IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 10583/06

In the matter between:

YATZEE INVESTMENTS BK H/A SEEFF WESKUS Applicant

and

PIETER DE BEER 1st Respondent
MARIZA SAAYMAN 2nd Respondent
JOHANNES VAN WYNGAARD 3rd Respondent
ACCUTTS 4th Respondent

J U D G M E N T : 17 AUGUST 2007

MEER, J:

Introduction.

[1] In this application Applicant seeks an order in respect of costs only, in circumstances where it succeeded in obtaining the relief sought in two of the prayers in an application brought on 2 October 2006 (prayers 2.1 and 2.2), and abandoned the relief sought in three of the remaining prayers, (at prayers 2.3 to 2.5).

[2] On 2 October 2006 Applicant urgently sought the

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following relief at paragraph 2 of its notice of motion.

"2. 'n Bevel *nisi* word gelas wat Respondente aansê om op Maandag, 23 Oktober 2006, redes, indien enige, aan te voer waarom die volgende bevel nie toegestaan moet word nie:

2.1 Eerste en Tweede Respondent word gelas om Tweede Respondent se naambalkie, Applikant se dagboeke, alle lystingsvorms van kopers en verkopers (asook afskrifte daarvan), munisipale lyste en kaarte en bordstaanders van Applikant onverwyld aan Applikant te oorhandig;

2.2 Derde Respondent word gelas om Applikant se dagboeke, munisipale lyste en kaarte en bordstaanders van Applikant onverwyld aan Applikant te oorhandig;

2.3 Vierde Respondent word gelas om Eerste, Tweede en Derde Respondent se name en besonderhede onverwyld van hul webwerf te verwyder;

2.4 Eerste en Tweede Respondent word verbied om tot 25 November 2006 as eiendomsagente in Veldddrif, Laaiplek en Port Owen besigheid te bedryf;

2.5 Derde Respondent word verbied om tot 25 November 2006 as 'n eiendomsagent in Dwarskersbos en Elandsbaai besigheid te bedryf;

2.6 Eerste, Tweede, Derde and Vierde Respondent word gelas om die koste van die aansoek te betaal.

3. Paragraaf 2.3, 2.4 en 2.5 hierbo sal geld as 'n interim interdik hangende bogemelde keerdatum;

4. Verdere en/of alternatiewe regshulp."

[3] The First, Second and Third Respondents, being estate agents, had each signed a "Sales Agent Agreement" with Applicant, in terms whereof Respondents entered into an association with Applicant who owned the license to conduct the business of an estate agency under the SEEFF Property trademark, on the Cape West Coast. The application stemmed from the resignation of First, Second and Third Respondents from their association with Applicant and their subsequently entering into an association with Fourth Respondent, another firm of estate agents.

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[4] On 6 October 2006 Respondents filed a notice to oppose the application.

[5] Thereafter on 10 October 2006 the following order was granted by agreement between Applicant, First and Second Respondents, which stated *inter alia* as follows:

*"*2. 'n Bevel *nisi* word gelas wat Respondente aansê om op Dinsday, 31 Oktober 2006, redes, indien enige, aan te voer waarom die volgende bevel nie toegestaan moet word nie:

2.1 Eerste en Tweede Respondent word gelas om Tweede Resondent se naambalkie, Applikant se dagboeke, alle lystingsvorms van kopers en verkopers (asood afskrifte daarvan), munisipale lyste en kaarte en bordstaanders van Applikant onverwyld aan Applikant te oorhandig;

2.2 Derde Respondent word gelas om Applikant se dagboeke, munisipale lyste en kaarte en bordstaanders van Applikant onverwyld aan Applikant te oorhandig;

2.3 Vierde Respondent word verbied om tot 25 November 2006 Eerste, Tweede en Derde Respondent se name en besonderhede op hul webwerf te vertoon;

2.4 Eerste dn Tweede Respondent word verbied om tot 25 November 2006 as eiendomsagente in Velddrif, Laaiplek en Port Owen besigheid te bedryf;

2.5 Derde Respondent word verbied on tot 25 November 2006 as eiendomsagente in Dwarskersbos en Elandsbaai besigheid te bedryf;

2.6 Eerste, Tweede, Derde en Vierde Respondent word gelas om die koste van die aansoek te betaal;

3. Hangende bogemelde keerdatum word:

3.1 Vierde Respondent gelas om Eerste, Tweede en Derde Respondent se name en besonderhede onverwyld van hul webwerf te verwyder;

3.2 Eerste en Tweede Respondent verbied om as eiendomsagente in Velddrif, Laaiplek en Port Owen besigheid te bedryf;

3.3 Derde Respondent verbied om as eiendomsagent in Dwarskersbos en Elansbaai besigheid te bedryf;

4. Respondente moet hulle opponerende eedsverklarings, indien

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enige, teen 16:00 op Donderdag, 25 Oktober 2006, aflewer;
5. Applikant moet hul repliserende eedsverklarings, indien enige, teen, 16:00 op Maandag, 30 Oktober 2006, aflewer. Applicant word verlof verleen om 'n faksimilee-afskrif van hul repliserende eedsverklarings af te lewer en gemelde eedsverklarings hoef nie aan die bepalings van reel 63 te voldoen nie;
6. Die koste van 10 Oktober 2006 staan oor vir latere beregting."

