

SUNNASY V. & ORS v THE STATE OF MAURITIUS & ORS

2024 SCJ 456

Record No. 119719 (1/35/20)

THE SUPREME COURT OF MAURITIUS

In the matter of:

- 1. Vishwadev SUNNASY**
- 2. Ivor Axel TAN YAN**
- 3. Neelam NARAYEN**
- 4. Goindamah Nirmala NARAYEN**

Plaintiffs

v

- 1. The State of Mauritius**
- 2. The Electoral Supervisory Commission**
- 3. The Electoral Commissioner**
- 4. The State Informatics Ltd**
- 5. The Independent Broadcasting Authority**
- 6. The Mauritius Broadcasting Corporation**

Defendants

INTERLOCUTORY JUDGMENT

1. The plaintiffs are seeking constitutional redress for alleged breaches of constitutional rights relating to the 2019 general elections, under section 83 of the Constitution and at the outset, preliminary objections have been raised by the defendants.
2. The objection raised by defendants No.1 and No.3 is that the present court has no jurisdiction to entertain the plaint as it cannot pronounce itself on the validity of National Assembly elections except by way of an election petition entered in accordance with the provisions of the Representation of the People Act 1958 ("RoPA").

3. The objections raised by defendant No.2 are set out as follows:
 - a) The present plaint seeks to challenge the validity of the election of a member of the National Assembly.
 - b) In application of section 37 of the Constitution and section 45 of the Representation of the People Act,
 - i. *this Honourable Court does not have jurisdiction to entertain a challenge to the validity of the election of a member to the National Assembly otherwise than in accordance with the mandatory provisions of the Representation of People Act by lodging an election petition within 21 days after the date of the return by the Returning Officer to the defendant no.2 of the member to whose election the petition relates, and/or*
 - ii. *in any event, the present action is time-barred.*
4. Defendants No.4 and No.5 have also raised similar objections.
5. In considering the objections, it is necessary to examine what the plaintiffs are seeking from the present court in their prayers. It is noted that the plaintiffs have made several averments concerning the organisation and conduct of elections by defendants No.2 and No.3. They have also made averments against defendant No.6, the national television station and public news broadcaster which comes under the aegis and sole and direct responsibility of the Prime Minister. The plaintiffs rely on a reading of section 41 (*headed: **Functions of Electoral Supervisory Commission and Electoral Commissioner***) together with section 1 of the Constitution for the concept of a fair and credible election.
6. The “*grounds for relief*” on which the plaintiffs are relying to substantiate their prayers are set out under the following headings:
 - A. *A number of ballot papers were declared null, void and invalid and found stranded in the open*
 In paragraphs 18 to 21 of the plaint, the plaintiffs are questioning the integrity and transparency of the whole electoral process with specific reference to the embossing and stamping of ballot papers. Reference is also made to the fact that authentic ballot papers were found in the open.
 - B. *Failure to properly organise the conduct of elections and ensure security of the candidates*
 The plaintiffs refer to the unprecedented delay in certain Constituencies such as No.10 whereby counting process went on until 3.a.m. and it was such unconducive conditions

making it impossible for polling agents to properly supervise the integrity of the counting process. They also aver that defendants Nos.1 and 2 failed to ensure the security of candidates towards the last quarter of the counting process in Constituency No.10.

C. The 2019 General Elections conducted on the prerogative of the Prime Minister by inexperienced officers

The plaintiffs have averred that the elections were not held in the best possible condition as certain voting centres were already booked for the National Secondary School examinations.

D. Voter suppression

The plaintiffs have averred that many persons who were entitled to be registered as electors were denied to vote as their names had been unfairly taken off the register of elections.

E. Discrepancies in the number of 'confirmed voter turnout by Constituency': two different figures provided

The plaintiffs have averred that immediately following the holding of the elections, both defendants Nos.2 and 3 held a joint press conference, informing the public of the 'confirmed voter turnout by Constituency'. The figures did not tally with the confirmed voter turnout by Constituency after the election.

F. The unlawful and compromising services of Defendant No.4

Reference is made to the services of the State Informatics Limited in relation to the counting process and electronically recording and compiling figures and the public was never informed of same.

G. Involvement of a senior adviser to the Prime Minister in the electoral process and bias and/or perception of bias by members of the Electoral Supervisory Commission

The plaintiffs have averred that Mr Ali Dauhoo, Senior Adviser to the Prime Minister was actively involved with defendants Nos.2 and 3 in the conduct of the elections.

