*Privy Council Appeal No. 10 of 1975*

**Henri Lincoln and Others** – – – – – – *Appellants*

*v.*

**The Governor-General of Mauritius and Others** – – *Respondents*

FROM

**THE SUPREME COURT OF MAURITIUS**

---

# JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND MARCH, 1977

---

*Present at the Hearing:*
VISCOUNT DILHORNE
LORD MORRIS OF BORTH-Y-GEST
LORD EDMUND-DAVIES
LORD FRASER OF TULLYBELTON
LORD KEITH OF KINKEL

[*Delivered by* VISCOUNT DILHORNE]

---

By virtue of the Mauritius Independence Order 1968 Mauritius was given the written Constitution attached to that Order which came into effect on the 12th March 1968. Chapter I of the Constitution headed " The State and the Constitution " contains the following two sections.

> " 1. Mauritius shall be a sovereign democratic State.
>
> 2. This Constitution is the supreme law of Mauritius and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void."

Chapter V of the Constitution is headed " Parliament ". Section 31, the first section in Part I of that Chapter, provided that there should be a Parliament for Mauritius consisting of Her Majesty and a Legislative Assembly with seventy members elected in accordance with Schedule 1 to the Constitution. Section 39 provided that there should be twenty-one constituencies and paragraph 1(1) of that Schedule provided that one constituency should return two members and the others three, the total elected membership consequently being sixty-two. Paragraph 1(2) of the Schedule provided that these sixty-two members should be directly elected in accordance with the provisions of the Constitution at a general election or by-election " held in such manner as may be prescribed."

The Schedule contains complicated provisions for the appointment of the eight non-elected members of the Assembly. So far as possible they were to be selected by the Electoral Supervisory Commission from those who

had stood, unsuccessfully, at the general election (paragraph 5). If a vacancy occurred during the lifetime of a Parliament, the most successful unreturned candidate available who belonged to the community and to the party to which the person appointed at the time of the general election belonged was to be appointed (paragraph 5(7)).

Section 35(3) of the Constitution provided that if a seat in the Assembly of an elected member became vacant otherwise than as a result of the dissolution of Parliament, the writ for an election to fill the vacancy should, unless Parliament was sooner dissolved, be issued within ninety days of the occurrence of the vacancy.

On the 20th July 1972 a vacancy occurred in the Curepipe-Midlands Constituency and on the 24th August 1972, the 5th December 1972 and the 1st January 1973 vacancies arose in three other constituencies.

On the 9th October 1972, when there were two vacancies, the Governor-General made Regulations under the Emergency Powers Ordinance giving him power to fix any day for the day of the election and any day as polling day.

Following upon this on the 13th October 1972 writs were issued for by-elections in the Curepipe-Midlands Constituency and in that in which the vacancy had occurred on the 24th August. In each case the 4th June 1973 was fixed as the election day.

On the 31st January 1973 the Supreme Court of Mauritius held that these Regulations were invalid as the result of non-compliance with section 41(3) of the Constitution.

On the 3rd September 1973 the Emergency Powers (Dates of Elections) Regulations No. 2 of 1973 were made by the Governor-General under the Emergency Powers Ordinance. By these Regulations the 14th January 1974 was fixed as the election day for the by-elections in each of these four constituencies and the 18th February 1974 as the polling day.

On the 27th September 1973 the appellants lodged a petition to the Supreme Court in which they asked *inter alia* for a declaration that these Regulations were null and void, and, alternatively, a declaration that the substitution of the new dates for election day and polling day was unreasonable. The ground advanced was that the Regulations were null and void as not being consistent with the Constitution.

On the 13th November 1973 the Governor-General gave his assent to the Constitution of Mauritius (Amendment) Act, 1973 (No. 40 of 1973), the bill for which had been passed by the Legislative Assembly on the 9th November 1973. By that Act section 35 of and Schedule 1 to the Constitution were amended with other minor amendments.

Section 47 of the Constitution is in the following terms:

> "(1) Subject to the provisions of this section, Parliament may alter this Constitution.
>
> (2) A bill for an Act of Parliament to alter any of the following provisions of this Constitution, that is to say:—
>
> (*a*) this section;
>
> (*b*) sections 28 to 31, 37 to 46, 56 to 58, 64, 65, 71, 72 and 108;
>
> (*c*) Chapters II, VII, VIII and IX;

(*d*) schedule 1; and

(*e*) Chapter XI, to the extent that it relates to any of the provisions specified in the preceding paragraphs,

shall not be passed by the Assembly unless it is supported at the final voting in the Assembly by the votes of not less than three-quarters of all the members of the Assembly.

