

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



CASE NO: A5019/17

Delete whichever is not applicable
(1) Reportable No
(2) Of interest to other Judges No
(3) Revised: Yes

Date: 06/11/ 2018

A. Trautley
Signature.....

In the matter between:

EUPHODIA K. TSATSI

Appellant

and

VIRGIN ACTIVE

First Respondent

HASHEM NOORMAHOMED

Second Respondent

ADV. KAREN GORDON

Third Respondent

PETRE KLEYNHANS

Fourth Respondent

JACQUES HUMA

Fifth Respondent

J U D G M E N T

MAIER-FRAWLEY AJ:

Introduction

1. This appeal, with leave of the court a quo, is directed against the whole of the judgment and order made by Klaaren AJ on 1 February 2017 when he dismissed a rescission application initiated by the appellant, with costs.
2. The grounds of appeal are enumerated in a lengthy notice of appeal, spanning some 42 pages. The drafter of the notice of appeal appears to have adopted a 'wide angle' approach in the formulation thereof, catering for every contingency, even levelling criticisms against the court a quo's summation of the historical background pertaining to the litigation.
3. The pertinent issues arising in the appeal are those based on grounds of appeal that are directed against the court a quo's finding that the appellant failed to provide a satisfactory explanation for her default of appearance in the underlying main application (which led to an order being made on 20 October 2015 dismissing the main application) as well as the finding that notwithstanding that the appellant enjoyed reasonable prospects of success, at least with respect to part of the relief sought in the main application, such a finding did not tip the scales and reverse an explanation for default that was otherwise unacceptable. Further salient grounds of appeal are directed against the finding that neither rule 31(2)(b) or Rule 42(1) of the Rules of court were applicable to the adjudication of the rescission application and, amongst others, the failure by the court a quo to make a ruling on a point *in limine* which had been raised by the appellant in the replying affidavit.
4. A determination of the issues, confined in the terms set out above, has proven to be dispositive of the appeal. For that reason, it becomes unnecessary to consider numerous further grounds on ancillary questions that have no impact on the outcome of the appeal.

5. The underlying main application was brought in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA) for the disclosure of information held by the first respondent (Virgin Active), arising from an incident which occurred at a health club operated by Virgin Active in which the appellant was allegedly subjected to racial and gender abuse and harassment by certain members of Virgin Active in contravention of the club's rules governing the conduct of members, and, by extension, in violation of certain of the appellant's rights as contained in the bill of rights.

6. A decision whether or not to grant rescission involves the exercise by the court of a discretion. The principles relating to the nature and proper exercise of the discretion vested in a judicial officer when making such a decision, and the circumstances in which an appeal court can interfere with the exercise of that discretion, are well established. A court's power to interfere on appeal is limited to instances where it is found that the court of first instance did not exercise the discretion judicially or acted upon a wrong principle, or exercised its discretion capriciously, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons.¹ Albeit in a different context, the constitutional court put it as follows:

'... the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'²

7. A court hearing an appeal against a refusal to rescind a judgment is accordingly not at liberty to upset a decision of the court a quo merely because it thinks that it would have come to a different conclusion on the facts or merely on the ground

¹ See for eg: *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781I-782B and the authorities therein cited; *Kruger v Le Roux* 1987 (1) SA 866 (A) at 871F-G; *Cronje v Pelser* 1967 (2) SA 589 (A) at 592H-593C.

² *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 11.

that if the members of the court of appeal had been sitting as the lower court, they would have exercised their discretion differently.³

8. The relevant facts and principles against which the appeal is to be adjudged, are summarised below.

Relevant facts

9. The appellant is a seasoned legal practitioner who practises as an advocate. She is also a member of Virgin Active.

10. After the launch of the main application in terms of PAIA (which was opposed), the matter was enrolled for hearing on three occasions. It first came to court In April 2015, when the parties agreed to postpone the matter, on which occasion the appellant tendered to pay the costs of the postponement on the opposed scale. The next hearing occurred on 27 July 2015 before Kathree-Setiloane J. On this occasion the appellants heads of argument were not in the court file although the respondents were ready to proceed. As a result, the matter was again postponed, and the appellant was ordered to pay the costs of the postponement on the attorney and client scale.⁴ The matter was specifically postponed to a date and week agreed upon by the legal representatives of the parties, being the week commencing 19 October 2015. During that week, the matter once again served before Kathree-Setiloane J. The matter appears to have been allocated for hearing on Tuesday the 20th October 2015 by the presiding judge. At the time, the appellant was working outside of Gauteng, performing judicial duties in another division.