H. Abuse of government machinery

The plaintiffs have averred that both the abuse of State resources and of State-owned media constitute serious infringement of accepted norms and international standards.

I. *The unlawful partisan approach of both defendants' Nos.5 and 6*

The plaintiffs have averred that defendant No.5 failed to uphold its mandate as lawful authority inasmuch as it did not ensure that broadcasting services by defendant No.6 were impartially, accurately, truthfully and objectively carried out.

J. *Breach of international conventions*

This is in reference to the International Covenant on Civil and Political Rights as well as the African Charter on Democracy, Elections and Governance.

7. The redress sought is under section 83 of the Constitution for fundamental breaches of sections 1, 33, 34, 41, 42, 43 and 44 of the Constitution.
8. Alternatively, the plaintiffs are also seeking that the Supreme Court, under its unlimited jurisdiction, hear the present case under section 76 and section 83 of the Constitution.

The remedy the plaintiffs are seeking are the following:

- a. *a declaration from the present court that the defendants have contravened and breached sections 1, 33, 34, 41, 42, 43, 44 of the Constitution of Mauritius.*
- b. *a declaration that the National Assembly elections held on the 7th of November 2019 in each of the 21 constituencies are null and void to all intents and purposes.*
- c. *a direction ordering that National Assembly elections in the Republic of Mauritius be held anew in a proper and credible manner according to law, and within such reasonable time as this court may determine.*
- d. *for such other order(s) as the court may deem fit and proper in the present circumstances.*

The arguments of the plaintiffs with respect to the objections raised

9. It is the plaintiffs' contention that they are challenging the procedural propriety and legal due process of the conduct of the 2019 general elections which they submit, fall foul of the constitutional norms in a democratic State and constitute a breach of section 1 of the Constitution. It is also contended that the RoPA is for a particular candidate based upon specific grounds pertaining to a particular constituency.

10. It has been submitted by the plaintiffs that the Supreme Court has unlimited jurisdiction by virtue of section 76(1) of the Constitution and that its powers are not ousted by other election-related laws in force in Mauritius. It is further submitted that the Constitution of Mauritius is the supreme law which prevails over the RoPA.
11. Learned counsel for the plaintiffs stated that the redress is being sought for breaches of constitutional rights as set out in the plaint. There was no exhaustion of remedies rule in so far as section 83 of the Constitution is concerned.
12. There are numerous allegations in the plaint that several provisions of the Constitution have been contravened and that the interest of the plaintiffs are being or are likely to be affected by these contraventions. This entitles the plaintiffs to apply to the Supreme Court for a declaration and for relief under section 83 of the Constitution.

The submissions of the defendants

Defendants No.1 (The State) and No.3 (The Electoral Commissioner)

13. The submissions of defendants No.1 and No.3 are that the court has no jurisdiction to entertain the plaint as it cannot pronounce itself on the validity of National Assembly elections except by way of an election petition entered in accordance with the provisions of RoPA. It is submitted that the relief sought is inseverable. We understand the submissions to mean that if the court were so minded, it could not grant prayer A and only declare that the defendants have contravened and breached sections 1, 33, 34, 41, 42, 43 and 44 of the Constitution.
14. It has been submitted that the Supreme Court can only entertain a question as to the validity of an election in accordance with section 37 of the Constitution. The complaints are inextricably linked to the conduct and organisation of the General Elections and are '*election petition*' grounds. Learned counsel stated that section 45 of the RoPA, especially section 45(1)(a)(i) would be pertinent as it allows an election to be questioned on the ground of any irregularity whatsoever. Parliament has, pursuant to section 37(5) of the Constitution, made provision for the procedure to be followed to challenge an election.
15. Learned counsel drew a parallel between the present plaint and the judicial review case of **Bhadain S. v The Electoral Supervisory Commission & Anor** [\[2020 SCJ 257\]](#) where the general elections as a whole were being sought to be challenged.

16. She relied on the authority of **Kodabaccus v Electoral Commissioner and Ors And Attorney-General Electoral Supervisory Commission v Kodabaccus and Electoral Commissioner and Ors** [\[1992 SCJ 257\]](#) that where there was an irregularity, common to more than one constituency, then as many petitions as were required needed to be lodged.
17. In as much as the submissions of the plaintiff are concerned, Learned counsel countered that section 83's jurisdiction is constrained by section 83(5) of the Constitution.
18. She also emphasised the strict time limit is imposed as elaborated in **Bonnellame v Curé** [\[1991 SCJ 136\]](#) and she referred to the judgment of **Mungtah v Jugnauth** [\[2009 SCJ 393\]](#) on the issue of section 37 of the Constitution. All of the above established a specific and proper manner in which the validity of the election of a member of the National Assembly may be challenged which had to be by way of an election petition. The Supreme Court derived its jurisdiction to hear such an election petition from the Constitution itself.

