**THE STANDARD BANK  LTD v THE ATTORNEY-GENERAL  AND SIAFUMBA (1974) ZR 140 (HC)**

HIGH COURT

BWEUPE J

5th JUNE 1974 5

(1973/HP/1041)

**Flynote**

**Vicarious liability - Liability of the Government for the wrongs of a court bailiff in the course of employment - Whether a court bailiff an agent or servant of the Government.**

**Headnote**

The 10 plaintiff claimed the sum of K1,953.05 being a sum levied under a writ of *fieri - facias* on the grounds that the second defendant at all material times was a servant and/or agent of the first defendant and had misappropriated the said sum whilst executing his duties and that, in those circumstances, the first defendant was vicariously liable for the 15 conduct of the second defendant. The second defendant was in fact a court bailiff and as a result of the misappropriation was convicted on two counts of theft by public servant. The first defendant denied that the second defendant was a servant or an agent of the Government of the Republic of Zambia. Thus, the question for determination was whether 20 the court bailiff was a servant or agent of the Government for whose acts, omissions or defaults the Government of Zambia can be made liable to a third party.

*Held:*

   (i)   That under s. 4 (1) of the State Proceedings Act, Cap. 92, the 25 State can only be liable in tort for the act or omission of a servant or agent after such act or omission has given rise to a cause of action in tort against that servant or agent or his estate.

   (ii)   That on the question whether a court bailiff was a public servant, 30 one must consider whether the State retained complete control over the court bailiff and had some interest in the execution of his duties and, secondly, whether the State was responsible for the payment of his remuneration; and that the evidence disclosed that the court bailiff was not a public officer since he was 35 not paid out of public funds and that, in terms of s. 14 *(a)* of the Sheriff's Act, control of a court bailiff was vested in the party which demands the execution of the writ or process and the said party could only make such a demand if he had an interest in the purpose for the execution.

   (iii)   That although s. 4 of the Penal Code, Cap. 146, defines, *inter alia*, "Person employed in the Public Service" as any person employed to execute any process of a court, the court would be slow to interpret s. 171 (6) of the Criminal Procedure Code, Cap. 160, as meaning to include a court bailiff, because this 45 would conflict with the provisions of s. 138 of the Constitution, which excludes a court bailiff from being regarded as a public officer, and it followed that the court bailiff was not a servant

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      or agent of the Government of the Republic of Zambia for whose acts, omissions or defaults the Government would be held liable and, accordingly, judgment would be entered against the plaintiff with costs awarded to the defendants.

Cases cited:

   (1)   *Collins v Hertfordshire CC* (1947) KB 598. 5

   (2)   *Cassidy v Ministry of Health* (1951) ZK 343, 362.

   (3)   *Stevenson, Jordan and Harrison Ltd v Macdonald* [1952] ITL: R 101.

Legislation referred to:

Sheriff's Act, Cap. 49, s. 14 *(a).*

Criminal Procedure Code, Cap. 160, s.171 (6). 10

Interpretation and General Provisions Act, Cap. 2, s. 3.

*F  Burke, Esq.,* for the plaintiff.

*A J  Nyangulu, Esq.,* for the defendant.

**Judgment**

**Bweupe J:** This is an action brought by the plaintiff, the Standard Bank Limited, against the defendants, the Attorney-General (first 15 defendant), sued in his representative capacity on behalf of the State and Anderson Siafumba (second defendant).

The plaintiff's claim is for the sum of K1,953.05, being the sum levied under a writ of *fieri - facias,* 1969/HN/589. The basis of the claim against the first defendant is that at all material times the second defendant was 20 a servant and/or agent of the first defendant and did misappropriate the said sum of K1 953.05 while executing his duties and that the first defendant is vicariously liable.

At the outset I must state that the following facts are not in dispute and consequently stand proved upon the balance of probability. 25

   1.   That on the 22nd July, 1969, the Standard Bank Limited issued a specially endorsed writ against Rev. Bernard Laban Zulu (first defendant) and Oliva Rudo Zulu (second defendant), trading as Olive Grocery and Tea - room, claiming from them the sum of K4,500.00, being in respect of an overdraft due 30 and payable to the plaintiff by the defendants, including interest thereon at 10 *per cent per annum* from the 22nd July, 1969 payable in advance.