(3) A bill for an Act of Parliament to alter any provision of this Constitution (but which does not alter any of the provisions of this Constitution as specified in subsection (2) of this section) shall not be passed by the Assembly unless it is supported at the final voting in the Assembly by the votes of not less than two-thirds of all the members of the Assembly.

(4) In this section references to altering this Constitution or any part of this Constitution include references—

(*a*) to revoking it, with or without re-enactment thereof or the making of different provision in lieu thereof;

(*b*) to modifying it, whether by omitting or amending any of its provisions or inserting additional provisions in it or otherwise; and

(*c*) to suspending its operation for any period, or terminating any such suspension."

The bill, which became the Constitution of Mauritius (Amendment) Act, 1973, was supported at the final voting in the Assembly by the votes of not less than three-quarters of all the members of the Assembly and the validity of that Act cannot consequently be challenged on the ground of non-compliance with the requirements of section 47.

On the 28th November 1973 Notice of Motion was filed on behalf of the appellants seeking leave to amend their petition by adding a request for a decaration that the Constitution of Mauritius (Amendment) Act, 1973, was null and void. Leave to do so was granted.

On the 31st January 1974, in the course of delivering an interlocutory judgment in the Supreme Court, it was said that:

" The effect of the Act would be impliedly to revoke the Regulations, the validity of which is challenged by the petitioners, and to render inoperative anything done for the purpose of, and in relation to, the holding of by-elections. . . . .

It is evident that with the passing of the Act any question which might arise with regard to the validity or effect of the Regulations and of anything done under them has become subordinate to the main question whether the Act is valid or not."

The Court (Latour-Adrien C. J., Garrioch S. P. J. and Ramphul J.) said that they did not propose to go into or to decide any other matter until they had heard the parties on that issue.

The Act amended section 35 of the Constitution by deleting subsection (3) thereof and substituting the following subsection:

" (3) If the seat in the Assembly of a member becomes vacant otherwise than by reason of the dissolution of Parliament, the vacancy

shall, unless Parliament is sooner dissolved, be filled in accordance with schedule 1 to this Constitution."

and by adding to Schedule 1 to the Constitution a new paragraph which provided that instead of a vacancy for a constituency being followed by a by-election, a person should be appointed by the Electoral Supervisory Commission to fill the vacancy and that the person appointed should be

(*a*) the most successful unreturned candidate who belongs to the community and to the party to which the member belonged at the time of the election; or

(*b*) where the vacancy relates to the seat of a member who is not regarded as a member of any party, the most successful unreturned candidate (if any) who is not regarded as a member of any party but who belongs to the community to which the member belonged.

If no such persons could be found the most successful unreturned candidate who belonged to the community to which the member belonged irrespective of the party to which he belonged was to be appointed.

So the effect of this Act was to abolish by-elections. From the date it came into force the procedure of appointment under the unamended Constitution was adapted to fill vacancies occurring in constituencies for which prior to its amendment the members of the Assembly were chosen by election. Under this Act the electorate of a constituency ceased to have any choice as to the person to represent them should a vacancy occur between general elections. The most successful unreturned candidate might be someone who had fought at the general election on the other side of the island.

The amending Act also contained transitional provisions, of which it is only necessary to refer to two, the first being that a seat which had become vacant before the commencement of the Act should be filled by appointment in accordance with the amended Schedule and the second that any writ for an election to fill a vacancy issued before its commencement should cease to have effect.

The judgment of the Supreme Court (Latour-Adrien C. J., Garrioch S. P. J. and Ramphul J.) was delivered on the 14th May 1974. That Court held that the impugned Act was valid and dismissed the appellants' petition.

Before the Board Mr. Blom-Cooper's main contention was that the Act was null and void as being inconsistent with the Constitution but he put forward also another contention not advanced either in the proceedings which had led to the delivery of the interlocutory judgment or at the hearing before the Supreme Court. Reference will be made to that contention later.

In support of his main contention, he argued that Chapter I of the Constitution was immutable with the consequence that any law which changed the character of Mauritius from that of a sovereign democratic State must be held to be void, and also with the consequence that any law passed by the Assembly must, to be valid, be consistent with that Chapter of the Constitution. Similar arguments, it would seem, were advanced before the Supreme Court.

