REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2014/37055

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

1/02/2017
DATE

SIGNATURE

In the matter between:

EUPHODIA K TSATSI Applicant

and

VIRGIN ACTIVE & OTHERS Respondents

J U D G M E N T

KLAAREN, AJ:

INTRODUCTION

[1] This application seeks to rescind an order made on 20 October 2015 dismissing an application made in terms of the Promotion of Access to

Information Act 2 of 2000 (PAIA). In the underlying PAIA application, Euphodia Tsatsi sought to compel disclosure of certain information held by the first respondent, Virgin Active, stemming from an allegedly racist incident which occurred at a health club currently operated by Virgin Active, named "Old Eds Virgin Active" (Old Eds) in Johannesburg in May 2014. Tsatsi launched the current application via a notice of motion dated 19 February 2016. It was opposed by Virgin Active and affidavits were exchanged, leading to the hearing before me.

LITIGATION HISTORY

[2] It will be helpful to recapitulate the litigation history of the underlying application leading to its dismissal on 20 October 2015. This court's jurisdiction for hearing the underlying application is section 78 of PAIA read with section 82. PAIA section 82 provides for the court to "grant any order that is just and equitable, including orders ... (d) as to costs." Tsatsi's application was opposed by Virgin Active and came to court on 29 April 2015. The parties agreed to postpone the application with Tsatsi paying the costs of postponement. At the next hearing of the matter, on 27 July 2015 before Kathree-Setiloane J, Tsatsi's heads of argument were not in the court file. Virgin Active was ready to proceed. Tsatsi's counsel accepted the court's suggestion to tender wasted costs on an attorney and client scale. The matter was stood down in order to be allocated a date for hearing.

[3] Tsatsi's Founding Affidavit at paras 15 and 16 picks up the history from there and states as follows: "Para 15. This matter was then postponed to a date agreed upon by my erstwhile counsel, and the legal representative on behalf of the Respondents, and on the week that this matter was to be heard, I was working out of town. On the Monday morning [19 October 2015] when this matter was called in Motion Court, my erstwhile counsel appeared only to be told that the matter was only enrolled for the next day. While we were preparing for the appearance the next day, my erstwhile counsel became unavailable, hence counsel had to be briefed afresh. However, that was not the problem in this particular matter that resulted in judgment being taken by default. The problem lay in the fact that without any cogent reasons whatsoever I was advised by the junior associate in the firm of my erstwhile attorneys of the fact that the senior partner had advised that the firm withdraw from representing me, and upon soliciting reasons from the junior associate, he could not tell me anything, since he had now been overruled by his superiors in this regard."

"Para 16. It then transpired that my erstwhile attorneys emailed a notice of withdrawal to the attorneys of the Respondents, and on the next morning when my new counsel appeared, all he could do is to bring it to the Court's attention that the erstwhile attorneys had withdrawn, and that I was not represented at the time as he was not instructed but all he could do as an officer of the Court was to appraise the Court of the fact that I was working out of town, and my erstwhile attorneys had withdrawn, and in a bid to seek an indulgence with a view to being granted time or having the matter stood down

to later in the week in order to enable me to provide an affidavit and also get a new set of attorneys appointed, if possible[.] [T]he Learned Judge then refused the indulgence and granted judgment by default, [citing] the fact that I did have a remedy if I wanted to exercise such remedy, and the very remedy she was talking about was [a] rescission of judgment application, hence I am exercising my right in line with the ruling made by Kathree-Setiloane J of bringing an application for rescission of judgment."

[4] This account largely tallies with the documents on record. With a date of Monday, 19 October 2015, Tsatsi's then-attorneys served via email a Notice of Withdrawal as Attorneys of Record.

[5] At the hearing of the application on 20 October 2015, the application was again before Kathree-Setiloane J and was dismissed with costs without written judgment. However, the order does not state that it was granted by default, stating rather: "HAVING read the documents filed of record and having considered the matter: -- IT IS ORDERED THAT: -- 1. The application is dismissed with costs."

[6] Tsatsi's original PAIA request was for information held by Virgin Active concerning an alleged racist incident which took place at a Virgin Active health club, Old Eds, on 10 May 2014. The incident involved Tsatsi and four other members of the Old Eds club. The other four members are apparently part of a family, although they were in two separate groups, one on foot and one in a car. In the course of searching for a parking space for her car and

parking her car in the Old Eds club parking lot, Tsatsi and the other members engaged in at the very least heated and vehement discussion and arguably aggressive driving. In this, Tsatsi alleges, a racist term was directed to her. Needless to say, the account given here is no more than a brief sketch for purposes of this judgment and further details are contained in the affidavits as well as presumably in the information Tsatsi seeks from Virgin Active.

