

The Republic of South Africa

THE SUPREME COURT OF APPEAL

reportable

case no:54/99

In the matter between:

NACH INVESTMENTS (PROPRIETARY) LIMITED

Appellant

and

KNIGHT FRANK SOUTH AFRICA (PTY) LTD

Respondent

Coram: Scott, Cameron, JJ A and Nugent, A J A

Heard: 23 February 2001

Delivered: 16 March 2001

Summary - Estate agent's claim for commission - whether agent effective cause of sale by providing an offer which triggers a right of pre-emption.

J U D G M E N T

NUGENT, A J A:

[1] An estate agent's contractual relationship with his or her principal is like any other contractual relationship and is not subject to special rules of law. Whether the agent is entitled to the payment of commission will depend upon what was agreed between the parties. Where such a claim is made, as pointed out by Jenkins LJ in *Midgley Estates Ltd v Hand* [1952] 2 QB 432 (CA) at 435:

"One has to look at the particular contract and see whether, according to its terms, construed in accordance with the ordinary principles of construction, the event has happened on the occurrence of which the commission is expressed to be payable."

[2] In this case Goldstein J, sitting in the Witwatersrand Local Division, concluded that the event entitling the estate agent (the respondent) to commission had indeed occurred, and he granted judgment accordingly (1999(3) SA 891(W)). The appellant (the principal) now appeals against that decision with the leave of the court *a quo*.

[3] The facts underlying the claim can be quite briefly stated. The appellant was the owner of certain immovable property situated in Germiston which was let to a tenant. Included in the agreement of lease was a right of pre-emption in favour of the tenant. It provided that if the appellant received an offer to purchase the property, and wished to accept it, the appellant should submit the offer to the tenant and grant the tenant an option for thirty days to purchase the property on the same terms. Only after the expiry of the option was the appellant entitled to accept the offer.

[4] By early 1996 the appellant had decided to sell the property and it appointed the respondent to assist it to do so. The express terms upon which the respondent was appointed were recorded in a letter written by the respondent to the appellant's managing director in the following terms:

"I hereby confirm that you have granted [the respondent] an exclusive mandate to sell the abovementioned property.

Such mandate shall endure for a period of 120 days from the date of your signature on the attached copy of this letter."

[5] The letter was signed by the appellant's managing director. It was also a tacit term of the agreement that the respondent would be entitled to commission in accordance with the tariff of the South African Property Owners' Association if he accomplished what he had been appointed to do. When the period of the "exclusive mandate" expired the respondent's appointment tacitly continued though it was no longer exclusive.

[6] The respondent was aware at the time he was appointed that the property was let and that the tenant enjoyed a right of pre-emption. The tenant, too, was aware that the property was being placed on the market, but it had no immediate intention of purchasing it. The tenant was intent rather upon biding its time in the hope that it would be able to purchase the property at a favourable price if no other purchaser could be found.

[7] In 1998 the respondent managed to find a purchaser who was willing and able to purchase the property at a price that was acceptable to the appellant. A written offer was prepared and submitted to the appellant. The appellant, as it was required to do in terms of the right of pre-emption, submitted the offer to its tenant and gave the tenant an option to purchase the property on the same terms. The tenant exercised the option with the result that the property was sold to it.

[8] On behalf of the appellant it was submitted that it was an implied term of the agreement between it and the respondent (ie a term imported into the agreement as a matter of law) that the respondent would be entitled to commission only if the property was sold to a person who was introduced by the respondent. I think it is apparent from the decision of this court in *Nelson v Hirschhorn* 1927 AD 190 that the law imports no such term into an agreement of this nature. Whether an estate agent is entitled to the payment of commission depends upon what the parties agree upon and not upon any special rules of law. When parties agree, as in this case, that the agent will "sell" the property they envisage no more than that the agent will

bring about a sale between principals. In those circumstances the agent will earn his or her commission if the property is indeed sold to a willing and able purchaser and if the agent was the effective cause of that occurring. That follows from a construction of the agreement between the parties rather than from the application of any special rules of law. In the absence of some further qualifying term in the agreement (which is not said to exist in the present case) the fact that the purchaser was not introduced by the respondent does not preclude the agent's claim. It might, in some such cases, be a matter of difficulty to establish that the agent was the effective cause of the sale, but that is a different matter.

[9] In the present case it was also submitted that the respondent was not the effective cause of the sale. It has often been said that to be the effective cause of a sale the agent's conduct must not only be a *causa sine qua non* but also the *causa causans*. It was pointed out, however, by Van den Heever JA in *Webranchek v L K Jacobs & Co Ltd* 1948 (4) SA 671 (A) at 679 that:

"The distinction between the concepts *causa sine qua non* and *causa causans* is not as crisp and clear as the frequent use of these phrases would suggest; they are relative concepts. Where a *causa sine qua non* emerges as the only known causative factor, one is easily persuaded that it was also the *causa causans* ... It is only where a number of causes compete for recognition as the effective cause that the distinction has any meaning."

[10] While there were, as pointed out by counsel for the appellant, various factors that contributed to making the tenant a potential purchaser, that is beside the point. The question is rather what caused it to become a purchaser. The fact that the tenant was already acquainted with the property, and wished at some time to acquire it, and had a right of pre-emption, were all of no consequence to the appellant unless the tenant was induced to buy. The evidence establishes quite clearly that the effective cause of that occurring was the production by the respondent of an offer from an alternative source. But for that the sale would not have occurred, and it was also because of it that the sale occurred: it was the *causa sine qua non*, and the *causa causans*, and the respondent was entitled to his commission.

[11] The appeal is accordingly dismissed with costs.

R W Nugent, A J A

Scott, J A)
Cameron, J A) concur