11. The appellant's counsel appeared in court on Monday the 19th October 2015 to move the application⁵ when it was pointed out that the matter was only allocated

³ See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at 14A-C.

⁴ It is apparent from the transcript of the proceedings on 27 July 2015 that the appellant's counsel conveyed to the court that the appellant was 'grievously at fault' in failing to file her heads of argument timeously on this occasion.

⁵ This was not in dispute on the papers.

for hearing the following day. Whilst the appellant and her legal team were preparing for the hearing the following day, the appellant's counsel became 'unavailable'⁶ and in the result, a 'new counsel' was briefed afresh. Later in the afternoon of 19 October 2015, the appellant's attorneys served a notice of withdrawal as attorneys of record. The appellant appears to have been telephonically informed thereof on the same day.

12. When the matter was called in court on Tuesday the 20th October 2015, the applicant failed to appear in person. She was also not legally represented at the hearing. The appellant's 'new counsel', who held no instructions to appear on her behalf, appeared merely as a courtesy to apprise the court of the fact that the appellant's attorneys had withdrawn and that the appellant was 'working out of town'. An indulgence was sought to stand the matter down until later in the week to enable the appellant to provide an affidavit and also to appoint a new set of attorneys, 'if possible'.⁷
13. In the exercise of her discretion, Kathree-Setiloane J refused the indulgence sought, and granted judgment by default against the appellant, thus dismissing the PAIA application with costs.
14. It was common cause on the papers that the matter was enrolled for hearing at the instance of the respondents on each occasion that it came to court. However, each time it could not proceed as a result of the appellant's conduct, as evidenced, *inter alia*, by the costs orders that were granted against the appellant on each occasion.

⁶ See para 15, founding affidavit, at p.225. Why the appellant's erstwhile counsel suddenly became 'unavailable' during the week in which he was briefed to appear in the opposed motion court, was not explained at all.

⁷ See para 16, founding affidavit, at p.226.

15. On 22 February 2016, the appellant launched an application for rescission of the judgment of Kathree-Setiloane J of 20 October 2015 in terms of the provisions of Rule 32(1)(b) alternatively, Rule 42(1) of the Rules of Court, further alternatively, in terms of the common law. Condonation was also sought for the late filing of the rescission application.

16. The court a quo, per Klaaren AJ, granted condonation but dismissed the rescission application with costs on grounds that:-
 - 16.1. There was no acceptable explanation for the appellant's lack of legal representation at the hearing on 20 October 2015; and

 - 16.2. The appellant enjoyed no good prospects of success in the underlying main application in relation to 8 of the 10 items appearing in the appellant's list of information that had been sought in terms of PAIA .

Relevant legal principles governing rescission

17. As far as the common law is concerned, in *De Wet and Others v Western Bank Ltd*, 1979 (2) SA 1031 (A), Trengove AJA (as he then was), pointed out that in Roman-Dutch law, courts had a relatively wide discretion to rescind judgments obtained in default of appearance on 'sufficient' cause shown. The Appellate Division (as it then was known) held that although no 'rigid limits' were set as to the circumstances which constituted sufficient cause, the courts had nevertheless laid down certain general principles for themselves to guide them in the exercise of their discretion. To this end, and broadly speaking, the exercise of the court's discretionary power was influenced by considerations of justice and fairness, having regard to the facts and circumstances in the particular matter before it.

18. As further pointed out in *De Wet*, these powers were wider than the statutory powers afforded to a court under the provisions of Rule 31 and Rule 42, as the grounds for rescission of a default judgment in terms of these Rules did not cover the case of a litigant who found himself in default because of unforeseen circumstances beyond his control, such as illness or '*some other misadventure; and one could envisage many other situations in which logic and common sense dictated that a defaulting party should, as a matter of justice and fairness, be afforded relief at common law.*' [At 1042H-1043A].