[7] This incident led to Tsatsi laying a complaint at the Old Eds health club, an investigation by Virgin Active, and further communication (including telephone calls as well as written correspondence) between Tsatsi and employees of Virgin Active. Virgin Active attempted to finalize this interaction with a letter to Tsatsi on 20 June 2014 as follows:

"Dear Mrs Tsatsi:

INCIDENT AT OLD EDS VIRGIN ACTIVE ON 10 MAY 2014 – VAPL 705-17685

We refer to the above incident and the extensive correspondence that has been exchanged between yourself and our club, as well as the recent meeting between yourself and our regional director, Jacques Human.
Understandably, an incident of this nature can be extremely upsetting to all parties concerned and we regret this negative experience.

However, after investigating the incident to its fullest extent, holding a member hearing, and reviewing all the statements submitted to us, we are left with one irrefutable fact; that on May 10th all parties involved in this unfortunate car park incident were guilty of conduct and behavior that is unbecoming and unacceptable in terms of the good order and character of the Club, Virgin Active and its members.

Despite exhaustive attempts to secure any concrete evidence, such as clear and witnessed accounts of the incident or CCTV footage that supports a statement, we are left with two contradictory accounts.

We can only act swiftly and decisively when there is substantiated evidence that a member has been racially derogatory to another member or has demonstrated extreme prejudice in some form or another. Faced with this evidence, a member will be severely sanctioned and may lose their membership, as we have done in the past. We have urged you on various occasions to pursue a formal legal route by means of opening a case with the SAPS (which would include a sworn affidavit). In light of the seriousness of your allegations, we remain perplexed as to why you have therefore not pursued this avenue. Should you choose to do so in the future, we remain committed to assisting you and acting on any new evidence.

We are satisfied that appropriate steps have been taken against all parties in the light of the evidence that we have at hand.

We strive to create a safe and harmonious environment for all our members and staff and can only achieve this with the co-operation of all parties involved. Please keep this in mind while you use our facilities.

Yours sincerely,

Hashem Noormahomed

Old Eds Virgin Active

Club General Manager"

[8] Dissatisfied with this state of affairs, Tsatsi turned to PAIA and submitted a request to Virgin Active in terms of that legislation, detailing ten items of information requested. Tsatsi complied with PAIA formalities and procedures and submitted her request dated 26 June 2014.

[9] The ten items Tsatsi requested were as follows: "1. Signed statements of the four people I lodged a complaint against. 2. Affidavits of the said four people. 3. Statements of managers Bontle, Bruce, Carl and Chantell of exactly what these people said to them, when they were giving their versions orally including the dates and times when it was said. 4. Written proof when Virgin Active advised me to depose to an affidavit for the sole purpose of opening a case with the SAPS. 5. The name of the lawyer who advised that I must be the only one deposing to an affidavit and the four people should not. 6. Virgin Active's rule as found in the Rule Book that empowers Virgin Active to ask for an affidavit from a member to lodge a complaint. 7. Since it has

been said that all parties are guilty, please provide the following: 7.1 [O]n what basis have I been found guilty? What exactly these people say about me for Virgin Active to find me guilty? 7.2 On what basis have the other people been found guilty? What exactly did they do to be found guilty? If this was due to my statement, which part of my statement is it and why does Virgin Active believe that part? 7.3 As Virgin Active alleges that there is no substantial evidence that people have been racially derogatory or extremely prejudicial to me, kindly give a guide of exactly what evidence Virgin Active requires to [prove] the above? 7.4 If I am allegedly found guilty, what "substantial evidence" did Virgin Active use against me to reach the said decision? If the said "substantial evidence" is based on what these people say about me, why [is] their evidence ... considered "substantial" and why is mine not considered "substantial"? 8. Kindly define the following: 8.1 "Conduct and behavior unbecoming and unacceptable" in the context of the alleged incident. 9. It has been alleged by Virgin Active that these people were not racially derogatory, neither have they demonstrated extreme prejudice to me. How does Virgin Active know this as none of Virgin Active staff members were present when this incident occurred? 10. A report from Virgin Active confirming that there has never been a complaint lodged against me regarding my driving in the twenty two years that I have been a member of Virgin Active, whether alleged "reckless" or otherwise."

