ACROPOLIS BAKERY LTD v ZCCM LTD (1985) Z.R. 232 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MUWO, JJ.S.
10TH SEPTEMBER AND 10TH DECEMBER ,1985
(S.C.Z. JUDGMENT NO. 30 OF 1985)

Flynote
Tort - Vicarious liability - Striking employees redoing and destroying third party's proper- Whether employer liable.
Tort - Strict liability - Principles of - Application to rioting employees in employer's township.
Tort - Negligence - Duty of care - Employer's duty care to third party - Failure by employer to meet employees' demands allegedly incensing the employees and provoking a riot.
Tort - Employer and employee - Liability of employer to third party for acts of employee - Creation or recognition of novel basis for liability - Whether possible.

Headnote
Some miners who had grievances against their employers went on strike during the course of which they rioted in their township and set fire to a bread van belonging to the appellant, an innocent passerby. The question arose whether the employers could be vicariously liable, or if they were strictly liable, or in breach of duty of care owed to an innocent passerby. It was also argued that novel basis for liability should be introduced to enable the appellant to recover from the respondent as employers of the riotous miners.

Held:

(i) Acts of vengeance and violence unrelated to the proper or improper, but bonafide performance of a job, will not be regarded as falling within the course of employment and will not create vicarious liability;

(ii) The principles of strict liability under Rylands v Fletcher cannot be extended to the keeping and collecting of miners in a mine compound;

(iii) There is no duty of care which can be recognised by the law which employers can owe generally to third parties not to incense the workers so as to prevent a riot during an industrial dispute;

(iv) In a proper case, an established principle can be extended to cover novel situation and remedies will be available in new situation where the legitimate rights of a person are

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unfairly or wrongfully injured by another since the recognition of those rights presupposes the availability of remedies for their endorsement and protection;

(v) No new right by a third party to recover for riot damage against an employer can be recognised. Doing so would make employers generally liable for all the criminal or purely private frolics of their workers.

Cases cited:
(1) Poulton v Kelsall [1912] 2 K.B. 131.
(2) Warren v Henlys Ltd. [1948] 2 All E.R. 935.
(3) Rylands v Fletcher [1865-67] 12 L.R. Exh.265.
(4) Donoghue v Stevenson [1932] A.C. 562.

For the appellant: A.J. Mkandawire, of Mkandawire and Company.
For the respondent: M.G. Masengu, of ZCCM Ltd.

Judgment
NGULUBE, D.C.J.: delivered the judgment of the court.

The facts accepted by the learned trial commissioner were that there was in July, 1981, an illegal strike staged by some miners working for the respondents at Kitwe. It appears that the miners had some dispute with their employers, the respondent, over working conditions and, without going through the procedures required by the Industrial Relations Act, Cap.517, they went on what is popularly referred to as a wild-cat strike. On 23rd July, 1981, there was assembled in the Mindolo Mine Compound, a large crowd of people found by the learned trial commissioner to have been striking miners and this crowd was in riotous mood. At that point in time, the appellant's driver and helper arrived with a bread van to make deliveries of bread to customers in the compound. The crowd attacked the bread van with sticks and stones and finally set it on fire, resulting in the total destruction of the vehicle, valued at K36,000, and the bread, valued at K1,200.

It was argued at the trial on behalf of the appellants that the respondents ought to be made answerable to the appellants for the loss which they suffered, broadly speaking, on any one of three alternative footings. The first was that the respondents must be vicariously liable for the acts of their striking employees, since when they vented their anger on the appellant's property, they did so in connection with a grievance against their employers and as such complaint was related to their work, it was in the course and within the scope of their employment and their actions attached vicarious liability to their employers. The learned trial Commissioner had no difficulty in rejecting this argument. After carefully reviewing the authorities he found that what the strikers did was neither within the scope nor in the course of their

employment. In fairness, it should be stated that Mr Mkandawire does not, before this court, seek to rely on vicarious liability which depends on the employee, inter alia, acting in the course of his employment. All the authorities are agreed that acts of personal or collective vengeance and violence unrelated to the proper or improper but bonafide purported performance of a job will not be regarded as falling within the course of employment. In particular, an act amounting to a criminal offence committed by an employee which has no conceivable connection with his employment will not attract vicarious liability and will not be in the course of employment. Thus in *Poulton v Kiesall* (1), a case under the repealed Workmen's Compensation Act, 1906, of the United Kingdom an assault was held not to have been suffered in the course of employment when striking workers assaulted a fellow worker who was on his way home from work and who had been specifically requested by his employers to continue to work despite the strike. If the worker who

was the victim of the assault was not in the course of employment then the more reason to say that the striking workers who assaulted him were even more outside the course of employment. And in *Warren v Henlys* (2), the employers were not liable for the act of personal vengeance when a garage employee assaulted a customer out of personal dislike. One of the considerations for attaching vicarious liability these days is that the employer is better able to make good the plaintiff's loss and to bear the cost of the damages inflicted by the employees' wrongful conduct. But even on this rationale there must be a proper foundation and an arguable connection between the conduct complained of and the employment. When the strikers attacked and burnt the bread van they were clearly not engaged on their employers' business. They were wholly on an orgy of their own and any connection between their violence and the grievances they had against their employers is so tenuous as to be wholly insufficient in law to bring about vicarious liability. We agree entirely with Mr Mkandawire's approach that the question of vicarious liability does not arise for our consideration.