Defendant No. 2 submissions (The Electoral Supervisory Commission)

19. The objections have been reproduced in paragraph 3. The submissions offered are along similar lines as those of defendants No.1 and No.3. It is submitted that the court has no jurisdiction to entertain the plaint and should be set aside and that the plaintiffs are disregarding the constitutional and statutory framework to challenge elections. He relied on the authorities of **Kodabaccus¹** and **Bhadain²**. Learned counsel submitted that the present matter was a '*broad sweeping and blanket challenge*' to National Assembly elections.
20. It is submitted that the court does not have discretion to entertain the plaint and no relaxation of the rule that challenges to elections must be presented by way of election petition in each of the 21 constituencies. An election petition is required for each constituency which sets out with precision the irregularity for each particular candidate whose election is being challenged.
21. The plaintiffs are not seeking to challenge the election of a particular candidate but of challenging the general elections as a whole. It is submitted that upon a scrutiny of the grounds in the plaint, it is revealed that it is the validity, legitimacy, reliability and or integrity of the elections which are targeted and thus should be grounds of relief in an election petition.

¹ [1992 SCJ 257]

² [2020 SCJ 257]

22. Learned counsel for defendant No.2 set out in a helpful tabular form, the averments made in the grounds in the plaint that attack the validity of the elections and which are governed by section 37 of the Constitution and the RoPA. On this issue, Learned counsel referred to section 83 of the Constitution and the Supreme Court (Constitutional Relief) Rules 2000 which entitles the court to entertain the plaint. Special attention was accorded to section 83(5) of the Constitution which refers to section 37. It was submitted that section 37 of the Constitution is an enabling provision which provides for limited court intervention in the democratic process of election. As a safeguard, section 37(1) provides for a limited and prescribed avenue for redress to challenge the validity of an elected member of the National Assembly. Learned counsel submitted that the mechanism to challenge the validity of the election of a member of the National Assembly had been provided for by Parliament under section 45 of RoPA.

Defendant No.4 submissions (The State Informatics Limited)

23. Learned counsel for defendant No.4 joined in the submissions of the other four defendants' counsel. It, however, canvassed two additional points. Firstly, that the plaintiffs had failed to put into cause, all interested parties and secondly, there was a need for finality *quoad* returned candidates against whom electoral petitions have been dismissed, or have been elected following a recount exercise.
24. The gist of the submission under the first point, was that by the form and tenor of the prayers, the plaintiffs are seeking to challenge and invalidate the election of all 62 returned candidates at the general elections held on 7 November 2019 of the 21 constituencies. As a result, all 62 returned candidates as well as the eight "best losers" have a direct interest in the present matter. These persons have their rights protected under section 31(2) and the First Schedule of the Constitution. The cases of **Tsang Mang Kin T.F.K v The Electoral Supervisory Commission** [\[2006 SCJ 24\]](#); **Bhadain**³ and **Hon. Ashley Ittoo v Sooredoo** [\[2020 SCJ 279\]](#) were relied upon. It was submitted that the consequence of the nonjoinder of the returned candidates and the eight best losers was fatal and was a defect which could not be cured by the joining of the interested parties especially as the 21 days' mandatory time limit for presenting an election petition had passed. The submissions emphasised that the present subject matter of the plaint was akin to an election petition, the whole purpose of which was to invalidate the general elections of 7 November 2019. If the court allowed the plaintiffs to put into cause all 70 members of the National Assembly, at this stage, it would allow the plaintiffs to circumvent the strict procedural requirements pertaining to the presentation of an election petition which included the 21 days' time limit.

³ [2020 SCJ 257]

25. On the second issue, defendant No.4 listed 3 electoral petition cases in which judgments had been delivered. The relevant returned candidates had already had the elections challenged by way of the specific procedure under the RoPA, there is *res judicata* as regards the contestation of the elections. As such, there should be finality of legal proceedings challenging the elections. Otherwise, there would be an abuse of the court process.