   2.   That judgment in default of appearance was entered against the defendants in the sum of K4,500.00 plus K52.80 costs on 35 the 14th November, 1969.

   3.   That by *Gazette* Notice No. 1899, dated 18th November, 1969, Siafumba was appointed court bailiff.

   4.   That subsequently, on 20th November, 1969, a writ of *fieri facias* was issued against the defendants, which writ was 40 handed to Mr Siafumba for execution. Mr Siafumba pretended to make execution against Rev. Zulu, which turned out to be fictitious returns of execution.

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   5.   That in the meantime, the defendants, Rev. Zulu and Olive Zulu, made genuine efforts to repay the money due and the plaintiff learned that Rev. Zulu had paid K2,115.

   6.   That on 16th July, 1971, Siafumba, was convicted on two 5 counts of theft by public servant and was sentenced to nine months' I.H.L. on each count, to run concurrently.

The first defendant denies that the second defendant was a servant or agent of the Government of the Republic of Zambia, as alleged in paragraph 10 of the Statement of Claim, or at all, and puts the plaintiff 10 to a strict proof of all and singular the allegations contained in the Statement of Claim.

The question that I must decide, therefore, is whether or not the court bailiff of Zambia, whoever it may be, is a servant or agent of the Government of the Republic of Zambia, for whose acts omission or 15 defaults the Zambian Government can be made liable to the third party.

Both the senior clerk of court at Ndola, Mr Mayondo, and the Sheriff of Zambia, Mr Banda, say that bailiffs, though appointed by the Sheriff of Zambia, are not paid out of the public funds. They are not civil servants. They are not paid any money at all in any manner by the State. They 20 solely depend on fees to sustain their living. According to the Sheriff, Mr Banda, there are two ways of getting such fees. First, for any document of service they get their service fee from the plaintiff or plaintiff's solicitors, which is K1.20. Second, for every process for execution, if it is ready cash, their fees are in poundage for the amount paid by the defendants 25 to the plaintiffs. He concluded by saying that in this present case Siafumba would have been paid out of the proceeds collected from Rev. Zulu.

The learned counsel for the plaintiff, Mr Burke, has vividly argued that Siafumba was by virtue of his position the servant or agent of the 30 State and that the Attorney-General is properly sued as the representative of the State. He has referred me to the Sheriff's Act, Chapter 49, the relevant sections of which read:

   "3 (1) the Public Service Commission may appoint

*(a)*   a Sheriff of Zambia 35

*(b)*   Deputy Sheriff of Zambia

*(c)*   so many Assistant Sheriffs . . ."

*(d)*   an Under - Sheriff for each District

   3  (2) . . ."

   "4 (1) the Sheriff may appoint as many Bailiffs for each Bailiwick 40 as he may think fit.

   4 (2) every Bailiff appointed under the provisions of this section shall be deemed to be a Court Messenger for all the purposes of the High Court Act and of the Subordinate Courts Act."

   "7 (1) the Sheriff shall receive all Writs and process and shall be 45 charged with making returns thereto as shall be prescribed by Rules of Courts.

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   7 (2)   the Sheriff shall, at the request of any person delivering a Writ to him for execution give a receipt for such Writ stating the hour and day of such delivery."

   . . .

   "11.   A Bailiff, shall within the Bailiwick for which he is appointed, 5 serve writs, or execute process as may be required by any written law."

   "12.   The Sheriff and every Deputy Sheriff, Assistant Sheriff and Under Sheriff shall in the performance of his duties, in connection with any writ or process, be an officer of the Court by 10 which such writ or process was issued."

   "13.   Every duty of the Sheriff in the Service of Writs and the execution of process may be performed by such Police Officer or other person as may be authorised in that behalf by the Sheriff . . . and every such officer or person who is in possession 15 of such writ, or process shall be presumed to be as authorised, and shall for all purposes connected therewith, be an officer of the Court by which such writ or process was issued."

Mr Burke states that in 1969 the Sheriff of Zambia exercised his powers under section 4 *supra* by appointing Siafumba as bailiff under 20 *Gazette Notice* No.1899 dated 18th November, 1969. The point is, he argues, that although the bailiffs are not paid out of the public funds as such there is a tax in form of a fee imposed upon a person who requires the execution of a writ. Hence we have a chain of authority complete in that the Sheriff, who is appointed by the Public Service Commission under section 3, also 25 appoints the bailiff under section 4 - and this chain must go back to the Government. The amount of fees is fixed from time to time by the man with the highest authority in the land, who is the Chief Justice. What would happen, he asked, if the Sheriff goes wrong and puts the money in his pocket?

