

TRINIDAD AND TOBAGO

**IN THE HIGH COURT OF JUSTICE
SUB-REGISTRY, SAN FERNANDO**

H.C.A. NO: S-2142 OF 2004.

**IN THE MATTER OF THE CONSTITUTION
OF THE REPUBLIC OF TRINIDAD AND TOBAGO
BEING THE SCHEDULE OF THE TRINIDAD AND TOBAGO
CONSTITUTIONAL ACT CHAPTER 1:01**

AND

**IN THE MATTER OF AN APPLICATION CONCERNING THE PROVISIONS
OF SECTION 4 OF THE SAID CONSTITUTION PROTECTING THE
APPLICANT'S FUNDAMENTAL RIGHTS AND FREEDOMS ENSHRINED IN
THE CONSTITUTION AND IN PARTICULAR SECTION 4 (B) AND/OR 4 (D)
AND /OR (H) HAVE BEEN, ARE BEING, OR ARE LIKELY TO BE
CONTRAVENED IN RELATION TO THEM, APPLICATION FOR REDRESS
UNDER SECTION 14 OF THE SAID CONSTITUTION**

BETWEEN

**JOSINE JOHNSON
YUCLAN BALWANT**

APPLICANTS

AND

**THE ATTORNEY GENERAL OF
TRINIDAD AND TOBAGO**

RESPONDENT

Before the Honourable Mr. Justice Best.

**Mr. Ramlogan for the Applicants.
Mr. Byam for the Respondent.**

[A] Introduction.

By affidavits filed herein on 07th December 2004, the Applicants swore that they are:

- (1) By profession, a Police Constable and a Public Health Inspector;

- (2) Divorced females, who live in open concubinage; and
- (3) Desirous of re-marrying but are daunted by Regulation 52 of the Police Service Commission Regulations and Regulation 58 of the Statutory Authorities Service Commission Regulations, which they claim are discriminatory and inconsistent with Section 4 of the 1976 Constitution of the Republic of Trinidad and Tobago (hereinafter called the 1976 Constitution).

[B] Regulations No. 52 and No. 58 reproduced.

(1) The Police Service Commission Regulations at Regulation 52 states:

“ The Commission may terminate the appointment of a female police officer who is married on the grounds that her family obligations are affecting the efficient performance of her duties and the procedure for the termination of such appointment shall be in accordance with regulation 51(2) and (4).”

(2) The Statutory Authorities Service Commission Regulations at Regulation 58 states:

“ The Commission may terminate the appointment of a female officer who is married on the ground that her family obligations are affecting the efficient performance of her duties and the procedure for the termination of such appointment shall be in accordance with regulation 56(2), (3) and (4).”

[C] The core application.

Counsel for the Applicants has urged this Court to hold that the said Regulations:

- (1) Are null and void under Section 2 of the 1976 Constitution because they discriminate against women in contravention of Section 4(b) and/or (d) of the said 1976 Constitution;
- (2) Are to be construed as severed from the Police Service Commission Regulations and/or the Statutory Authorities Service Commission Regulations on the ground that they are inconsistent with Section 4 of the said 1976 Constitution; and
- (3) Are not to be relied upon by the relevant Commissions as part of the terms and conditions of service of the Applicants and/or as the basis/ground for terminating the services of the Applicants.

[D] The Birth of Regulations No.52 and No.58.

- (1) The previous **Constitution of Trinidad and Tobago** of 1962 (hereinafter called the **1962 Constitution**) established a Police Service Commission. Section 102 of **the 1962 Constitution** empowered the said Commission to make regulations. *Legal Notice No. 131 of 1966* saw the exercise of that power and the birth of Regulation 52.
- (2) **The 1976 Constitution** by Section 129 retained the power of the Service Commissions to make Regulations. Thus saw a reincarnation of Regulation 52, which was deemed to have been made under the said Section 129.
- (3) The enactment of Regulation 58 of the *Statutory Authorities Service Regulations* follows the same pattern as the enactment of Regulation 52 of the *Police Service Commission Regulations*.

[E] The Submissions of Counsel for the Applicants.

- (1) Counsel argued in general that Regulations 52 and 58 were status based and discriminatory, as they targeted only married female public servants.
- (2) As part of his general submission he referred the Court to the meaning of the word *equal protection* as found in the matter of **Smith v L. J. Williams (1980) 32 WIR 395** at page 415 where Bernard J (as he was then) adopted the definition of equal protection as found in Basu's *Shorter Constitution of India* (1976) Vol. 1, page 29:

“Equal protection means the right to equal treatment in similar circumstances both in the privileges conferred and in the liabilities imposed by the law...In other words, there should be no discrimination between one person and another if as regards the subject matter of the legislation their position is the same.”

In the view of Counsel, these regulations failed to give equal treatment in law of against married and unmarried female public servants.

- (3) Counsel continued that if discrimination is established, the intention of Parliament is irrelevant, even if the legislation was intended not to be discriminatory. In support thereof, Counsel relied upon the judgment of the House of Lords in the matter of **Equal Opportunities Commission v Birmingham City Council [1989] 1All ER769** the head-note stated at page 770c:

‘Although the intention or motive of the council to discriminate might be relevant so far as remedies were concerned if sex discrimination was established it was not a necessary condition of liability.’