Submissions of defendant No.5 (The Independent Broadcasting Authority)

26. The submissions of defendant No.5 are focussed on the prayers whereby the Supreme Court has to determine whether any provision of the Constitution (other than Chapter II) has been contravened and give a declaration accordingly. It is submitted that although the plaintiffs have at paragraphs 98 and 104(a) of the plaint set out the list of sections of the Constitution which have been allegedly breached, the plaintiffs have failed to set out how these sections have been breached *quoad* them. As such, the plaintiffs cannot seek constitutional relief by simply referring to certain sections of the Constitution.
27. Learned counsel has highlighted section 37(1)(a) of the Constitution which purports to empower the Supreme Court to hear and determine any question as to whether any person has been validly elected as a member of the Assembly. The section does not state the procedure or time limit but only specifies who has the *locus standi*. Section 37(5) of the Constitution was then cited in the written submissions. It was highlighted that the plaint made no reference to section 37 nor did the plaintiffs identify specific members of the National Assembly who have not been validly elected.
28. It is also understood that this plaint affects every member of the National Assembly. This circles back to the first issue canvassed by defendant No.5, that all relevant parties have not been joined in this matter.
29. It was submitted that the legislator has set out clear procedures to contest the validity of the election of a member in the RoPA and counsel has relied upon an extract of **Kodabaccus**⁴ which explained the connection between sections 37 and 83 of the Constitution and the RoPA⁵:
30. Learned counsel for defendant No.5 referred to section 45 of RoPA which provides for complaints of the undue election of a member to be made on the grounds of bribery, treat, undue influence, illegal practice, irregularity, or any reason which may be presented to a Judge in Chambers by

⁴ [1992 SCJ 257]

⁵ This same extract is reproduced further in our judgment at paragraph 41

way of an electoral petition and which is then heard by a bench of at least two judges of the Supreme Court.

31. Defendant No.5 re-iterated what has been submitted by the other defendants - because there is a specific avenue and strict procedures provided for in the RoPA, the validity of the whole National Assembly elections cannot be contested by another procedure.
32. The following extract from the case of **Kodabaccus**⁶ was relied upon:

“It follows therefore that an election may be questioned on the ground of any irregularity whatsoever. So that the only ground on which the plaintiff can complain is that, if a qualified person wishes to contest the validity of the election of a member of the Assembly, he is bound to do so by means of an election petition and that, if it is intended to show that a particular irregularity is common to more than one constituency, it is necessary to lodge as many petitions as there are constituencies involved. We can find nothing wrong in this, and we cannot fail to observe that, in addition to the present action, this is precisely the process that has also been adopted in this matter.

We accordingly hold that we have no jurisdiction to entertain the plaint which is set aside. (...).”

33. Learned counsel has then relied on **Bhadain S, GCSK v The Electoral Supervisory Commission and Anor** [\[2021 SCJ 217\]](#) and extensively quoted from it which we find apt to reproduce:

“In setting aside the application for leave to apply for judicial review, the Supreme Court found inter alia that the applicant was in effect seeking to challenge the integrity and results of the 2019 General Election and that he was seeking leave to have those results quashed which, if granted, would have had for effect to invalidate the election of the returned candidates in the 21 Constituencies. The Supreme Court also found that, contrary to the applicant’s contention, he was in effect relying on election petition grounds viz bribery, treating, illegal practice and irregularity in a judicial review application to challenge the decision and decision making process of the respondents and in turn the validity of the 2019 General Election whereas he should have proceeded by way of an election petition in accordance with the specific mandatory provisions of the law provisions of the law, namely section 45 of the Representation of the People Act. The Supreme Court further found that it was not open to

⁶ [1992 SCJ 257]

the applicant to substitute some other form of redress to the specific form of redress which the legislator has deemed fit to provide in the Constitution and in the Act (meaning the Representation of the People Act).

What the Supreme Court was in effect saying, after perusing the complaints and grievances of the applicant as per the averments contained in his affidavit, was that it had before it, an election petition in the form of a disguised Judicial Review application and that it could not condone the applicant's wrong choice of remedy for contesting the validity of the 2019 General Election, for, were it to do so, it would be encouraging the applicant in circumventing specific statutory remedies available to him to challenge the validity of the 2019 General Election and in the same vein bypassing stringent procedural requirements pertaining to an election petition.

...

We reiterate that the Supreme Court found that the applicant's complaints in support of his application for leave to apply for Judicial review fell within the ambit of an election petition; that the ultimate remedy sought by the applicant, if granted, would have had for effect to invalidate the results of the 2019 General Election which would have in turn impacted on the election of the returned candidates in the 21 Constituencies; and that the applicant could not be allowed to have recourse to the parallel remedy of judicial review to contest the 2019 General Election on grounds which the Supreme Court found were essentially electoral petition grounds; and that the applicant should not be encouraged to forum shop or enter parallel proceedings with a view to usurp the functions of an electoral court. The Supreme Court added that judicial review remedy is not only quite distinct from an electoral petition but is also a remedy of last resort when all alternative remedies have been exhausted. The Supreme Court held that the applicant could not substitute some other form of redress to the specific form of redress which the legislator has deemed it fit to provide in the Constitution and in the Representation of the People Act.

