as a Magistrate, which sufficiently shows that he carries out a professional activity in his country of origin. However, in the instant case, it has not been proven that in spite of such a professional activity, he still lives in a state of poverty.

80. Finally, the Applicants have failed to prove, the urgency, or extreme gravity which justifies the need order provisional measures to avoid irreparable harm being caused to Elie Sandwidi.
81. The Court, accordingly, dismisses the requests for provisional measures.
82. For the avoidance of doubt, this Ruling is provisional in nature and does not prejudice in any way the decisions that the Court may take on its jurisdiction, on admissibility of the Application and on the merits.

VII. Operative part

83. For these reasons,
The Court
Unanimously,

- i. *Dismisses* the objections to the admissibility of the Application;
- ii. *Dismisses* the Applicants' requests for provisional measures.