[6] On 25 October 2006 before Respondents had filed their answering affidavits, their attorney was informed per fax that on the return day of 31 October 2006, Applicant would only seek an order in terms of prayers 2.1, 2.2 and 2.6 of its notice of motion. The effect thereof was that Applicant abandoned prayers 2.3 to 2.5 of its notice of motion.

[7] In response, it would appear, on 25 October 2006 Applicant's attorney was informed that First, Second and Third Respondent's opposing affidavits, which had already been prepared on the basis of all the relief sought in the notice of motion, would of necessity have to be amended as a consequence of the abandonment of prayers 2.3 to 2.5 of the notice of motion.

[8] Applicant's attorney was simultaneously notified that the First and Second Respondents were prepared without prejudice to their rights to hand over all the items sought at paragraphs 2.1 and 2.2 of the notice of motion.

[9] On 30 October 2006, Respondents filed their answering affidavits.

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[10] Before the return day of 31 October 2006, First, Second and Third Respondents handed over the items sought by Applicant at paragraphs 2.1 and 2.2 of its notice of motion. Consequently, the only matter which remained for determination, was the question of costs and this was postponed for hearing on 7 August 2007 when the matter came before me.

[11] Mr Mouton for Applicant submitted that Applicant was substantially successful in its application, notwithstanding the abandonment by Applicant of the relief sought at prayers 2.3 to 2.5, because Respondents had handed over to Applicant the items sought at paragraphs 2.1 and 2.2 of the notice of motion. He conceded however that Applicant was liable to Respondents for the costs incurred in opposing the abandoned relief.

[12] Mr De la Rey for Respondents submitted that by virtue of the abandonment of prayers 2.3 to 2.5 Applicants had not achieved substantial success. Initially Respondents heads of argument had sought an order that Applicant be ordered to pay Respondents' costs, but in argument it was submitted that a proper order in all of the circumstances would be one requiring each party to bear their own costs.

[13] When Applicant withdrew or abandoned the relief sought at paragraphs 2.3 to 2.5, Respondents, I believe, were entitled to the costs or expenses to which they were put in opposing the

withdrawn relief sought in those prayers.

[14] In *Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others Intervening*) 2003(3) SA 547(C) at 550A-D Van Reenen, J stated:

> "... It is only in exceptional circumstances that a party that has been put to the expense of opposing withdrawn proceedings will not be entitled to all the costs caused thereby…"

[15] In *Germishuys v Douglas Besproeiiengsraad* 1973(3) SA 299 (NC) at 300D, it was stated that a plaintiff or applicant who withdraws his/her action or application is in the same position as an unsuccessful litigant because, at the close of the case such claim or application is futile and the defendant or respondent is entitled to all costs caused by the institution of proceedings by the withdrawing party. This, in my view, applies also in a situation where an applicant withdraws some of the relief or claims sought in an application, as in the present case, where the relief sought in respect of prayers 2.3 to 2.5 was withdrawn. Applicant cannot be said to have succeeded in respect of these prayers but only to have succeeded in respect of the relief sought and obtained at prayers 2.1 and 2.2. Nor can it be said that Applicant had achieved substantially all the relief claimed and was entitled to costs in the light of its abandonment of prayers 2.3 to 2.5. See *Financial Services Board and Another v De Wet NO and Others 2002 (3) SA 525 (C) at 626E-F and*

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Nicholaides v Marcus Stores (PTY) LTD 1960 (4) SA 694 (SR) at 694D.

[16] Similarly in Massey – *Ferguson (South Africa) Ltd v Ermelo Motors Pty Ltd and Others 1973 4 SA 206 (T)*, Viljoen J stated that where the plaintiff succeeds in recovering substantially less than what was claimed or an appellant succeeds to an insignificant extent, the opponent in each case is really substantially the successful party.

[17] On a consideration of what would be fair to both sides in all of the circumstances, and juxtaposing Applicant's success in relation to prayers 2.1 and 2.2, against its withdrawal of prayers 2.3 to 2.5, and Respondents' consequent entitlement to the costs of their opposition thereof, I come to the view that an appropriate order in respect of costs, would be no order.

[18] I accordingly order as follows:

There is no order as to costs.

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MEER, J

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and	
PIETER DE BEER	First Respondent
MARIZA SAAYMAN	Second Respondent
JOHANNES VAN WYNGAARD	Third Respondent
ACUTTS	Fourth Respondent

JUDGMENT BY : MEER, J

For the Applicant(s) : Adv. S F MOUTON

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(Ref: H De Beer/Abigail/GYS3/0047)

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Date(s) of hearing	:	7 AUGUST 2007
Judgment delivered	:	17 AUGUST 2007