The words "democracy" and "democratic" have in these days often widely different meanings attached to them. As the unamended Constitution provided for non-elected persons to be appointed members

of the Assembly, it can be argued that the presence of such members did not suffice to constitute a breach of the requirement that Mauritius should be a democratic State and also that an extension of that system to vacancies in constituencies between general elections was similarly not to be regarded as inconsistent with the meaning to be given to " democratic " in that section.

Their Lordships do not propose to express an opinion on this for it is not necessary to do so. In their opinion it is clear, so clear as to be almost unarguable but for Mr. Blom-Cooper's ingenuity, that every section of the Constitution including sections 1 and 2 can be altered by the Parliament of Mauritius if the requirements of section 47 are complied with.

The words of section 47(1) are clear and unambiguous. When it is said that Parliament can alter this Constitution, that cannot conceivably be interpreted as meaning power to alter all parts of the Constitution except sections 1 and 2. If any underlining of the power of Parliament to alter the Constitution is required, it is to be found in subsection (4) of section 47 which *inter alia* provides that the Constitution may be revoked with or without re-enactment or the making of different provision in lieu thereof, and Parliament's powers are indeed wide enough not only to alter any provisions of the Constitution but also to alter any provisions of the Mauritius Independence Order itself to which the original Constitution was attached (see section 17(1) of that Order).

Even if it were the case that there was an inconsistency between the amendments contained in the amending Act and a provision of the Constitution which the Act did not amend, their Lordships agree with the learned judges of the Supreme Court in thinking that effect would have to be given to the express language of the amending Act. This amending Act has to be read as one with the Constitution which it amends and the content to the word " democratic " in section 1 depends on, and may be affected by, those other provisions of the amended Constitution.

In the light of section 47, in their Lordships' opinion the words " other law " in section 2 mean law other than the supreme law, that is to say the Constitution itself. Once a bill has been passed to amend or indeed to revoke the whole or part of the Constitution in accordance with the requirements of section 47 and that bill has become an Act, the amendments and changes it makes in the Constitution become themselves part of the supreme law.

Their Lordships agree with the Supreme Court that the appellants' contentions must be rejected, that the Constitution of Mauritius (Amendment) Act, 1973, is a valid Act and that effect must be given to its provisions.

The point taken before the Board and not taken, though it could have been, in the Courts below was that even if the Act was valid, it did not affect the validity of the Emergency Powers (Dates of Elections) Regulations No. 2, 1973, at the time they were made and between then, the 3rd September 1973, and the date of the enactment of the Act, the 13th November 1973. As has been stated, in their interlocutory judgment the Supreme Court said that the effect of the Act would be impliedly to revoke the Regulations. From the date the Act came into operation that is clearly so, and from that date the Regulations, if validly made, ceased to have any effect at all. But unless the Act is to be regarded as retrospective

or retroactive in operation, if the Regulations were valid and had any effect during that period of just over two months, it cannot be said that that validity or effect were destroyed by the Act.

In their Lordships' opinion the Act was not retrospective in effect or retroactive. Indeed this was conceded by Mr. Gerald Davies for the respondents.

In the circumstances, while their Lordships entirely agree with the Supreme Court on the main issue, namely the validity of the Act, that conclusion does not dispose of the questions as to the validity of the Regulations raised by the appellants in their petition, consideration of which was postponed by the Supreme Court. The case must therefore be remitted to the Supreme Court for that Court to deal with those issues if they are pursued.

There remains the question of costs. Bearing in mind that the appellants have lost on the main issue, argued both before the Board and the Supreme Court, and that they have only succeeded on a point which could have been and was not taken in the Supreme Court, the appellants should, in their Lordships' opinion, be ordered to pay three-quarters of the respondents' costs of this appeal.

Their Lordships will humbly advise Her Majesty that this appeal should be allowed and the case remitted to the Supreme Court of Mauritius. The appellants must pay three-quarters of the respondents' costs of the appeal to Her Majesty in Council.

3176575—2 Dd 119907 80 4/77

**In the Privy Council**

---

**HENRI LINCOLN AND OTHERS**

*v.*

**THE GOVERNOR-GENERAL OF MAURITIUS AND OTHERS**

---

DELIVERED BY
VISCOUNT DILHORNE

Printed by HER MAJESTY'S STATIONERY OFFICE
1977