...

We endorse the submissions of learned Counsel for respondent no. 2 to the effect that "allowing a course of action seeking, by way of a collateral attack, in a judicial review, the invalidation of general election results, is more likely to set an evil precedent for the future and divert the due and orderly administration of the law into a new course (...) whilst totaling disregarding the safeguards provided (...) in the Representation of the People Act." We also agree with her that in deciding whether or not to grant leave to appeal to the Judicial

Committee, the Court “also has to be alive to the fact that in matters concerning general elections, the public interest involved in having a measure of certainty as soon as may be in the composition and proper functioning of such an important public institution as the Legislative Assembly cannot be understated” and that “such public interest cannot be compromised by any court action entered on erroneous premises without following the applicable legal provisions which Parliament itself has prescribed in pursuance of section 37 of the Constitution.”

Defendant No.6 (The Mauritius Broadcasting Corporation)

34. Learned counsel for defendant No.6 did not offer submissions *per se* but did join in the objections (without stating which specific ones as all are not exactly the same). We therefore presume that the submissions offered by all of the other defendants and their relevant submissions are endorsed by defendant No.6.

Analysis and Conclusions

35. We have carefully considered all of the submissions offered to us by Learned counsel of all the parties in this matter on the objection raised by the defendants. We have carefully scrutinised the averments and prayers in the plaint.
36. We bear in mind that the general elections are an essential pillar governing a democratic State. Seeking constitutional redress to declare the National Assembly Elections held on 7 November 2019, in the 21 constituencies null and void and ordering the general elections anew, is not a matter to be trifled with.
37. We find it relevant to refer to an extract from **Seedoo A. G v The Returning Officer for Ward 4 of Municipal City Council of Port Louis & Ors** [\[2013 SCJ 290\]](#) which had been relied upon by Learned counsel for the plaintiff:

“...The most entrenched principle to uphold the democratic process in the Constitution is the mandatory holding of elections at regular intervals. Elections thus lie at the root of our democratic process. In such a democratic process voting at elections is how the people expresses its will and translates into reality the fundamental democratic precept of ‘a government by the people’. The reliability and credibility of the voting system are essential elements for the upholding of such a democratic process.”

38. The present case has been entered on the basis of section 83 of the Constitution which deals with the original jurisdiction of the Supreme Court in constitutional matters, where any provision, other than a Chapter II provision, is alleged to have been contravened.

39. Section 83 of the Constitution provides that:

83 Original jurisdiction of Supreme Court in constitutional questions

(1) *Subject to sections 41(5), 64(5) and 101(1), where any person alleges that any provision of this Constitution (other than Chapter II) has been contravened and that his interests are being or are likely to be affected by such contravention, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for a declaration and for relief under this section.*

...

(5) *Nothing in this section shall confer jurisdiction on the Supreme Court to hear or determine any such question as is referred to in section 37 or paragraph 2(5), 3(2) or 4(4) of the First Schedule otherwise than upon an application made in accordance with that section or that paragraph, as the case may be. [underlining is ours]*

40. Section 83 (5) of the Constitution refers to section 37 which is set as follows:

37 Determination of questions as to membership

(1) *The Supreme Court shall have jurisdiction to hear and determine any question whether –*

- (a) *any person has been validly elected as a member of the Assembly;*
- (b) *any person who has been elected as Speaker or Deputy Speaker was qualified to be so elected or has vacated the office of Speaker or Deputy Speaker as the case may be; or*
- (c) *any member of the Assembly has vacated his seat or is required, under section 36, to cease to perform his functions as a member of the Assembly.*

...

(5) *Parliament may make provision with respect to –*

- (a) *the circumstances and manner in which and the imposition of conditions upon which any application may be made to the Supreme Court for the determination of any question under this section; and*
- (b) *the powers, practice and procedure of the Supreme Court in relation to any such application*

The underlining is ours.

41. Sections 83(5) and 37 of the Constitution have been interpreted and explained in the case of **Kodabaccus**⁷ as follows:

“Indeed, a reading of section 83(5) makes it clear that the jurisdiction conferred on this Court by section 83 to hear complaints relating to an alleged violation of Part I and Parts III and following of the Constitution (unlike that conferred by section 17 concerning a contravention of Part 11 which is all-embracing) is, by that very subsection 83(5), limited, to the extent that, where, inter alia, a question as to the validity of an election is raised, this Court can only entertain it in accordance with section 37.