19. In order to obtain rescission at common law, a litigant is required to show '*sufficient cause*'. Under Rule 31(2)(b) the requirement is '*good cause*'. In a long line of cases the courts have held that the requirement of sufficient cause is synonymous with the requirement of good cause. What an applicant is required to show, in essence, is a reasonable explanation for his default (it has also sometimes been described as an '*acceptable*' or '*satisfactory*' explanation)⁸ and a *bona fide* defence to the plaintiff's claim, which *prima facie* has '*some prospect of success*'.⁹

20. An applicant who applies for rescission under rule 42(1)(a) is not required to show good or sufficient cause. It is simply enough if the order was erroneously sought or granted in the absence of that party. Generally a judgment is erroneously granted if there existed at the time of its issue a fact which the court was unaware of, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment.¹⁰ In *Rossiter*, an application for default judgment was lodged with the registrar, purportedly in terms of Uniform rule 31(5)(a), and served on the appellants' attorney. The appellants contended that the default judgment had been erroneously sought and granted because of non-compliance by the respondent with Uniform rule 31(5)(a) read with para 2.3 of

⁸ Some of the cases refer to this as not being in '*wilful*' (deliberate) default.

⁹ *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) 352G; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) 765A-D; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para [11], 9E-F.

¹⁰ *Rossiter v Nedbank Ltd* (96/2014) [2015] ZASCA 196 (1 December 2015) at para [16];

the Practice Manual of the KZN Division of the High Court. It was common cause that the respondent's notice of intention to apply for default judgment was procedurally defective, in that, *inter alia*, it did not provide a time and date on which default judgment would be sought. The court held that '*there can be no doubt that if the registrar had been made aware of the procedural defect in the rule 31(5)(a) notice, default judgment would not have been granted. In Lodhi 2 Properties Investments CC v Bondev Development (Pty) Ltd 2007 (6) SA 87 (SCA), Streicher JA held that if notice of proceedings to a party was required but was lacking and judgment was given against that party such judgment would have been erroneously granted.*' [para 16].

21. In *Lodhi*, Streicher JA went on to state in para [25] that 'a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware... See in this regard *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)* in paras 9-10' (own emphasis). In *Colyn*, a notice had been lost in the defendant's attorney's office, and the defendant accordingly did not appear when the plaintiff applied for summary judgment. Jones AJA held that no procedural irregularity had occurred and that summary judgment had not been erroneously granted.
22. It bears reiterating that a court's decision not to rescind lies within the discretion of the presiding judge. It should be mentioned, however, that a court is bound to exercise its discretion judicially in light of the considerations set out above, and any other considerations which might be relevant.

Court a quo's adjudication of the rescission application in terms of the common law

23. The appellant persists with her contention that the court a quo erred in failing to determine the rescission application under the precepts of either Rule 31(2)(b) or Rule 42(1)(a) of the Rules of court.
24. The criticism is directed against the court a quo's finding that '*Rule 31(2)(b) is inappropriate as it requires that the applicant for rescission should have been in default of intention to defend or of a plea. Here Tsatsi has submitted a plea as well as affidavits*'
25. Accepting that the appellant launched motion proceedings and hence no plea could have been filed, the appellants contention that she was procedurally entitled to invoke the provisions of Rule 31(2)(b), alternatively, Rule 42(1) on the facts of the matter, lacks merit.
26. Rule 31 regulates the procedure for applying for judgment on confession and by default in *action* proceedings.¹¹

¹¹ Rule 31(2) reads as follows:

“(2)(a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in sub-rule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.

