DISTRIBUTABLE (62)

Judgment No S.C. 67\2002

Civil Appeal No 21\00

LOCHNER CONSTANT SLABBERT v DAVID LEONARD VAN BREDA

SUPREME COURT OF ZIMBABWE
EBRAHIM JA, SANDURA JA & CHEDA JA
HARARE FEBRUARY 19 & SEPTEMBER 24, 2002

R.M. Fitches, for the appellant

J.B. Colegrave, for the respondent

CHEDA JA: The appellant had a good tobacco season in 1991 from which he made a good profit. He wanted to transfer his tax liability to the following financial year.

A discussion took place between him and his friend, Mr Holland, who was employed by C.C. Sales Limited, a company whose main business was the buying and selling of cattle. He was advised that this could be achieved by making book entries to reflect that he had purchased some cattle. In the following financial year further book entries would be made to reflect that he had sold the cattle. These were to be book entries only without any cattle proper being involved.

He paid over to C.C. Sales a sum of $1 545 000. Mr Tunmer of C.C. Sales loaned $1.5 million of the money to a company owned by Stewart Phillip Cranswick and Barry Deacon (hereinafter referred to as Cranswick and Deacon respectively). He took $45 000 as commission for handling the deal. These two had previously entered into a series of complicated agreements and formed several companies with the respondent. At some stage the respondent decided to pull out of the joint venture formed with Cranswick and Deacon and go it alone.

The money loaned to the two was repayable in March 1992. When it was time to pay Cranswick and Deacon did not have any money.

In addition to the liability to pay back to the appellant his money, there were other liabilities to be met by the three former partners. They discussed and agreed on who was to pay which liability. At that time the respondent had no money, so Cranswick and Deacon met his share of liabilities in the sum of $700 000. The respondent then owed them this money which eventually came to $970 000 with interest. Cranswick and Deacon then arranged that this debt to them should be transferred so that instead of owing them that amount the respondent would owe the appellant.

The respondent agreed to this arrangement. Because he still had no money, the respondent gave in to the appellant’s demand for security and offered his ranch Gonundwe which he had now withdrawn from the joint venture, together with share certificates and signed transfer papers. The ranch had already been placed on sale through a Mr Charles Randal of C.C. Sales. A date was agreed on, at which the

appellant would take over the ranch and either sell it or keep it for himself if it was still not sold.

That date, December 31, 1993, arrived before the respondent sold the ranch. The appellant took over the ranch and later sold it to a Mr Gous for $1.5 million. He kept all the money for himself and did not pay anything to the respondent.

When the respondent sued for the difference the trial court ordered that he be paid the difference of $530 000.

This appeal is about whether the respondent was entitled to the difference or not. The respondent also filed a cross-appeal claiming that the ranch was sold for more than $1.5 million and he should have been awarded more than he got.

When the respondent issued summons against the appellant he was claiming $1 230 000, alternatively $830 000 and, further, alternatively $530 000.

These amounts were based on the allegation that prior to taking over the ranch, the appellant was aware of offers made by Mr Gous of $1.5 million, going up to $1.8 million and $2 000 000 to a possible $2.2 million. The respondent's case was that the appellant was aware of these offers, and at the time the appellant took over the ranch after the fixed date of 31 December 1993 he agreed to the price of $2.2 million which was the highest offer received.

This is denied by the appellant. The appellant, on the other hand, says following the deadline of December 31, he was entitled to take the ranch as his, after which he could do what he wanted with the ranch, or sell it at a price that he himself wanted.

The respondent argued that the parties had agreed that he would be paid the difference between the price of the ranch and the debt he owed. He said he could never have agreed to take over a liability to the appellant which was more than his liability to Cranswick and Deacon. The appellant argued that he had told the respondent that he intended to recover his full amount of $1.5 million because although he had been paid $700 000 by Cranswick and Deacon, some of the money was interest as he had not been paid on the date when the money was due.

Mr Tunmer of C.C. Sales said that at the meeting of September 6, which was attended by both the appellant and the respondent, the amount due to each party was discussed but was not concluded. In other words, the parties did not agree what was due to the appellant and whether there was anything to be paid to the respondent. He said the respondent was arguing that if the appellant wanted more than $970 000 he should look to Cranswick and Deacon for that, while the appellant insisted that it was the respondent who should look to Cranswick and Deacon for the difference. Tunmer's evidence was viewed with suspicion by the trial judge who observed that Tunmer "seemed to be anxious not to take sides, understandably, because of his own involvement in the scheme".

Although Tunmer said the meeting was inconclusive, the trial court found that some form of agreement seemed to have been reached but the terms of the

agreement were not clear. When the trial judge found that it was the plaintiff's word against the defendant's word he had this to say:-

> "Only the terms of that agreement are in issue now. The evidence of the plaintiff in this regard is preferable. Not only does it accord with the probabilities but the plaintiff was an incomparably better witness than the defendant.

Where his evidence conflicts with that of the defendant I prefer his version to that of the defendant. I therefore find that the gist of the agreement reached on 6 September 1993 was that the plaintiff would sell Gonundwe ranch and from the proceeds he would pay the defendant the sum of $970 000 and retain any amount over and above this figure.

In the event that the farm was taken over by the defendant he (the defendant) would pay the difference between $970 000 and the amount offered, to the plaintiff."

This conclusion of the trial court was reached after the trial judge had observed the witnesses giving evidence before him and the conduct of the defendant when he gave evidence as well as when he was under cross-examination. This finding is supported by the record of proceedings which shows that the defendant was most evasive and could not give meaningful answers to questions. The finding cannot be faulted.

The remaining issue is what the ranch was sold for.

The plaintiff called Charles Randal to support his story that Gous had made offers varying between $1.5 million and $2.2 million.

Gous accepts that he met Randal and went to see Gonundwe ranch, after which he made offers up to $1.5 million. The offers were turned down. He was, at the same time, contracting his partners in South Africa for their approval of offers he made.

He denied making offers of $1.8 million or more. He denied receipt of any letter or fax from C.C. Sales on the offers. He says he was eventually offered another farm by Randal in the Midlands which his partners rejected as they wanted one in the conservancy area. When he made further enquiries he learnt from someone that Gonundwe ranch was still available for sale. He was given a telephone number and he contacted the appellant. They had some meetings after which he purchased the ranch for $1.5 million as the appellant told him that was what he was owed.

The appellant said he was not aware of the alleged offers made by Gous to Randal and the respondent.

It is clear that even if the offers had been made, the appellant was not made aware of them. Even Randal and the respondent could not say that they ever brought these offers to his attention.

This leaves the respondent’s allegation that the ranch was sold for

more than $1.5 million unsupported. There was no evidence in his favour to go against the written agreement of sale between Gous and the appellant which recorded the price as $1.5 million. Even the fact that the respondent was a better witness than the appellant could not assist him on this issue. He failed to prove that the property was sold for more and that he was entitled to more than he got. These reasons cater for both the main appeal and the cross-appeal.

The main appeal is dismissed with costs.

The cross-appeal is dismissed with costs.

EBRAHIM JA: I agree

SANDURA JA: I agree

Scanlen & Holderness, appellant's legal practitioners

Coghlan Welsh & Guest, respondent's legal practitioners