The 30 sanity of the law, which Mr Burke so ably argues corners very well with *Halsbury, Vol.* 34, 3rd Edition, at page 696, paragraphs 1233 and 1234, which read:

   "1233.   A Sheriff is civilly liable for any fraud or wrongful act or omission on the part of his Under Sheriff, Bailiff or Officer in 35 the course of his employment though there may be no proof of any recognition by the Sheriff of the act or default complained of . . .

   "1234.   The Civil liability of the Sheriff extends not merely to acts done by his Bailiff or Officer pursuance of his warrant, 40 but also to anything done by him *colore mandati*, the reason for extended liability being that the Sheriff is supposed to be executing his duty in person. The impossibility of so doing authorises him to delegate his duty, but he puts the delegate in his place and is liable not only for what is done *virtute* 45 *mandati*, but also for what is done by colour of the warrant (*colore mandati*)."

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*Prima facie*, I should agree with Mr Burke in view of the aforegoing that, as the Sheriff is appointed by the Public Service Commission and the Sheriff in turn appoints bailiff, the sanity of the law (to use Mr Burke's expression) would be that the State should be liable for the acts, 5 omissions and defaults of those appointed by the Sheriff.

However, the sanity of *Halsbury's* views has been displaced by section 14 of Sheriff's Act, Cap. 49, which reads:

   "14   (1) the Sheriff shall not be liable to be sued for any act or omission of any Sheriff's officer police officer or other persons 10 in the service of any writ or the execution of any process which shall have been done or omitted to have been done or which may have occurred either through disobedience to or neglect of the orders or instructions given by the Sheriff."

The learned counsel, Mr Burke, has referred me to section 4 (1) of 15 the State Proceedings Act, Cap. 92, Part II, the terms of which are:

   "4 (1) Subject to the provisions of this Act, the State shall be subject to all those liabilities in tort, to which if it were a private person of full age and capacity it would be subject:

*(a)*   in respect of torts committed by its servants or agents.

*(b)*    . . . 20

*(c)*    . . .

   Provided that no proceedings shall lie against the State by virtue of para *(a)* in respect of any act or omission of a servant or agent of the State *unless the act or omission would,* 25 *apart from the provisions from this Cap. have given rise to a cause of action in tort against that servant or agent or his estate."* (The italics are mine.)

I entertain no doubt that the provisions of section 4 (1) quoted, *supra*, puts it in very clear words that the State can only be liable in tort 30 for the act or omission of a servant or agent if such act or omission has given rise to a cause of action in tort against that servant or agent or his estate. Section 14 of the Sheriff's Act gives immunity to the Sheriff against an act or omission of his subordinate officers and, *prima facie*, the State cannot be liable.

However, 35 the issue which I have to decide, despite the immunity given by section 14, chapter 49, is whether or not a court bailiff is a servant or agent for whose acts or omission the State would be liable. This question brings me to the law relating to the master and servant.

In his submission, Mr Nyangulu, on behalf of the Attorney-General, 40 said: "We are this morning faced with a test case of this nature in Zambian history . . . I agree that it is not so much the amount involved which is important but the principle of law involved . . . We are faced with a case in which a person is not a servant of the State as deposed by the Sheriff of Zambia . . . I submit the court bailiff is not a servant of the Government 45 for whose acts or omissions the Government can be made liable. In my new a bailiff is an independent contractor for whose acts the principal is not liable."

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BWEUPE J

Before I come to explore the Zambian law relating to "Public Officers" I must have recourse to *Clerk and Lindsell on Torts*, 12th Edition, of which paragraph 202 reads:

   "202. The two most important classes for whose torts another person may be liable are servants and independent 5 contractors . . . Both classes consist of persons employed to do work, but traditionally the distinction between them is taken to lie in the different amounts of *Control* (italics are mine) exercisable by the employer.

   In case of a servant the employer reserves to himself  by 10 the terms of employment, express or understood a power of controlling his servant in the execution of his work and of *dismissing* him (again the italics are mine) for disobedience to orders.

   The employer of an independent contractor, on the other 15 hand cannot control the way in which the work is carried out. He can only give directions as to what work is to be done.