Virgin Active denied the PAIA request in a letter to Tsatsi dated 11 July 2014 as follows:

"Dear Mrs Tsatsi:

INCIDENT AT OLD EDS VIRGIN ACTIVE ON 10 MAY 2014 – VAPL 705-17685

We refer to your request for information in terms of the Promotion of Access to Information Act ("the Act") dated the 26th of June 2014.

With regard to the particulars of the records that you have requested in Section D of the application, we wish to advise that your request has been denied for the reasons as set out below:

1. *The disclosure of this information would involve the unreasonable disclosure of personal information of a third party as per Section 63(1) of the Act. In addition to this, we owe a duty of confidence to the relevant third parties. In this regard, we confirm that Section 65 expressly prohibits any request from being granted should the said disclosure constitute an action for breach of duty of confidence owed to a third party;*
2. *We refer you to 1 above;*
3. *No such record is in our possession or under our control. In any event, such evidence would constitute hearsay;*
4. *Virgin Active denies that they advised for an affidavit to be deposed to for the sole purpose of opening a case with the SAPS, and therefore no such record is in our possession or under our control.*

5. *Virgin Active denies that any party advised that the applicant must be the only one deposing to an affidavit and the other four parties should not, and therefore no such record is in our possession or under our control.*
6. *As Virgin Active does not require empowerment in terms of a rule to request an affidavit from a member, same is done informally with no obligation on the member, and there no such record and/or rule exists or is in our possession or under our control.*
7. *Virgin Active owes a duty of confidence to the relevant third parties. In this regard we confirm that Section 65 of the Act expressly prohibits any request from being granted should the said disclosure constitute an action for breach of duty of confidence owed to a third party. In any event, no such record is in our possession or under our control.*
8. *No such record is in our possession or under our control.*
9. *No such record is in our possession or under our control.*
10. *No such record is in our possession or under our control.*

We would further like to inform you that should you not be satisfied with the outcome of this decision you are entitled to lodge an application with a court within a period of 30 days of the date of this decision.

Yours sincerely

Adv K Gordon

Legal Director (Acting)

Virgin Active South Africa (Pty) Ltd"

[10] As noted above, Virgin Active's refusal of her request for information led Tsatsi to launch her application in this High Court in terms of ss 82 and 78 of PAIA.

[11] Before turning to the primary issues in this case, I consider the application for condonation to entertain this application. While the order dismissing the application was granted on 20 October 2015, this application was only launched in February 2016, around four months later. Tsatsi has explained that part of the delay was due to seeking the intervention of the Deputy Judge President (DJP) of this court. Tsatsi describes a meeting in the DJP's office "the purpose of which was among other things to discuss [her] lack of access to the court file" on or around 6 November 2015. The delay in this case is significantly shorter than delays considered to be too long, which are on the order of several years.[1] In my view, the application here is made within an acceptable period of time.

Should the rescission application be considered in terms of Rule 42, Rule 31, and/or the common law?

[12] Tsatsi's application for rescission was framed in terms of Rule 42, alternatively Rule 31, and in the further alternative, the common law. Tsatsi's chief concern with the order of 20 October 2015 is that it was granted in her

[1] Van Tonder v Bailiff; In re: Bailiff v JPVT Property Developments CC and Others (A5090/14) [2016] ZAGPJHC 33 (26 February 2016).

absence. As she explains in her founding affidavit, she was not legally represented on the day and was not herself present.

[13] Some of the argument before me concerned the issue of whether this issue should be decided under Rule 42, Rule 31, or the common law. In my view, this issue should be decided under the common law.

[14] Rule 31(2)(b) is inappropriate as it requires that the applicant for rescission should have been "in default of notice of intention to defend or of a plea." Here, Tsatsi has submitted a plea as well as affidavits.

