REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 29 of 2008

BETWEEN

CARMEL SMITH **APPELLANT**

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO **RESPONDENT**

Panel: R Hamel-Smith, JA
W. Kangaloo, JA
P-M. Weekes, JA

Appearances:
Sir Fenton Ramsahoye for the Appellant
Mr. Avory Sinanan, S.C. for the Respondent

Date: July 21, 2008.

JUDGMENT

R. Hamel-Smith, JA.

1 The issue for resolution in this appeal is whether the Attorney General or the Statutory Authority Service Commission ("SASC") is the proper party to the proceedings brought by the appellant for a declaration that her fundamental rights under the Constitution have been infringed by the SASC.

2 The appellant is a deputy director of the National Lotteries Control Board, a statutory authority, and its employees fall within the jurisdiction of the SASC. The SASC has power to appoint persons to act as officers and to transfer, promote, remove and exercise disciplinary control over persons so affected.

3 The appellant instituted the action against the Attorney General under section 14(1) of the Constitution but the Attorney General applied to have the SASC substituted as defendant. The judge held that the SASC was the proper defendant and it is that decision which has been challenged on appeal.

4 Trinidad and Tobago became a republic in 1976. It adopted a republican constitution in which express provision is made in section 76(2) that all civil proceedings for or against the State must be instituted in the name of the Attorney General.

5 Section 14 (1) of the Constitution makes express provision for applications to the High Court for redress where one is alleging that there has been or is likely to be a breach of any of his fundamental rights secured by section 4. Section 14(3) makes it clear that the State Liability and Proceedings Act Ch 8:02 ("the Act") applies for the purpose of any proceedings under this section. Section 19 of the Act provides that all civil proceedings against the State must be instituted against the Attorney General. That mandate has been followed from time immemorial. The Attorney General is of the view that it need no longer be followed and the *primary offender* (as the SASC has been described) must be brought to the fore as defendant.

6 It is trite law that one of the main objectives of Chapter 1 of the Constitution is to prohibit contravention by the State of any of the fundamental rights and freedoms set out in section 4 (see ***Marahaj v The Attorney General of Trinidad and Tobago*** [1]. Lord Diplock in ***Maharaj*** confirmed that the protection afforded by section 14 was against contravention by the State or *some other public authority endowed in law with coercive powers and not by another private individual.* Accordingly, any application to the High Court would be considered 'civil proceedings' against the State and not a private individual.

7 There is no argument that these proceedings have been brought against the correct party. The appellant has done precisely what the Constitution and the Act requires her to do, viz., to bring the action against the Attorney General. That much is clear.

8 Further, there is also no sustainable argument that the SASC is not a public authority endowed with coercive powers and exercises statutory powers pursuant to the Statutory Authorities Act. In ***Thornhill v The Attorney General of Trinidad and Tobago*** [2], Lord Diplock explained what he meant by the expression "*by the State or some other public authority endowed with coercive powers"*. He prefaced his definition by way of an example of a police officer carrying out his functions in the course of his duties for the maintenance of order and apprehending an offender and bringing him before a

[1] (No 2) 1977 29 WIR 325, 363
[2] [1976] 31 WIR 498

judicial authority as a public officer carrying out an essential executive function. His actions would be susceptible to redress under section 14 of the Constitution. It was in this context that Lord Diplock said:

> "*In this context, "public authority" must be understood as embracing local as well as central authorities and including any individual officer who exercises executive functions of a public nature. Indeed, the very nature of the executive functions which it is the duty of police officers to perform is likely in practice to involve the commonest risk of contravention of an individual's rights under sections 1(a) & (b), through over-zealousness in carrying out those duties*."

9 The same can be said of the SASC because it performs executive functions, in the course of which it may infringe fundamental rights and freedoms, as the appellant alleges in this case. The trial judge, correctly in my view, identified the powers conferred on the SASC by the Statutory Authorities Act as being similar to those bestowed upon the Public Service Commission by the Constitution. He correctly noted that the purpose of such commissions was to insulate members of the civil, teaching and police service from *political influence exercised directly upon them by the government of the day.*

10 Quoting from Lord Diplock in ***Thomas***[3], the Judge said that the means adopted was to vest in autonomous commissions, to the exclusion of any other person or authority, power to make appointments, transfers and promotions within the relevant service and power to remove and exercise disciplinary control over members of the service. As the judge recognized, correctly again in my view, these autonomous commissions are nonetheless **public authorities.** He highlighted 'public authorities' because Lord Diplock had said that these autonomous commissions are excluded by section 105(4)(c) from *forming part of the service of the Crown*.

