REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 606 / 05

In the matter between

MANO ET MANO **APPELLANT**

and

NATIONWIDE AIRLINES (PTY) LTD **FIRST RESPONDENT**
NATIONWIDE AIR CHARTER (PTY) LTD **SECOND RESPONDENT**
VERNON BRICKNELL **THIRD RESPONDENT**

Coram : **ZULMAN, FARLAM, CONRADIE, MAYA JJA et THERON AJA**

Date of hearing : **20 NOVEMBER 2006**

Date of delivery : **30 NOVEMBER 2006**

SUMMARY

Agent's claim for commission arising from the sale of two Boeing 737-200 aircraft - first sale falling through because aircraft sold to rival purchaser - aircraft again put on market following cancellation of sale - imminent change in aviation regulations dictating new need for aircraft purchases - observing advertisement for same aircraft in trade journal - negotiating sale directly with seller - agent not effective cause of sale of aircraft.

Neutral citation: This judgment may be referred to as:
Mano et Mano v Nationwide Airlines (Pty) Ltd and Others **[2006] SCA 156 (RSA)**

J U D G M E N T

CONRADIE JA

[1] The appeal started as a trial before Snyders J in the Johannesburg High Court. Judgment went against the first respondent, Nationwide, which was ordered to pay to the appellant, Mano, an aircraft broker, commission on the sale of two aircraft by El Al Israel Airline to one of Nationwide's associated companies. The airline's request for leave to appeal was turned down by the trial court but leave to appeal to the full court was granted by this court. The full court reversed the trial court's decision. The present appeal is before us with special leave from this court.

[2] None of the essential and straightforward facts of the case is disputed. Early in 1999, or it may have been late in 1998, Nationwide represented by its chief executive officer, Mr Vernon Bricknell agreed with Mr David Stark, Mano's sole director, that Mano would look out for aircraft to gradually replace Nationwide's fleet of BAC 111's. Its commission would be one percent of the purchase price of an aircraft. Towards the end of April 1999, El Al, at Stark's request, sent him specifications for two aircraft, both Boeing 737-200's, so-called sister ships, built at about the same time and so equipped with the same engines and technology, desirable features for an airline when it comes to keeping fleet maintenance costs down.

[3] The specifications were forwarded to Bricknell and were swiftly followed by the draft of a 'Mutual Non-Circumvention, Non-Disclosure Agreement', the purpose of which was to ensure that Nationwide would not go behind Mano's

back and conclude a sale with any potential seller of an aircraft located by Mano. The agreement was not signed by Nationwide. Whether or not Nationwide nevertheless orally agreed to all its terms is not really important. It is common cause that Bricknell agreed not to circumvent, avoid or bypass Mano to avoid payment of commission on any transaction.

[4] Mano began preliminary negotiations with El Al on behalf of Nationwide but after about two weeks the aircraft were taken off the market to enable El Al to negotiate with a rival purchaser. Nothing came of the negotiations so Mano continued its endeavours on Nationwide's behalf. Stark wrote to Bricknell to confirm that Mano's commission, which worked out at $50 000 per aeroplane, would be due ' . . . in the event that you should go ahead with [an aircraft] that has been introduced by our company.'

[5] The beginning of June 1999 saw Bricknell inspecting the two El Al aircraft at Ben Gurion airport and shortly thereafter Nationwide made an offer through Mano, one that was increased when El Al indicated that there was considerable interest in the aircraft.

[6] El Al was initially prepared to sell the Boeings to Nationwide and even forwarded a draft contract of sale to Nationwide but just as Bricknell and the airline's chief engineer were ready to conduct a further and more detailed pre-sale inspection of the aircraft, El Al sold the aircraft to another rival purchaser, Aero Al. Mano was thereupon authorised by Nationwide to find other suitable aircraft in Europe. It did not locate any but Nationwide itself found and bought

two Boeing 737's ex Croatia Airlines, the first on 29 July 1999 and the second on 15 October of that year.

[7] When, by the beginning of September 1999, the sale of the El Al Boeings to Aero Al was beginning to look insecure, Stark wrote to El Al on 6 September 1999 canvassing the possibility of their being sold to Nationwide if they should come on the market again. He copied the fax to Bricknell who, having in the meantime found other suitable aircraft, did not respond to it.

[8] Mano did not ascertain the outcome of the El Al and Aero Al transaction. Both he and Bricknell remained unaware that the sale to Aero Al had been cancelled at the beginning of November 1999 and that at the end of that month the aircraft were back on the market. Nationwide had by now bought the two additional Boeing 737's it needed and was for the time being not interested in any further aeroplanes. Mano must have realised this, because after the letter of 6 September, there was no further attempt by it to broker the sale of aircraft to Nationwide.

[9] Early in 2000, Nationwide's legal adviser pointed out to Bricknell that the civil aviation authorities were about to impose serious flight restrictions on Nationwide's BAC 111 fleet by limiting them to an operational ceiling of 20 000 feet unless the interior were modified by the installation of drop-down oxygen masks. Since these modifications were financially not viable and Nationwide could not economically operate the BAC 111's at the restricted altitude, Nationwide decided for the sake of its profitability to accelerate its

planned fleet renewal by replacing its BAC 111's with aircraft meeting the new civil aviation requirements.