[15] Arguing for the application of Rule 42, counsel for Tsatsi submitted that the order sought to be rescinded was erroneously granted in the absence of the applicant. However, Rule 42 is also inappropriate since there is no procedural error complained of – other than, in that sense, the absence of legal representation for the applicant and the absence of the applicant. The only error pointed to is the fact itself of the court proceeding rather than postponing in the absence of the applicant and her legal representative. This brings the contention out of the ambit of Rule 42 and directly into that of the common law.[2] In an analogous situation, the court in *De Wet and Others v Western Bank Ltd*, 1979 (2) SA 1031 (A) noted (at 1038): "The fact that the appellants had not been advised timeously of the withdrawal of their attorney is, of course, a factor to be taken into account in considering whether good cause has been shown for the rescission of the judgments under the common

[2] National Pride Trading 452 (Pty) Ltd v Media 24 Ltd (227/2010) [2010] ZAECPEHC 56; 2010 (6) SA 587 (ECP) (2 September 2010).

law, but it is not a circumstance on which the appellants can effectively rely for the purpose of an application under the provisions of Rule 42 (1) (a)."

At common law, is there an acceptable explanation for Tsatsi's lack of legal representation at the hearing on October 20 2015?

[16] At common law, the test for rescission of judgment has been stated as "... an applicant for rescission of a judgment must show sufficient cause which defies a precise or comprehensive definition. The party seeking rescission must have a reasonable and acceptable explanation for his/her/its default and a bona fide defence which prima facie carries some prospect of success as was stated in *De Wet and Others v Western Bank Ltd* 1979 (2) SA [1031] (A). In *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A) at 768C it was stated by Miller JA: "It may be that in certain circumstances, when the question of the sufficiency or otherwise of a defendant's explanation for his being in default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of [] success on the merits might tip the scale in his favour in the application for rescission. .... But this is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits."[3]

[17] The question here is whether Tsatsi has offered an acceptable explanation for her lack of legal representation on the date when her

[3] De Matrix Pool House CC and Another v Absa Bank Limited (22927/2012) [2013] ZAGPPHC 389 (15 November 2013).

application was dismissed. In her words (para 68 of her founding affidavit), Tsatsi's explanation is that "I was not to blame for the default of my erstwhile legal team that left me in the lurch, thus creating a state of affairs wherein there is indeed just cause to rescind and set aside the judgment obtained by default." She also states: "I cannot answer for both the attorney and counsel why they decided to withdraw. I am not sure what I am supposed to do if an attorney and advocate decide to withdraw unceremoniously when I was out of town." (replying affidavit, para 11). On the dates of 19 and 20 October 2015 when the court hearings took place, Tsatsi was working outside of Gauteng, in Bloemfontein, acting in a division of the High Court there.

[18] Virgin Active notes that Tsatsi is a senior legal practitioner, "a senior junior counsel at the Johannesburg Bar who has acted in different divisions of the High Court." Counsel for Virgin Active notes that there is no account of, for instance, Tsatsi telephoning or otherwise contacting an attorney who said she or he was unable to act on such short notice.

[19] It seems reasonable to me to think both that a senior legal practitioner would have an appreciation of the consequences of failing to be legally represented or appear in person at the hearing of her own application and that a senior legal practitioner would have access to networks of other legal practitioners, including attorneys as well as counsel.

[20] This line of thinking is bolstered by Tsatsi's evident ability to find replacement counsel immediately. Contacting and engaging an attorney to

provide the necessary instruction to counsel to seek a postponement on the grounds of a change in legal team would not be overly complicated. Indeed, Virgin Active's counsel argued that Tsatsi was in willful default by not appointing an attorney, particularly in a situation where counsel was ready to proceed.

[21] We find a rough parallel to the events of this matter nearly four decades earlier in the case of *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A). That case confirmed that the grounds upon which one could apply for rescission of judgment were broader than those of fraud and certain circumstances of *justus error* as stated in *Childerly Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163. More pertinently for the case at hand, the facts in *De Wet* concerned a set of five litigants who were faced with a judgment by default against them due to the withdrawal of attorneys. These litigants had largely left the conduct of the litigation in the hands of a sixth litigant and their joint attorney. After the attorney withdrew for "obscure" reasons, one of the set of five litigants was advised of the attorney's withdrawal – on a Saturday before the hearing of the case on a Monday -- and "immediately"[4] began to engage alternative legal representation. The other litigants in this set of five did not have such knowledge or opportunity before the hearing of the matter. Due to a misunderstanding between attorney and counsel, it transpired that none of the five litigants were represented at the Monday hearing. Adjudicating on the question whether any of these litigants were entitled to a rescission of judgment, the Appellate Division would have

[4] De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A).

allowed rescission for the one litigant who had taken immediate steps to secure legal representation and did not allow rescission for the other four.