   The question whether a person is employed as a servant or as a contractor is a question of intention and therefore usually a question of fact, though it may be mixed question of 20 fact and law."

I have not been cited with any case. Nevertheless in *Collins v Hertfordshire CC* [1], Hilbery, J, suggested that the distinction lay in the fact that the servant is employed under a contract of service, while an independent contractor is employed under contract for services. 25

In *Cassidy* v *Ministry of Health* [2], at pp. 343 and 362, Denning, L J, disapproved of the distinction between a contract of service and a contract for services suggested by Hilbery, J, in Collins case, hereinbefore referred to. However, in *Stevenson, Jordan and Harrison Ltd* v *MacDonald* [3], Denning, L J, said: 30

   "It is often easy to recognise a contract of service when you see it, but difficult to say wherein the distinction lies. A ship's master, a chauffeur and a reporter on the staff of a newspaper are all employed under a contract of service, but a ship's pilot, a taxi - man and a newspaper contributor are employed under a contract for 35services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as a part of the business, and his work is done as an integral part of the business, whereas under a contract for services, his work, although done for the business is not integrated into it but is only accessory to it. 40

From the three cases given above one would rightly say that, although the criterion of control continues to be used, reference to the work done by the person employed and its place in the employer's business provided a better means of distinguishing between servants and independent 45 contractors.

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BWEUPE J

Furthermore, *Clerk and Lindsey*, 12th Edition, paragraph 207, goes on to say:

   "207.   To constitute the relationship of master and servant for the purposes of vicarious liability it is not essential that the 5 service be rendered under a contract, though normally the relationship is in fact created by a contract, thus for example, where the owner of a vehicle gets a friend to drive it for him the owner will be liable for the manner in which the vehicle is driven provided that he retains the right of control and has 10 some interest in the purpose for which the vehicle is used. If, however, the owner has either parted with the right to control or has no interest in the purpose for which the vehicle is used, he will not be liable."

The principle involved here is that, for the master to be liable, he must retain the right of control and must have some interest in the 15 purpose for which the vehicle is used.

I deliberately decide to leave this question of control for the time being and deal with the other point raised by the learned counsel, Mr Nyangulu.

While 20 agreeing that the bailiffs are appointed by the Sheriff he contends that the Sheriff does so for the purpose of protecting the bailiffs from committing trespass on the other people's premises. He has referred me to section 4 (2) of Cap. 49, section 3 of Cap. 2, section 125 of the Zambian Constitution and section 171 *(b)*, Criminal Procedure Code.

For 25 easy reach I append below the provisions of the above sections. Section 4 (2), Cap. 49, reads:

   "(2)   Every Bailiff appointed under the provisions of this Section shall be deemed to be Court. Messenger for all the purpose of the High Court Act and of the Subordinate Courts Act;."

Section 30 3 of the Interpretation and General Provisions Act, Chapter 2, provides:

   "Public Officer" has the same meaning as in the Constitution.

However, the terms of section 138 of the Constitution (leaving those of no application) are these:

   "Public 35 Officer" means a person holding or acting in any public office..

   "Public Office" means an office of emolument in the public service, but shall not include an office constituted by the President and declared by him under Article 62 not to be an office in the public 40 service

   "The Public Service" means, subject to the provisions of clauses (2) and (3), the Civil Service of the Government.

Mr Nyangulu contends that as the court bailiffs are not paid out of the public funds they cannot be said to be servants or agents of the 45 Government.

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BWEUPE J

I am now faced with two tests, *(a)* one of control exposed by Denning, LJ, in *Stevenson and Others'* case and paragraph 207 of *Clerk and Lindsell on Torts*, and the other *(b)* that of the paymaster.

I shall deal with each test in turn.

It is not in dispute that the bailiff is appointed by the Sheriff who, 5 as I said above, has been indemnified against the acts or omission of his subordinates. Neither is it disputed that the Sheriff has the power to dismiss the bailiff. The mere fact that the Sheriff appoints and dismisses the bailiffs is in my view insufficient to make the State liable, unless the Sheriff himself can in law be liable. But, as I have already said, section 10 14 of chapter 49 has indemnified and, therefore under the terms of section 4 (1), chapter 92, Part II, the indemnity of the Sheriff affords protection to State also.