11 Whether the trial judge was influenced by Lord Diplock's observation that the commissions are excluded by section 105 from *forming part of the service of the Crown* into thinking that the commissions form no part of the State's functions is not clear. If he did then he misunderstood the reference. Lord Diplock was simply emphasising the independence of the members of the commissions by demonstrating that they were not even considered as forming part of the service of the Crown. He referred to section 105(4)(c) to show that a member was not considered as holding a public office by reason only that (c) *he is a member of any Commission established by this Constitution.* In spite of that independence, however, the commissions exercise executive powers, which are ultimately functions of the State.

12 Accordingly, while the Commissions are indeed independent from the influence of the government of the day, they nevertheless perform public functions on behalf of the State. This was not lost on the judge as he recognised that the allegations of the appellant *in effect concern State action in the broadest sense of the* term and accepted that they do possess coercive powers that are capable of infringing one's fundamental rights. As he

[3] ibid p.381-2

pointed out, *in purporting to suspend the appellant, the SASC was performing a quasi-judicial function capable of affecting the claimant's legal rights and obligations.*

13 The Judge was obviously swayed by the need to preserve the autonomy and independence of the SASC to the extent that he considered it absolutely necessary to further insulate the commissions by not having the Attorney General represent the SASC in the action. As he put it, *this* (naming the SASC as defendant) *would have the salutary effect of preserving the commission's autonomy and provide a commensurate degree of insulation by ensuring that it has independent representation*. The State, he noted, could not really complain of any prejudice because the Civil Proceedings Rules (1998) (Part 56.10(4)) made express provision for service of the proceedings on the Attorney General.

14 At the end of the day, it cannot be said that the Judge's decision had any legal underpinning. It was solely premised on the need to preserve the autonomy of the commission and to keep it insulated from political influence. It ignores however, the strict legal requirements of the Constitution and the Act. It does not advance the case of the respondent to say that in judicial review proceedings the proper defendant is the commission itself. There is no *lis* in such proceedings so the comparison is not an appropriate one. It also does nothing to advance the case to say that in England, proceedings under the Human Rights Act 1998 are instituted against the relevant authority and not the Attorney General. That is simply so because there is express provision in section 7 of the 1998 Act to that effect.

15 I make no criticism of the Judge because it is a noble ideal for which he was striving. Nonetheless, it is an issue that requires further thought because if the protection sought is not absolutely necessary to the extent that one might be tempted to suggest that the demands of the law should be disregarded, and that certainly was not the argument in the Court below, then the decision cannot stand.

16 What then is the mischief apprehended by the Attorney General for making the application to have the SASC placed as defendant in these proceedings? One can understand the SASC making such an application if there was a real concern that in some way the independence and autonomy of the commission would be interfered with or compromised by having the Attorney General as defendant. The SASC has made no such pronouncement. In any event, had it done so it was always open to the Court to join it as a defendant to put to rest any concerns it may have.

17 It is indeed surprising and somewhat curious that the Attorney General seeks to suggest that his presence as defendant will jeopardize that independence without any complaint from the SASC. I would think that the dye has been cast and what is at stake now is whether the allegations of the appellant can be sustained. It surely cannot be the argument (and it is not) that in providing legal representation for the SASC the independence of the commission will in some way be jeopardized or compromised. I have no doubt that counsel will take the commission's instructions on the issue and, depending on those instructions, will advise it whether to defend or settle the matter. What then has provoked this foreboding?

18 It seems that the submission that the *primary offender* should be made to face the music is the real reason for the application. It is of obvious concern to the respondent that the public may think that the Attorney General is the one to blame for any wrong doing committed by the SASC. As misplaced as that perception is, it may be the source of the distraction that has propelled the respondent into taking steps that necessarily run counter to the express provisions of the Constitution and of the Act. Respectfully, any discomfort felt by the respondent should not be a basis to circumvent the clear and unambiguous mandate of the law. The respondent has done nothing that it improper or against the law. She has instituted her action against the correct party and no justifiable reason has been advanced to demonstrate that one party should be removed in preference to another. Her action should be allowed to proceed without further disruption.

19 I would allow the appeal and quash the order of the judge substituting the SASC as defendant. The respondent shall pay the costs of the appeal in accordance with the budgeted costs as ordered by Mendonca J.A.

R. Hamel-Smith
Justice of Appeal

I have read the judgment of Hamel-Smith, JA and, for the reasons given, I agree that the appeal be allowed. I also agree with the order for costs.

W. Kangaloo
Justice of Appeal

I have read the judgment of Hamel-Smith, JA and for the reasons given, I too agree that the appeal be allowed. I also agree with the order for costs.

P.M. Weekes
Justice of Appeal