(2)(b) A defendant may within 20 days after he has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet.” (own emphasis)

27. 'Action' is defined in rule 1 as 'a proceeding commenced by summons'. Sub-rule 31(2) explicitly limits its application to action proceedings, as is evident from the italicised portion of the quotation in fn 11 below. *Cadit quaestio* (the argument collapses).
28. The appellant failed to appear in court on 20 October 2015, either in person or by means of legal representation. Plainly stated, she was in default of appearance at the hearing of the PAIA application. Her 'new counsel' informed the court that he was not instructed as such in the matter, and although not expressly stated, presumably on the basis that he had not been briefed by an attorney, as is required. All being considered, he would in fact have lacked standing to appear on behalf of the appellant at the hearing.
29. The question then arises as to whether or not the appellant made out a case for rescission of judgment in terms of Rule 42(1)(a). The rule provides that a court may on application of any party affected, rescind an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. The appellant was clearly a party affected by the judgment or order of Kathree-Setiloane J on 20 October 2015, which was also made in her absence.
30. The court a quo found that Rule 42(1) (a) is inappropriate because '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.'
31. In the rescission application, the appellant alleged that the court ought to have granted her an indulgence to stand the matter down on 20 October 2015 when it

was called,¹² given her absence from Gauteng and the short opportunity in which she was expected to procure the services of a new attorney, and given the fact that her erstwhile attorneys had withdrawn at the eleventh hour and had 'left her in the lurch'.

32. Mere withdrawal by a practitioner or the mere termination of a mandate does not entitle a party to a postponement as of right.¹³ A request for a postponement is none other than a request for an indulgence to hear the matter on a date other than at its appointed time. As pointed out by the Constitutional Court, the grant of any indulgence is a matter of judicial discretion. And it cannot be had for the mere asking. It involves a value judgment by the court seized with the matter, based on the facts of the case.¹⁴ In the exercise of its discretion, a court will consider, *inter alia*, whether or not: the applicant has fully explained the true reason for the unpreparedness; whether his or her un-readiness to proceed is not due to delaying tactics and whether justice demands that the applicant should have further time for the purpose of presenting his case.¹⁵
33. 'Higher courts have recognised that one of the oldest tricks in the book is the practise of some legal practitioners, whenever the shoe pinches, to withdraw from

¹² The appellant's further allegations in this regard are somewhat astonishing. In the replying affidavit, she alleges that "...the attorneys and counsel withdrew a day before the hearing. The following morning my counsel went to court to stand the matter down until the new legal team was finalised and the Court refused. People stand matters down all the time. My counsel is not the first person to ask the Court to stand the matter down. The Court is there to assist the litigants, whether the litigant is counsel or not."

In her written argument presented to court, the appellant persisted with the contention, submitting that: "*Setloane J should have asked the Applicant to depose to an affidavit explaining lack of appearance of the attorneys of record at the time, before ordering default judgment against the Appellant...The reasons put forth by the Appellant's counsel for her non-appearance and consequent non-appearance of her attorney should have been sufficient reasons, not only for the Courts to have at least considered holding that the matter be heard a week later, and also in the rescission application proceedings...Setloane J was aware of the reasons [or] facts facing the Appellant and decided to grant judgment in default in the Appellant's absence.*" (own emphasis) The submission is particularly surprising in the light of the fact that no reasons were in fact ever furnished to the court, either on 20 October 2015 or in the rescission application, for the withdrawal of the appellant's attorneys.

¹³ See: *Take and Save Trading CC v Standard Bank of SA* 2004 (4) SA 1 (SCA) at 4H-5B

¹⁴ See: *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC)

¹⁵ See: *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398-9..

the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate of their legal representatives (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement.¹⁶

34. As is apparent from the allegations made in the founding affidavit to the rescission application, Kathree-Setiloane J was only informed that the appellant was 'working out of town' and that her erstwhile attorneys had withdrawn the day before. No explanation was given by the appellant as to why her erstwhile counsel was no longer available; why her attorney of record had withdrawn and why the matter was not ready to proceed a day after it had been conveyed as being ripe for hearing. When confronted with a historical factual scenario in which the matter had previously been postponed on two prior occasions as a result of the applicant's conduct; where the appellant's legal representatives had been ready to proceed on the merits the day before, yet decided to withdraw sometime later the same day without as much as a hint of why this occurred; where the applicant herself had failed to place evidence before the court, at the very least, to explain the circumstances surrounding the withdrawal and the steps that were taken, if any, by her to secure alternate legal representation (or to explain why this could not be done) so as to enable the court to assess whether the true reason for her non-preparedness to proceed at the appointed time of hearing of the matter was due to circumstances beyond her control, and indeed to enable the court to consider the issue of prejudice, if any, that would be suffered by the opposing party in the result; where the appellant had failed to make an appropriate tender for costs in circumstances where she was again not ready to proceed, it comes as no surprise