[22] In a part of its judgment worth quoting extensively in order to make the parallel to the events of 2015 apparent, the *De Wet* court reasoned as follows:

"[I]t now becomes necessary for this Court to consider whether, having regard to all the circumstances of the case, including the appellants' explanation for their default, this is a proper case for the grant of indulgence. The appellants' explanation, in a nutshell, is that they were let down by Coligionis [the sixth litigant] and Lebos [the attorney], who failed to notify them timeously that their case had been set down for hearing on 16 August 1976 and that Lebos had withdrawn from the case. They state in their affidavits that they had left the appointment of an attorney, and the conduct of the case, in the hands of Coligionis. He was effectively their agent and he had to inform them, from time to time, of the progress of the case. The first intimation they received that Lebos had withdrawn as their attorney, and that their case had been set down for hearing on 16 August 1976, was after the default judgments had already been entered against them at the instance of the respondent. The appellants' failure to appear, or to be represented, at the hearing on 16 August 1976, was, of course, primarily due to the remissness of their attorney, Lebos. In March 1976 Lebos already knew that the appellants' case had been reinstated on the roll for hearing on 16 August 1976. It is not clear from the papers whether he advised Coligionis of this date, at the time. He does not, however, appear to have taken any steps to prepare for the trial or to brief counsel to

represent the appellants. And, although Lebos had by 5 August 1976 already, for some obscure reason, decided to withdraw from the case, he took no steps whatsoever to inform them of his decision prior to 9 August 1976. He had Coligionis' telephone number and he could very easily have got into touch with him by telephone. However, on 9 August 1976, he wrote to Coligionis and requested him to advise the appellants of the date of the hearing and of his decision to withdraw. This letter only reached Coligionis late on Friday, 13 August 1976, as I have already mentioned. Lebos must have realised that by the time his letter reached Coligionis, and his message was conveyed to the appellants, it would be too late for them to make adequate or satisfactory arrangements to continue with the trial on 16 August 1976. Lebos has not explained why he left the appellants in the lurch by withdrawing from the case at the eleventh hour and why, in view of the urgency of the matter, he neglected to inform Coligionis of his decision immediately. On the information before us, Lebos' conduct appears to be inexcusable, and unless he can give some satisfactory explanation, the appellants may well consider reporting the incident to the Law Society.

However, the appellants' predicament was not solely due to their attorney's negligence or ineptitude. According to their affidavits, the appellants had not been in direct touch with Lebos at any stage of the proceedings; Coligionis was representing them, they left the conduct of the case in his hands entirely, and although he was supposed to look after their interests, he also let them down. Upon receiving Lebos' letter on Friday, 13 August 1976, Coligionis got into touch with the first appellant and apprised him of the position, but he took

no steps to communicate with any of the other appellants prior to 16 August 1976.

However, the appellants too cannot be absolved from blame. They appear to have manifested a complete disinterest in the conduct of the case after the interim settlement on 19 February 1973, and they have not proffered any acceptable explanation for their failure to keep in touch with Coligionis, or with Lebos for that matter, as to the progress of the proceedings during the three and a half year period subsequent to the interim settlement. In this regard I fully agree with MELAMET J's observation at 780E of the Full Court judgment, that the appellants "cannot divest themselves of their responsibilities in relation to the action and then complain vis-à-vis the other party to the action that their agents, in whom they have apparently vested sole responsibility, have failed them.

Having regard to all the relevant facts and circumstances, I am of the view that, on common law principles, this Court would not be justified in exercising its discretion in favour of granting the appellants the relief sought. They are, as MELAMET J correctly remarked at 780G "the authors of their own problems and it would be inequitable to visit the other party to the action with the prejudice and inconvenience flowing from such conduct". Their appeals must accordingly be dismissed.

This brings me to the respondent's cross-appeal, which concerns the first appellant only [the advised litigant]. ... The position is that, although the first

appellant was not present in Court on the appointed day, he had instructed attorney Trilivas to brief counsel to appear on his behalf, and he genuinely believed that he would be represented. But for the unfortunate misunderstanding between his attorney and counsel, that would indeed have been the position. ... In the circumstances VAN REENEN J was quite entitled to enter judgment against the first appellant because he was, in fact, in default. However, the first appellant was properly represented when the Court re-assembled after the lunch adjournment. Counsel then informed the Court of the misunderstanding that had arisen and he also explained that he should have appeared on the first appellant's behalf, and not on behalf of the second appellant, on the first occasion. He then moved that the default judgments granted against the first appellant, earlier in the day, be set aside but, as I have already mentioned, the application was refused.