In the view of Counsel, there was no intention on the part of the Parliament to discriminate against married female public servants, but in fact, it did.

(4) Counsel then directed the Court to the test to be applied to determine if discrimination occurs. The head-note in the matter of **James v Eastleigh Borough Council (1990) 2 A.C. 751**, states:

‘...the test to be applied ...was objective and if, applying an objective test, the answer would have been that the complainant would have received the same treatment from the defendant but for his or her sex there was direct discrimination.’

(5) In addition, Counsel argued that legislation that distinguishes one situation from another should not be arbitrary but must be based upon real and substantial differences. In the matter of **Magnano Co v Hamilton (1934) 54 292 U.S. 40**, the Supreme Court of the United States held that the difference between butter and margarine was sufficiently real to justify a separate classification for the purposes of taxation.

In the view of Counsel, the said Regulations are arbitrary, with there being no real basis for distinction between married and unmarried female public servants and should be struck down.

[F] The Existing Law.

Section 6 (1) of the 1976 **Constitution** states:

*‘Nothing in section 4 and 5 shall invalidate-
(a) an existing law...’*

(1) Counsel for the Applicants has admitted, in his submission, that the said Regulations forms part of the existing laws, when the 1976 **Constitution** was enacted by Parliament.

(2) Further, Counsel has argued that the said Section 6(1) of the 1976 **Constitution** was not absolute; but can be subject to a conformity application of section 5(1) of the **Constitution of the Republic of Trinidad and Tobago Act 1976**.

‘Subject to the provisions of this section, the operation of the existing law on and after the appointed day shall not be affected by the revocation of the Order-in-Council of 1962 but the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act’

(3) In the view of Counsel, applying section 5(1) of the **Constitution of the Republic of Trinidad and Tobago Act 1976**, the said Regulations should be deleted from the **Police Service Commission Regulations** and the **Statutory Authorities Service Commission Regulations**, to achieve conformity with Section 4 (b) and (d) of the 1976 **Constitution**.

[G] The Hurdle.

(1) However, Counsel was faced with the hurdle of the supremacy of the 1976 **Constitution** .

Section 2 of the 1976 **Constitution** states that the Constitution:

‘...is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency’.

(2) In the Privy Council matter of **Balkissoon Roodal v The State (2003) 64 WIR 270** (an appeal from the Court of Appeal of Trinidad and Tobago) the head note at page 272c reads:

“...the first stage in determining the constitutional validity of an existing law such as s 4 of the Offences Against the Persons Act was to determine whether the section could be modified under s 5(1) of the Constitution of the Republic of Trinidad and Tobago Act 1976 so as to make the words of s 4 conform with the 1976 Constitution...”

(3) A submission, re-tooled around the law enunciated in **Balkissoon Roodal v The State**, was raised at paragraph 16 in the Privy Council matter of **Charles Matthew v The State (2004) 64 WIR 412** (an appeal from the Court of Appeal of Trinidad and Tobago):

‘...the fact that ss 4 and 5 cannot invalidate an existing law does not mean that the law is deemed to be in conformity with them. The court is still obliged by s 5(1) of the 1976 Act to modify the existing law to bring it into conformity with ss 4 and 5.’

(4) However, by a majority decision in **Charles Matthews v The State** their Lordships:

- (I) Admitted that they had erred in the matter of **Balkissoon Roodal v The State**; and
- (II) They rejected the renewed submission raised in **Charles Matthew v The State**.

(5) At paragraph 17 of the **Charles Matthew v The State**, their Lordships intimated that such a submission:

*‘...is inconsistent with the supremacy of the Constitution, irrational in its consequences and contrary to the language and purpose of section 5(1) of the 1976...’ **Constitution**.*

(6) Further, at paragraph 20, their Lordships stated:

‘If the Constitution itself shows a plain intention to preserve existing laws, their Lordships find it impossible to accept that Parliament, by enacting section 5(1) of the 1976 Act, can have created a mechanism outside the Constitution for undermining the effects of its provisions.’

[H] The Decision.

- (1) Counsel for the Applicants, in his submission, has diligently conducted a trawl through a number of authorities (*all of which have read and accept*), ultimately tapping into what I call respectfully, the ***Balkissoon Roodal Principle***.

- (2) I have pondered over those authorities and Counsel's submission and have compared them to the majority view in the matter of **Charles Matthew v The State.**
- (3) I find myself unpersuaded by Counsel.
- (4) In the view of this Court to accept the *Balkisson Roodal Principle* would amount to an attempt to emasculate the 1976 **Constitution** and thereby deprive the supreme law of Trinidad and Tobago of the effect that it was intended to have.
- (5) This action fails.

[J] Costs.

The costs of this action is to be taxed and paid by the Applicants to the Respondent, certified fit for Counsel.

Dated this **11th day of April 2006.**

Carlton Best,
Judge.