[10] Bricknell, who was now looking out for aircraft once more, noticed the two El Al aeroplanes advertised in a trade publication known as Avmark. He immediately recognised the name of Polonsky, the Manager Co-ordination and Control at El Al to whom he had been introduced by Stark, so he contacted him and began negotiations that, on 10 April 2000, led to the purchase for $8.61m of the two aircraft by Aerotrans, a company in the Nationwide fold.

[11] It became common cause during the trial that Mano's claim for commission did not depend on the identity of the purchaser: it was agreed that it would be payable whether Aerotrans or Nationwide, or indeed any other entity in the Nationwide fold, had bought the aircraft. It was also undisputed that Mano's claim to commission depended on whether it was the effective cause of the sale by El Al to Aerotrans, Mano contending that it was and Nationwide maintaining that it was not.

[12] What, then, are the criteria for determining whether an agent has been the effective or efficient cause, or the causa causans, of a transaction? Mano was employed by Nationwide, the buyer, to find a willing seller of aircraft, but that does not distinguish this case from the line of estate agents' commission cases where the agent acts for the seller, so that one might, as the parties have invited us to do, fruitfully invoke their guidance.

[13] As good a place as any to start looking for guidance is the frequently cited dicta of De Villiers J P in *Le Grange v Metter*[1]:

'Our law with regard to agents' commission has regard to the substance rather than the form and is singularly free from technicality. Thus a broker, or other selling agent, has (in the absence of any express agreement to the contrary) been held repeatedly to be entitled to his commission, when once it is established that he was the "efficient cause" of the sale, notwithstanding that such sale may only go through long after his active efforts have ceased, and notwithstanding that such sale may eventually be concluded directly between the parties without his participation, and notwithstanding that such sale may go through on different terms and conditions from those on which the broker or agent was employed to sell . . . .' [2]

[14] In *Schollum & Co v Lloyd*[3] the first negotiations resulting from the introduction of a buyer to the property had been broken off. One of the partners in the seller, the partnership which owned the Commercial Hotel at Bloemhof, then bought out the other and continued the hotel business. Gregorowski J discussed the attributes of the intervening cause in that case[4]:

'This being the state of things, what next occurs is that more than six months after negotiations had fallen through, after the defendant had bought out his partner, and had carried on the business on his own account, without contemplating a sale, [the buyer] turns up at Bloemhof, and commences fresh negotiations, after fresh advertisements of the property had appeared in the papers. The plaintiff has not shown that he had anything to do with this visit of [the buyer] to Bloemhof, and even if he had, that his employment still continued. The question is one of fact. I think the original employment had been terminated, the original introduction had been exhausted, and the visit in 1915 of [the buyer] had nothing to do with the plaintiff's original exertions. I think the originating cause was quite a new one and distinct from what had gone before. It is quite likely that the visit was brought about by some other cause entirely distinct from the acquisition of the property or that it was prompted by the

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[1] 1925 OPD 76 at 80.
[2] On 'efficient cause' see *Eschini v Jones* 1929 AD 18 at 28-29. The onus of proving that an introduction operated right up to the execution of the deed of sale rests on the plaintiff: *Barnard & Parry Ltd v Strydom* 1946 AD 931 at 938.
[3] 1916 TPD 291.
[4] At 298.

fresh advertisements which had been inserted by the defendant's supporters. The element of time is important, and also the changes which had in the meantime ensued. For these reasons I think the plaintiff has failed to prove the facts which are necessary to establish his case.'

[15] The fact that negotiations for the purchase of a property may have been broken off is not sufficient to prevent an agent from being the effective cause of a sale.[5] *Doyle v Gibbon* is a case of that kind.[6] An estate agent facilitated an introduction but the negotiations led to nothing. The potential purchaser later returned to the same street and on observing the agent's sign recollected that he had previously inspected the property. He thereupon negotiated with the owner direct and bought for a lower sum. In discussing the facts of that case Wessels J contrasted them with those in *Machonochie's Executrix v Bidewell-Edwards*[7] where the husband of the eventual buyer who had been introduced to the property by the plaintiff did not want to buy it but was persuaded by the 'obstinacy' of his wife to acquire the property after she had seen it advertised in a newspaper.

[16] The point of difference is that in *Doyle v Gibbon* 'the original introduction still operated', 'there was no proof', said Gregorowski J, 'that a new cause had intervened which would set the owner free from the paying of a commission.' In *Machonochie's* case a new cause was considered to have intervened: Not the agent's efforts but the insistence of the wife resulted in the sale of the property.

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[5] *Lotz v Davidson* 1928 CPD 514.
[6] 1919 TPD 220.
[7] 1892 9 SC 204.

[17] In the same category as *Doyle v Gibbon* is *Aida Real Estate v Lipschitz*[8] where Marais J asked[9],

' . . . did the new factor outweigh the effect of the introduction by being more than or equally conducive to the bringing about of the sale as the introduction was, or was the introduction still overridingly operative?'