In my view, the trial Court erred in not granting the relief sought in this instance. The first appellant's case stands on a different footing to that of the other appellants. As soon as he became aware, on Saturday, 14 August 1976, that Lebos had withdrawn from the case and that the matter had been set down for hearing on Monday, 16 August 1976, he immediately set about making the necessary arrangements to be represented at the trial. The fact that he was not represented was entirely due to the misunderstanding between his attorney and counsel, and he sought to put this right at the afternoon session, immediately after the mistake had come to his notice. ... In the result I agree with the conclusion of the Court a quo that the Court of

first instance should, in the circumstances referred to above, have granted the first appellant the indulgence sought."

[23] Four decades later, the principle should be the same. Instead of depending on postboxes and exchanges for communication, most persons have access to cellphones and relatively instant telecommunications. Tsatsi was indeed out of the province but was clearly in touch with counsel and indeed was informed of her attorney's withdrawal.

[24] I conclude that Tsatsi has not offered an acceptable explanation for her lack of legal representation on 20 October 2015.

WHAT ARE TSATSI'S PROSPECTS OF SUCCESS IN THE UNDERLYING PAIA APPLICATION?

[25] In order to consider Tsatsi's prospects for success in the underlying PAIA application, it is convenient to group the items of information requested into three categories: items not disclosed on the grounds that they do not exist (numbers 3-6 and 8-10), items relating to statements made by other persons involved in the allegedly racist incident (items 1 and 2), and information relating to Virgin Active's statement on 20 June 2014 that "all parties … were guilty" (item 7).

[26] **First**, are there reasonable prospects for success in respect of the records of information requested by Tsatsi and refused by Virgin Active as not

to be disclosed as they do not exist? Tsatsi was refused access to items 3-6 and 8-10 by Virgin Active on the grounds that these records did not exist.

[27] The prospects of success for these requests for access to information are slim. This is so for two principal reasons.

[28] For one reason, while PAIA is of course entitled an access to "information" statute, it operates as an access to records statute. Section 1 of the Act defines a record of, or in relation to, a public or private body to mean "any recorded information – (a) regardless of form or medium; (b) in the possession or under the control of that public or private body, respectively; and (c) whether or not it was created by that public or private body, respectively."[5] Further, the key section granting a right to access information held by private bodies, section 50, operates through the concept of a record: "(1) A requester must be given access to a record of a private body if – (a) that record is required for the exercise or protection of any rights; (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part."[6] Where information is not contained in records, PAIA is of significantly limited assistance in obtaining access to information. PAIA does not impose an obligation to create records. PAIA also provides for a procedure amounting to a refusal based on the ground that the records requested do not exist for

[5] "Promotion of Access to Information Act," Pub. L. No. Act 2 of 2000, sec. 1.
[6] *Ibid., sec. 50.*

private bodies.[7] The current papers do not indicate that this procedure was used.

[29] For another reason, requests for access to information need to be formulated with sufficient clarity and precision to be satisfied. Section 53(2) of PAIA requires that the requester provide on the identified form "sufficient particulars to enable the head of the private body concerned to identify ... the record or records requested."[8]

[30] For these reasons, the items in this first category have slim prospects of success. On Tsatsi's list, item 8.1 is more of a command or a direction than a request for access to information. Item 9 has the character of a general question, rather than a request with sufficient particularity for access to a defined piece of information.

[31] **Second**, are there reasonable prospects for success as regards the records requested by Tsatsi and refused by Virgin Active relating to the statements and the affidavits of the other four people involved in the incident? These items are numbers 1 and 2 on her list.

[32] The prospects of success for these requests for access to information appear reasonably strong under PAIA. The two grounds for refusal relied upon by Virgin Active in their letter of July 2014 were section 63(1) (mandatory protection of privacy of third party who is a natural person) and

[7] Ibid., sec. 55.
[8] Ibid., sec. 53(2).

section 65 (mandatory protection of certain confidential information of third party). In addition, Virgin Active has identified the reason for refusal that these records were collected in contemplation of legal proceedings and that they are thus legally privileged, sourcing this in PAIA section 40.