That section, as we have seen, does not, apart from saying that only a voter or a candidate at the election, or the Attorney-General can enter such a suit and that, if the Attorney-General is not the mover, he must be joined in the action, tell us anything else about the manner in which it should be lodged or processed. It leaves it to Parliament to do so.

Of course if Parliament had not made any provision at all pursuant to section 37(5), this Court would undoubtedly, in a prayer case, assume its constitutional responsibilities to enable a qualified person to question an election by an appropriate form or process.

*Indeed it is worth noting that section 37(1) deals with three matters: the validity of the election of a member of the Assembly, the validity of the election of the Speaker or Deputy Speaker or their vacation of office, and the vacation by a member of his seat in the Assembly where he is sentenced to imprisonment for more than 12 months. And while section 37(5) enables Parliament to make provisions for the procedure in respect of an application under any of those limbs, it has not enacted anything with regard to the latter two. And when issues arose, in **Duval v Seetaram** [\[1991 MR 21\]](#), as to the vacation of office by a Speaker and the election of a new one, no objection was raised to this Court hearing the case by way of a plaint under section 83 and the Court duly made a pronouncement on the matter.*

Again, where Parliament has made provision under section 37(5), as it has done in the Representation of the People Act for disputing the validity of the election of a member, the Court can most certainly enquire whether Parliament has not placed undue fetters on persons wanting to question the validity of an election and, in a fit case, intervene to hold that those fetters are not consonant with Mauritius being a democratic State.”

⁷ [1992 SCJ 257]

42. We also respectfully endorse the reasoning in **Mungtah v Jugnauth** [2009 SCJ 393], whereby the Supreme Court, after referring to section 37(1) and 37(5) of the Constitution, held as follows:

“What the framers of our Constitution have done by enacting the above provisions, is to secure two competing interests, which are both of importance and of great public interest in a democratic state. Under section 37(1) the Constitution ensures right of access to the Supreme Court to unsuccessful candidates or electors of a constituency to challenge the election of a member which, in their consideration, is not free and fair or which is tainted with illegality or corruption. On the other hand, under section 37(5) the Constitution provides for the imposition of conditions which are likely to be necessary to act as checks and balances to control any abuse of process in the bringing of election petitions under section 37(1).”

43. We note that there was an attempt in the case of **Bhadain S v The Electoral Supervisory Commission and Anor** [2020 SCJ 257] and **Bhadain S, GCSK v The Electoral Supervisory Commission and Anor** [2021 SCJ 217] to argue that the application for judicial review did not relate to the election of a member of the Assembly (terminology used in section 37(1)(a) of the Constitution) but relate rather to the General Elections as a whole, across all 21 constituencies and the Supreme Court observed that *“As correctly pointed out Learned Senior Counsel for respondent No.1, the present application is indeed an election petition, the whole purpose of which is to have the results of the 2019 General Election quashed, presented under the guise of a judicial review application, in an attempt to circumvent the mandatory provisions of the Act. We also agree with his submissions that this Court cannot pronounce itself in the validity or otherwise of the election of a member of the Assembly, which this Court is in effect being requested to do, except in a manner laid down by Parliament in the Act, in other words, by means of an election petition”*.⁸

44. In the present case, a somewhat similar approach has been taken in challenging in a wholesale manner the general elections of 7 November 2019 and asking the Court to order fresh elections. However, one cannot overlook the fact that the challenge is of election results for all constituencies. We agree with the reasoning held in **Kodabaccus**⁹ that *“if it is intended to show that a particular irregularity is common to more than one constituency, it is necessary to lodge as many petitions as there are constituencies involved.”*

45. We find that section 37(1) and (5) and section 83(5) of the Constitution should be read together and that the Supreme Court cannot pronounce itself on the validity of the election of a member of

⁸ Bhadain S v The Electoral Supervisory Commission and Anor [2020 SCJ 257]

⁹ [1992 SCJ 257]

the National Assembly except in accordance with the procedure prescribed by Parliament under the RoPA. A close analysis of the averments in the plaint indicate that they are inextricably linked to the conduct and organisation of the general elections and the plaint is a disguised election petition.

46. We find that the challenge of any election should be by way of an election petition under the RoPA. The challenge of the validity of an election which has been held, by way of a plaint would allow circumvention of the specific legislation, the RoPA. This would also imply that the provision to challenge outside the period of 21 days provided for under RoPA would also be avoided. We find that an election petition is the procedure to be adopted when elections have been held and the results have already been declared.