¹⁶ Per Harms JA in *Take and Save Trading supra*, para [3]. See too Van Loggerenberg's 'Erasmus Superior Court Practise' 2nd ed, vol 2 at D1-555 (I) and the stern warning given by the constitutional court to practitioners regarding compliance with the rules and directives of court in *Van Wyk supra* (at 78B-79C). Having regard to the appellant's position as legal practitioner and her experience in that capacity, she ought to have been aware of the principles governing a request for an indulgence when made to court.

that the presiding judge ultimately exercised her discretion against granting the indulgence sought. In short, the request for a postponement was not properly motivated and remained unsupported by evidence.

35. Perhaps more significant for present purposes, is the appellants own concession that 'Setloane J was aware of the reasons [or] facts facing the Appellant and decided to grant judgment in default in the Appellant's absence.'¹⁷ In the circumstances, it cannot be said that the presiding judge did not exercise her judicial discretion properly. Kathree-Setiloane J was quite entitled to enter judgment against the appellant because she was, in fact, in default. The respondents were also procedurally entitled to apply for default judgment and the judgment so granted was thus neither erroneously sought nor erroneously granted. See *Lodhi supra*.¹⁸ For that reason, the appellant failed to make out a case under the provisions of Rule 42(1)(a).
36. The upshot of the foregoing conclusions is that the court a quo correctly concluded that the matter should be decided under the common law. The appeal on this ground must accordingly fail.

Sufficiency of appellant's explanation in terms of the common law

37. The question to be answered is whether or not the court a quo erred in finding that the appellant failed, in the rescission application, to provide an 'acceptable' explanation for her lack of legal representation on 20 October 2015.
38. The appellant tendered an explanation to the effect that she was acting on the bench in another division and that this made it impossible for her to attend at court on 20 October 2015, as she 'could not be in two places at once'. She specifically

¹⁷ Para 32 of the appellant's heads of argument.

¹⁸ Referred to in para 21 above.

avers in her founding affidavit that although the matter had previously been postponed to a specific date and week, on the Monday preceding the allocated day of hearing on 20th October 2015, *'whilst we were preparing for the appearance for the next day, my erstwhile counsel became unavailable, hence counsel had to be briefed afresh'*. The appellant indicated that the erstwhile counsel's unavailability was not the problem that resulted in judgment being taken by default, presumably because he able to come to grips with the merits of the matter in time for the hearing the following day and was therefore equipped to argue the matter. The real problem, according to the appellant, arose by virtue of the withdrawal of her attorneys of record in the matter.

39. According to the appellant, a junior associate employed at her erstwhile attorneys informed her sometime on Monday that the firm had withdrawn from representing her in the matter at the instruction of the firm's senior partner. Despite her asking the junior associate for reasons for the decision to withdraw, she was not given any 'cogent' reasons for the withdrawal.¹⁹ The notice of withdrawal was filed in the afternoon prior to the day of the hearing. The appellant stated that she could not do much about the situation, even if she had wanted to, as she was working out of town, hence she sent a colleague (counsel) to court to appraise the court of her predicament, which counsel did, but despite which the presiding judge granted default judgment.²⁰ In the words of the appellant, *"it does not take a 'rocket scientist' to realize that it is impossible to organize another attorney firstly when you are taken by surprise a day before the hearing and secondly when you are out of town..."*²¹ Why this was 'impossible', even under those circumstances, was

¹⁹ It is not clear what the appellant intended to convey by means of this statement, i.e., whether she was given reasons which were not valid, clear or convincing ['cogent'], or whether she was not given any reasons whatsoever. The appellant did not reveal the identity of the attorney who was representing her in the matter, i.e., whether this was the senior partner or the junior associate mentioned in the affidavits or someone else employed at Mohlala attorneys (appellant's erstwhile attorneys).

²⁰ Paras 62 & 63, founding affidavit, at p.252.