The second proposition advanced at the trial and repeated here was that the respondents themselves had a primary liability to the appellants on the basis of strict liability under *Rylands v Fletcher* (3).The argument can be summarised as saying that, because the employers failed to attend to the workers' grievances, their brought about the violent mood in their employees and when the latter vented their feelings on the appellant's property, their employers must be answerable for the consequences. The third proposition was that the respondents were under a primary liability for their own negligence in that they owed the appellants a duty of care not to do anything in relation to their workers which would incense them and cause them to injure third parties. Neither the second nor the third proposition found favour with the learned trial commissioner. He determined, as Mr Masengu submits before us, that liability could only arise on the principles of vicarious liability. We agree that the principles of strict liability under *Rylands v Fletcher* cannot possibly be extended to the keeping and collecting of miners

in mine compound. We agree also that the proposed duty of care is not one which can be recognised.

Mr Mkandawire's major submission has been to say that this court should take a bold step and either recognise a new principle of law or extend the application of the existing principles so that employers must be liable for the wrongful actions of their employers which actually cause damage to a third party where the injury is suffered as a direct reaction to provocation by the employer or his failure to handle an industrial dispute in such manner that the employees do not lose their tempers and resort to indiscriminate violence against the person or property of innocent passers-by. It is common cause that the existing principles for attaching liability to one person for the wrongful deeds of another do not apply in the appellant's favour in this case, where it is sought to attach liability for riot damage to the respondents simply because it was their employees who rioted and destroyed the appellants' property. It is also not in dispute that we do not have in this country any legislation establishing any fund from which compensation can be paid to victims of riots or other crimes such as the fund under the Riot (Damages) Act, 1886, of the United Kingdom. Of Course, we used to have such a law in the past, namely the Riot Damages Ordinance, Cap. 261 in the 1962 Edition of the Laws. That ordinance established a Riot Damage Fund Administered by a Riot

Damage Commissioner who could settle claims such as that in this case from funds raised by imposing a levy on rioters and any other people aged 16 years and above who resided in the compound (riot damage area) where the destruction by rioters took place. This ordinance was repealed in 1965 and the mischief which did occur in this case is no longer remedied by any of our statutes. So far as we are aware the only safeguard available to innocent victims of riots in this country would appear to be protection of a suitable insurance policy extending cover to riot damage which can be taken out. Further we do not understand Mr Mkandawire to have been seriously suggesting that the principle in *Donoghue v Stevenson* (4), which he cited can be applied so as to enable us to say that there was in a case such as this a duty of care which can be recognised by the law which employers shall owe generally to third parties not to incense the workers. The argument in this regard assumes that the court is expected to inquire into the merits or demerits of workers' grievances and to declare whether the employer was or was not in the wrong so as to determine whether the employer should or should not be blamed for acts of violence by workers on strike. We are quite certain that the court cannot properly be expected to undertake such an exercise. The court can also not be expected to hold, in effect, that violent and riotous conduct is a natural and forseable consequence of conduct on the part of the employers allegedly amounting to provocation of the workers.

We agree that the law should be responsive to changing circumstances. In a proper case, we do not see why an established principle cannot be extended to cover a novel situation: we would not hesitate to do justice

on the merits of the case where new situation arises for which there is no precedent but where it plainly appears that the legitimate rights of one person have been unfairly or wrongfully injured by another, since the recognition of those rights would presuppose the availability of remedies for their enforcement and protection. But where a victim of a riot seeks to recover from another whose only known connection with the actual wrong-doer, or the wrongful act, is that he is the wrong-doers' employer, and where the implications of acceding to such a novel proposition would be to make employers generally liable, on wholesale scale, even for all the criminal or purely private frolics of their workers, then we must decline to take the bold step suggested by Mr Mkandawire. Such a drastic innovation is best left to the legislature since, as presently advised, the exclusion of an employer's vicarious liability and indeed the application of such vicarious liability are all founded on good sound principles of common sense and considerations of fair play. In any case, it would be far easier to attach new heads of liability to actual wrongdoers than to extend vicarious liability, which in effect the proposition seeks to bring about though couched in terms suggesting some sort of novel primary liability.

In the result, this appeal must fail. Costs follow the event.

Appeal dismissed