47. On the issue of the 21 days delay and matters of “*great public interest and not merely of private individual interest*”¹⁰, we find the following extract in the case of **Bonnelame**¹¹ relevant:

“...On the other hand, it is necessary in a democratic society that there is a measure of certainty as soon as may be in the composition and proper functioning of such an important public institution as the Legislative Assembly. There is also the desirability that the Assembly’s membership performs its functions with equanimity and without being subject for a lengthy period of time to the pressures to which an overhanging petition may subject them. Lastly, the jurisdiction of the Court in these kinds of cases is a special one and is conferred by section 37 of the Constitution. And Parliament itself has prescribed, in pursuance of section 37(5)(a), the time limit of 21 days in section 45 of the Representation of the People Act as a condition for the presentation of the petition.”

48. We find that the only way to seek to declare the National Assembly Elections null and void on the alleged grounds of relief as averred in paragraphs 18 to 48 (illegal practice, irregularity and undue influence), can only be made by way of an election petition, since Parliament has, pursuant to section 37(5) of the Constitution, made provisions for the procedure to be followed to challenge an election in the RoPA. An election petition is a specific statutory remedy through which the plaintiffs may contest an election process in accordance with the Constitution and the RoPA. It was incumbent for the plaintiffs to proceed by way of an election petition instead of a plaint with summons. Allowing the present case to continue is likely to set an evil precedent for the future and divert the due and orderly administration of the law into a new course whilst disregarding the safeguards provided in the RoPA.

¹⁰ From *Bonnelame v Curé* [1991 SCJ 136]

¹¹ [1991 SCJ 136]

49. It is noted that the issues raised in the present plaint have already been considered and determined in a number of cases heard by an election court and they are namely:
1. ballot papers declared null and void, invalid, found stranded in the open¹²;
 2. failure to organize conduct of elections and ensure security of candidates¹³;
 3. 2019 elections conducted by prerogative of Prime Minister by inexperienced officers¹⁴;
 4. voter suppression¹⁵;
 5. discrepancy in the number of confirmed voter turnout by constituency¹⁶;
 6. unlawful and compromising services provided by defendant No. 4 (State Informatics Limited)¹⁷;
 7. involvement of senior advisor to Prime Minister in electoral process and perception of bias by members of electoral supervisory commission¹⁸;
 8. abuse of government machinery¹⁹;
 9. partisan approach of IBA and MBC²⁰
50. We have also awaited and have the benefit of a decision of the Judicial Committee of the Privy Council in the case of **S. Dayal v P.K Jugnauth [2023] UKPC 37** which addresses the issue of bribery and treating.²¹
51. Raising such a matter by way of a plaint seeking constitutional redress with remedy a declaration and/or an order directing new elections, should have been lodged as soon as possible. We also bear in mind that under the RoPA, there is a 21-day delay within which an election petition should be lodged.
52. It is noted that the present plaint does not meet the standard requirement as it seeks to cast the net very wide and has included matters which are eminently suited for claims under the RoPA in an election petition. These are: the ballots found in the open, discrepancies in the number of confirmed voter turnout by Constituency, voter suppression, involvement of State Informatics Limited.

¹² Adebiro O.J. v Collendavelloo I.L & Ors [2022 SCJ 271], Bhadain S. v The Electoral Supervisory Commission & Anor [2020 SCJ 257], Chukowry M.C.D (Dr) v Navarre-Marie M.A (Mrs) & Ors [2021 SCJ 231], Duval A.C v The Electoral Commissioner & Ors [2021 SCJ 218], Jagutpal K.K.S & Ors v Bundhoo L. [2020 SCJ 273], Duval A C v The Electoral Commissioner & Ors [2022 SCJ 145]

¹³ Bablee S.G v Sayed-Hossen S.A & Ors [2021 SCJ 291], Duval A C v The Electoral Commissioner & Ors [2022 SCJ 145]

¹⁴ Duval A. C v The Electoral Commissioner & Ors [2022 SCJ1451]

¹⁵ Bhadain S. v The Electoral Supervisory Commission & Anor [2020 SCJ 257], Chukowry M.C.D. (Dr) v Navarre-Marie M.A. (Mrs) & Ors [2021 SCJ 23], Jagutpal K.K.S.& Ors v Bundhoo L. [2020 SCJ 273]

¹⁶ Bhadain S. v The Electoral Supervisory Commission & Anor [2020 SCJ 257]