²¹ Para 47 at pp. 421-422, replying affidavit. The appellant also alleged in the replying affidavit (para 43 at p.420) that there was no wilful default on her part. It was incumbent upon her to provide evidence to support such averment, namely, of the steps taken by her to secure representation in circumstances where she could not appear in person, or, in the very least, to explain why she could not do so. This she failed to do.

simply not explained. After all, the appellant managed, under the self-same circumstances, to procure the services of a replacement counsel,²² who would have had to familiarise himself with the substance of the matter in order to present argument on the merits the following day.

40. The court a quo clearly considered the issue in its judgment, as is apparent from the following excerpt:

“[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 wilful default by not appointing an attorney, particularly in a situation where counsel was ready to proceed.”

41. The appellant indeed did not mention in her affidavits that she had endeavoured to contact any attorney/s for purposes of enlisting their services to represent her in the matter on 20 October 2015, that is, after she acquired knowledge of the withdrawal of her erstwhile attorneys. The appellant merely spoke to some or other junior associate, who informed her of the firm’s withdrawal in the matter, without stating whether or not he was the person who had been her instructing

²² During her career at the Johannesburg Bar, the appellant would undoubtedly have formed collegial relationships with the attorneys who briefed her from time to time, whom she would have had access to via cell phone communication. She would not have had to look far and wide to enlist help. Even if such attorneys had declined to help her, given the short notice, it remained incumbent upon her to place such facts before the court, considering that she was obliged to demonstrate, in the rescission application, that she had not deliberately caused her default of appearance at the hearing of the main application.

attorney at the firm. The appellant further stated in the founding affidavit that an indulgence was sought on the day of the hearing enable her to provide an affidavit and '*to get a new set of attorneys appointed, if, possible.*' (own emphasis). In the replying affidavit the appellant stated that '*My counsel asked the court to stand the matter down until we could find another set of attorneys.*'²³ (own emphasis).

42. The appellant's statements quoted above suggest that she did not in fact endeavour to procure the services of an attorney after obtaining knowledge of the withdrawal, rather, she sought time in which to do so at the hearing on 20 October 2015. Significantly, the appellant did not indicate in her affidavit as to when the appointment of a new attorney was anticipated to occur or that an indication thereof had been given to the presiding judge. On her own version, the appellant was unsure as to whether or not she would succeed in procuring the services of a new attorney.
43. The appellant had, on her version, been preparing with counsel on the Monday for the hearing the next day, this, notwithstanding that she was out of town. In the replying affidavit, the appellant suggested that '*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.*'²⁴ Appellant also averred that she was not to blame for the default of her erstwhile legal team.²⁵ In order to allow for an assessment as to whether or not the appellant was or was not to blame, at the very least she ought to have disclosed the reason for the withdrawal. This would have shed light on whether or not this was a case of the nature described by Harms JA in *Take and Save Trading, supra* (referred to in para 33 above). And that, in turn, would have shed light on whether or not the appellant deliberately refrained from securing legal representation at the hearing of the matter on 20 October 2015. It is, in any

²³ Para 37 at p. 419, replying affidavit. In para 241 at p.488, replying affidavit, the appellant stated that her counsel asked the court to stand the matter down '*until the new legal team was finalised.*'

²⁴ Para 110 at p. 444, replying affidavit.

²⁵ See fn 21 above.

event, inconceivable that the appellant would *not* have demanded an explanation from her erstwhile attorney, especially in the circumstances described by the appellant, that is, where the attorney suddenly withdrew the day prior to the hearing without warning and without 'cogent' reasons, thereby leaving her in the lurch. This notwithstanding, the reason for the withdrawal was not disclosed in the rescission application.