[18] Often the intervening cause is alleged to be the efforts of a second agent. Although every commission claim depends on its own facts, second agents seldom seem to succeed: the introduction of a purchaser by the first agent usually remains the effective, or as Van den Heever JA put it, 'the dominant' cause of the sale.[10]

[19] Mano pointed out in argument that at the time Bricknell happened to see the advertisement for the El Al Boeings he still remembered dealing with Ami Polonsky and that it was this recollection that predisposed him to the two El Al aircraft rather than any of the others of similar make and capacity that were advertised on the same page. Mano's counsel sought to draw from this the inference that the introduction was still operative. The difficulty in the way of accepting this argument is that the topic was not discussed with Bricknell in cross-examination. We do not know to what extent the fact that he had inspected these aircraft before, or had met Polonsky before, predisposed him to the purchase of these aircraft. We do not know, for example, whether he made enquiries from any of the other advertisers before settling on the El Al Boeings

[8] 1971 (3) SA 871 (W).
[9] At 874 A-B.
[10] *Webranchek v L K Jacobs & Co Ltd* 1948 (4) SA 671(A) at 683; *Barnard and Parry v Strydom* 1946 AD 931: the second agent was held to be the causa causans of the sale, but see the dicta at 936; in *Gordon v Slotar* 1973 (3) SA 765 (A) an attempt by a second agent to sell the property by public auction was held to be the causa causans of the sale; *Wakefield & Sons (Pty) Ltd v Anderson* 1965 (4) SA 453 (N); *Munitz v Steer's Trust Co (Pty) Ltd* 1993 (2) SA 369 (C); *Howard and Decker Witkoppen Agencies and Fourways Estates (Pty) Ltd v De Sousa* 1971 (3) SA 937 (T).

or what attributes of the other advertised aircraft he might have found unsuitable or undesirable. The factual underlay for the argument sought to be made by counsel was just not there.

[20] Although a long time lapse, by itself, does not necessarily deprive a commission agent of its claim, it is one of the factors that a court is entitled to take into account in ascertaining whether the chain of causation between the introduction and the sale has been ruptured. Direct negotiations between buyer and seller resulting in an agreement on terms that make the sale possible do not, as we have seen, generally rupture the chain.

[21] The only event that is regarded as breaking the chain of causation between the agent's endeavours and the eventual transaction is a sufficiently weighty intervening cause. What such an intervening cause might be or when it will be weighty enough, depends on the facts of each case. In general the question resolves itself into whether, on balance, it was the agent's exertions that caused the purchaser to buy or whether the sale was rather due to the impact of the intervening cause.[11]

[22] In the present case Mano's exertions not only ceased well before the sale, a circumstance that in itself may not be decisive, but from the time of the sale of the El Al aircraft in June 1999, Mano had no known prospect of complying with its mandate any longer. From the time that Nationwide bought the two ex-Croatian Boeings, Mano's efforts to find suitable aircraft for Nationwide were

[11] For a case in which a wife's pregnancy, an improvement in financial position and an unexpected windfall were held to be sufficiently weighty intervening causes, see *Basil Elk Estates (Pty) Ltd v Curzon* 1990 (2) SA 1 (T).

confined to the letter of 6 September 1999 which it sent to El Al and copied to Nationwide, but it did not pursue the lead. The parties had concluded their business with regard to the El Al aeroplanes and they both knew it.

[23] The new aviation regulations unexpectedly made Nationwide's BAC 111 fleet economically obsolete. It had urgently to replace them. This, and not any earlier requirements or negotiations, was the impetus for Nationwide's decision to re-enter the market for aeroplanes. The decision arose from unforeseen developments and were, moreover, separated from Mano's failed endeavours by a lapse of several months.

[24] In the case of the sale of an aircraft, there is an important feature that is not present in the case of the sale of immovable property. An aircraft is really just a consumer durable. It has an operational life expressed in flying hours. Major, and expensive, overhauls that are due periodically affect its selling price at any given time; so does its age. When it is sold some time after it was introduced to a buyer, it is not the same res. This gives the lapse of time in this sort of transaction a heightened significance.

[25] Mano also relies on the (disputed) 'Mutual Non-circumvention, Non-disclosure agreement'. The terms of the agreement do not add anything to the state of affairs prevailing under the common law. In agreeing not to circumvent Mano Nationwide undertook not to deprive Mano of commission to which it was legally entitled. Since Mano was not the effective cause of the second sale, it was not entitled to commission and there could have been no circumvention of any claim.

[26] Mano pressed other claims as well, none of which found favour with the court *a quo*. Its claim for damages is ill-conceived. If it was not the effective cause of the sale it can have no claim for damages. The claim based on delictual damages was only faintly pressed. It has no merit. It is founded on a supposed duty of care owed by Nationwide to Mano not to deal directly with and acquire the aircraft directly from the seller. It is clear that it must fail for formulating a delictual cause of action in wider terms that the parties' contractual obligations.

The appeal is dismissed with costs.

J H CONRADIE

JUDGE OF APPEAL

CONCUR:

ZULMAN JA
FARLAM JA
MAYA JA
THERON AJA