[33] We can dispense with the third ground relatively quickly. PAIA section 40 states; "*The information officer of a public body must refuse a request for access to a record of the body if the record is privileged from production in legal proceedings unless the person entitled to the privilege has waived the privilege.*" This section is however for public bodies and is inapplicable to this request for access to information from a private body.

[34] It should however be noted that sections 7 and 50 of PAIA provide that PAIA does not apply to records provided for the purpose of litigation where the request was made after the commencement of criminal or civil proceedings and access to the record is provided for in any other law.[9] The Supreme Court of Appeal has held that "*pre-action discovery under s 50 must remain the exception rather than the rule; that it must only be available to a requester who has shown the 'element of need' or 'substantial advantage' of access to the requested information … at the pre-action stage.*"[10]

[35] With respect to PAIA s 63(1), the ground of refusal is available where personal information is at stake and where disclosure of such information

[9] Unitas Hospital v Van Wyk and Another (231/05) [2006] ZASCA 34; 2006 (4) SA 436 (SCA) ; [2006] 4 All SA 231 (SCA) (27 March 2006), para 22.
[10] Unitas Hospital v Van Wyk and Another (231/05) [2006] ZASCA 34; 2006 (4) SA 436 (SCA) ; [2006] 4 All SA 231 (SCA) (27 March 2006) para 22.

would be unreasonable, such as where such disclosure entails an unjustifiable violation of the right to privacy. That balancing exercise must be done as part of considering the request for access to information. In this case, it is perhaps significant to note that at some point the statements of the other four people involved in the alleged racist incident were read to Tsatsi, a fact which arguably lessens the strength of the privacy interest in those statements. Further, it would seem that Virgin Active ought to have gone through third party consultation procedures provided for in PAIA section 71(1) in respect of these items.

[36] PAIA s 65 applies to information of a third party that is confidential but not necessarily commercially valuable. The apparent purpose is to uphold obligations of confidentiality arising from an agreement between the supplier and the holder of this information. Virgin Active has not pointed to any specific rule or clause of the membership agreement or Club Rules that would underpin such an obligation.

[37] **Third** and finally, are there reasonable prospects for success as regards the requests for records relating to Virgin Active's statement that "all parties are guilty" and identified in item 7 of Annexure A of the PAIA request?

[38] The prospects of success for this request for access to information are slim. Virgin Active initially denied this request on the grounds of section 65 and on the grounds that no such record exists. Later, it additionally relied on

the grounds in section 40 that these records were collected in contemplation of legal proceedings and that they are thus legally privileged.

[39] Some of these grounds are likely to found a refusal. The section 40 ground is, however, unavailing as discussed above. The section 65 ground also appears unlikely as discussed above.

[40] The ground for refusal that the records do not exist is likely to be valid as discussed above. Tsatsi's request in this respect appears to be more in the vein of a request for reasons rather than a request for access to information via records in terms of PAIA. This is understandable in that she seeks records effectively relating to the resolution by a private body of a complaint she made.

[41] I have thus concluded that, at least with respect to some items on her list, Tsatsi has reasonable prospects of success in the underlying PAIA application.

[42] Still, as noted above, such a finding does not tip the scales and reverse an explanation for default that is otherwise unacceptable.

[43] One more observation might be made before concluding. As appropriately confirmed by counsel for Virgin Active at the hearing of this matter, nothing precludes Tsatsi from submitting another PAIA request for all

or some of the items of information she requested in her 2014 request and has not received.

[44] With respect to costs, counsel for Tsatsi argued that, should the decision go against Tsatsi, an order that each side would bear their own costs would be appropriate. Virgin Active initially indicated it was seeking attorney and client scale costs but appropriately withdrew that contention. While this litigation has a long history, it should not be in my view be termed frivolous or vexatious.

[45] As for the potential applicability of the principles of the Biowatch case[11], the application before me was both in form and in substance a common law application rather than primarily a ventilation of constitutional rights, despite the jurisdictional origins of the matter dismissed on 20 October 2015. Thus I will apply the usual rule of costs and will award costs on a party and party scale to the respondent.

[46] For the reasons above, I order (1) that the application for rescission of the order of 20 October 2015 be dismissed and (2) that costs be awarded to the respondent.

J KLAAREN
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

[11] Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (Constitutional Court June 3, 2009).

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