¹⁷ Adebiro O.J. v Collendavelloo J.L & Ors, [2022 SCJ 27], Jhuboo E S v Ganoo A. & Ors [2021 SCJ 284], Chukowry M.C.D. (Dr) v Navarre-Marie M.A. (Mrs) & Ors [2021 SCJ 231], Bhadain S. v The Electoral Supervisory Commission & Anor [2020 SCJ 257], Jagutpal K.K.S. & Ors v Bundhoo L. [2020 SCJ 273]

¹⁸ Bhadain S. v The Electoral Supervisory Commission & Anor [2020 SCJ 257]

¹⁹ Dayal S v Jugnauth P. K & Ors [2022 SCJ 279]

²⁰ Dayal S v Jugnauth P. K & Ors [2022 SCJ 279]

²¹ Alluded to in Grounds for Relief H and paragraphs 55 to 66 of the plaint.

53. It is clear that the plaintiffs are seeking to have the 2019 General Elections declared null and void and have moved the Court to direct that the National Assembly elections be held anew without complying with the procedure prescribed by Parliament in the RoPA.
54. We feel compelled to add that whilst bearing in mind the premise on which the present claim relies, namely, the concept of free and fair election upon a reading of section 41 together with section 1 of the Constitution, we are not prepared to state that the Court cannot consider constitutional redress and has absolutely no discretion when it pertains to the organisation of elections. We are of the view that it may be possible to challenge certain aspects of the organisation of a general election *before* it is held. However, once votes are cast and members are declared, the provisions of the RoPA are applicable.
55. The plaintiffs have been unable to establish that the specific remedy and procedure provided to challenge national elections should be supplanted by Supreme Court's jurisdiction in the present claim as couched, by invoking Constitutional redress. It is clear from the averments in the plaint that the plaintiffs are seeking to bypass the RoPA. It is not that access is being denied to Constitutional redress but that the present claim does not meet the requirements whereby it can proceed in view of the issues it raises.
56. For the general elections to be declared as contravening sections 1, 33, 34, 41, 42, 43 and 44 of the Constitution, it would entail something clearly identifiable which affects the *whole* of the elections. However, on an analysis of the grounds under the heading 'grounds for relief' it is clear that they are matters in the plaint, which occurred *after* the elections and secondly which are under the purview of the RoPA.
57. The only issues which could be considered as occurring before the general elections and affecting the elections as a whole, could be the role of the Mauritius Broadcasting Corporation and the Independent Broadcasting Authority (ground I), abuse of government machinery (ground H), and bias by members of Electoral Supervisory Commission (ground G). Those issues could potentially have been raised before the Supreme Court but prior to the elections. This would have to be at the relevant time, namely, either upon their nomination or when the board members were retained as counsel and attorney for the Prime Minister. The Court will not allow a claimant to only raise this issue after elections have been held.

58. We therefore find that the present plaint as couched, cannot proceed any further. The majority of issues/grounds raised should have been challenged under the RoPA in election court. The issues which could have been the subject matter of a plaint under section 83 have not been raised at the appropriate juncture. Additionally, all of the relevant parties have not been joined.
59. In light of our findings and observations made above, the present plaint cannot proceed and the point raised by all the defendants that it is the procedure under RoPA which should prevailed is correct. The plaint is accordingly set aside with costs.

R. Teelock
Judge

G. Jugessur-Manna
Judge

30 September 2024

Judgment delivered by Hon R. Teelock, Judge

For Plaintiffs	:	Mr. A. O. Jankee, Attorney at Law Mr. N. Dulloo, of Counsel
For Defendants No.1 & No.3	:	Ms. V. Nirsimloo, Chief State Attorney Mrs. S. Beekarry-Sunassy, then Assistant Solicitor General Mrs. U. Rawat-Neerooa, then Senior State Counsel Mr. K. A. Putchay, State Counsel
For Defendant No.2		Mr. A. K. Rajah, Senior Attorney Mr. A. Mollan, Senior Counsel Mr. R. Pursem Senior Counsel Mr. A. Adamjee, of Counsel Mr. Currimjee R, of Counsel
For Defendant No.4		Mrs D. Ghose-Radhakeesoon, Attorney Mr. R. Chetty, Senior Counsel together with Mr. A. Sookhoo, of Counsel
For Defendant No.5		Mr. D. K. Manikaran, Principal State Attorney Mr D. Reetoo, Assistant Parliamentary Counsel Ms. V. Sunkur, State Counsel
For Defendant No.6		Mr. M. Mardemootoo, Senior Attorney Mr. M. Ajodah, of Counsel