I now turn to the question ''who is the Bailiff's paymaster" According to the Zambian Constitution, referred to above, "a Public Officer" is 15 one who gets *emolument* in the Public Service and the "Public Service" has been defined as the Civil Service of the Government subject to the provisions of subsections (2) and (3) quoted *supra*.

It is in evidence that the bailiff is not appointed by any one of the Service Commissions, e.g. Public Service Commission, Teaching Service 20 Commission or Judicial Service Commission. We are told by the Sheriff the facts which have not been disputed, that every writ which the bailiff serves he gets K1.20 from the plaintiff or plaintiff's solicitors and that for service of process he gets a poundage out of the proceeds levied or cash collected from the defendant. He does not get any emoluments from the 25 Public Fund in order to sustain his living.

I am, therefore, satisfied that the bailiffs are not paid out of the public funds and are not appointed by anyone of the Service Commissions.

The other test is that of "control". According to Denning, L J, if the work done is not an integral part of the servant's business, but is 30 merely an accessory to it, then the servant is under the contract for service. This to me appears the bailiff's position in this case. Paragraph 207 of *Clerk and Lindsell* also states the master must retain the right of control and must have some interest in the purpose.

Section 14 (2) of the Sheriffs Act, however, provides . . . "in every 35 case of execution all steps which may legally be taken therein shall be taken on the demand of the party who issued such execution . . ." On the proper interpretation of this section it seems to me that the subsection has vested the right of control in the party which demands the execution of the writ or process. Turning to the other question of "interest", I find 40 it difficult to see what interest the Sheriff would have in the execution of any writ or process. It is my view that the party that makes the demand has an interest in the purpose for the execution.

I therefore find as a fact that both tests, one of control and interest in the purpose for the execution of the writ or process, and the other of 45

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the bailiffs paymaster are the responsibilities of the party that makes the demand for execution. Hence, I entertain no doubt and I hold that the Court Bailiff of Zambia is not, in my view, a servant or agent of the Government, for whose acts, omissions or defaults the Government of the 5 Republic of Zambia can be held liable.

My attention has also been drawn to section 171 (6) of the Criminal Procedure Code, which reads:

   "(6) In this Section unless the context otherwise requires -

   'prescribed offence' means an offence under Chapter XXVI, 10 XXVII, XXX, XXXI or XXXIII of the Penal Code where the property in respect of which the offence is committed is the property of the Government or a local authority or is the property which comes into the possession of the person employed in the public service by virtue of his employment; 15 'Person employed in the public service' means a person who at the time of commission of the prescribed offence, was a person employed in the public service, as defined in section 4 of the Penal Code . . ."

Section 4 of the Penal Code, under the heading "Person employed in 20 Public Service" *(a)* (ii) includes "any person employed to execute any process of a Court".

This provision of the Penal Code may tempt one to say that the Court Bailiff is a person employed in the public service. If this were the case then it would be in total conflict with the provisions of the Constitution, 25 which I have earlier on referred to.

It is necessary in my view to discover the author's intention for the provisions of section 171 (6) of the Criminal Procedure Code itself. I owe no apology to repeat some parts of the provisions, in particular the following:

   ". . . where 30 the property in respect of which the offence is committed is the property of the Government or a local authority or is the property which comes into the possession of the person employed in the public service by virtue of his employment . . ."

The terms of the above quotation are not ambiguous. The words are 35 clear and have not been used in a peculiar or specialised meaning. I have to attribute to them their literal meaning.

On the proper construction of the quotation in the literal sense, the property must be *(a)* of the Government, or *(b)* of a local authority, or *(c)* which comes into the possession of the person employed in the public 40 service by virtue of his employment *(a)* and *(b)* are none of our concern here, but *(c)* arouses my curiosity. But my curiosity fades away in view of my earlier finding that Siafumba was not a man employed in the public service, he not having been paid out of the public funds. The money, therefore, which Siafumba received from Rev. Zulu was for the 45 plaintiff and for the plaintiff alone.

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BWEUPE J

I am, therefore, slow to give section 171 (6) of the Criminal Procedure Code an extended meaning, which the author of that section never had in mind.

In the final analysis I hold that a court bailiff is neither a servant nor an agent of the Government. Consequently, Siafumba was not a 5 servant and/or agent of the Government. I find not for the plaintiff.

The plaintiff to bear the costs.

*Suit dismissed*

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