44. The appellant chose to litigate in her personal capacity and given her position and legal experience, ought to have appreciated the consequences for failing to appear at the hearing of the matter at its appointed time, whether in person or by means of legal representation. She ought also to have appreciated the consequences that would follow in the event that she did not provide a full and frank disclosure of all the circumstances that led to the lack of legal representation. As indicated earlier, the appellant had to show good or sufficient cause for rescission under the common law. As pointed out in *HDS Construction (Pty) Ltd v Wait*:²⁶

'When dealing with words such as "good cause" and "sufficient cause" in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words (*Cairns' Executors v Gaarn* 1912 AD 181 at 186; *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352-3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.' (own emphasis)

45. According to the appellant, *'there was nothing more that Counsel could do, considering the attitude of the court which was that judgment by default would be granted and if I felt aggrieved then I would have to bring an application for rescission of judgment. Therefore, in view of the foregoing...the issue of wilful default does not even come into the picture in this particular instance if one factors into the equation the fact that I had left the matter in my legal team's hands with the distinct instruction that the matter be dealt with accordingly and not*

²⁶ 1979 (2) SA 298 (E) at 300 *in fine* – 301 B, referred to with approval in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* (127/2002) [2003] ZASCA 36 at para [11].

*abandoned in the manner that they did.*²⁷ The appellant misses the point. As indicated earlier in the judgment, what *she* did or did not do upon acquiring knowledge of the withdrawal, is what is relevant.

46. The appellant sought to absolve herself from blame by suggesting in the rescission application that she had left the prosecution of the matter in the hands of her attorneys.²⁸ The appellant alleged in the founding affidavit that she was not to blame for the 'default' of her erstwhile legal team that left her in the lurch '*thus creating a state of affairs wherein there indeed just cause to rescind and set aside the judgment obtained by default*'. *What adds insult to injury...is the fact that the court could have given the indulgence of standing the matter down with a view to obtaining an affidavit from me or enabling me to put someone on record, so that Counsel who was in place would then be enabled to appear and argue the matter on my behalf, but unfortunately the court elected not to do that, which effectively railroaded my section 34 constitutionally guaranteed right to be heard in a manner that can be justified in terms of section 36 of the constitution. Matters are always stood down in South African courts for various reasons, for so long as it is not a matter of life and death...Standing this matter down was not going to cause anybody severe damage or harm, and it was not a matter of life or death...For some reason my matter was treated differently from the matters that are usually stood down by counsel in our courts. In the light of the foregoing ...there is indeed just cause ...to rescind the judgment and order granted by Kathree-Setiloane J.'* The appellant's above sentiments were persisted with in written argument presented to court in the appeal.

47. The appellant appears to have expected to be accommodated by the court, simply for the mere asking. It is also apparent that little, if any, thought was given to the

²⁷ In para 62 (at p. 252) of the founding affidavit the appellant alleged that she did not default in any way in opposing the matter and causing it to be prosecuted properly, but rather left the matter in the hands of her erstwhile legal team until her erstwhile attorneys of record 'bailed out' on her the afternoon prior to the day of hearing. According to the appellant, it was their 'default' that caused her default of appearance.

²⁸ See paras 62 at p.262; read with paras 64 at p.253; a 73 at p.259 and 245 at p.490.

rights of the opposing litigants or the inconvenience of the court. Why the applicant assumed an entitlement to be accorded special treatment, different to that of other litigants, who are equally subject to the rules of court, is simply not understood.

48. As pointed out earlier, the reason for the attorneys 'default' was not explained at all. The reasons for the appellant's own inaction thereafter was not satisfactorily explained. As it was put by Jones AJA in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape*:²⁹

'While the courts are slow to penalize a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys (*Saloojee and Another NNO v Minister of Community Development*²³). Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a *bona fide* defence which has not merely some prospect, but a good prospect of success (*Melane v Santam Insurance Co Ltd*²⁴).' (footnotes omitted)

49. In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 E, the court held, *inter alia*, that what is needed is an objective conspectus of all the facts and that the respondent's interest in finality must not be overlooked by a court when exercising its discretion.

50. The court a quo applied the principles propounded in *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A) at 768C³⁰ and *De Wet and Others v Western bank Ltd*

²⁹ At paras [11] & [12], cited in fn 26 above.

³⁰ In *Chetty*, the following was said: "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.* (Cf *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532.) 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." (own emphasis).

1979 (2) SA 1031 (A)³¹ in concluding that the appellant had failed to provide an acceptable explanation for her lack of legal representation on 20 October 2015.

51. The court a quo drew a rough parallel between the events of the present case and the facts in *De Wet*, where 6 litigants were faced with a default judgment due to the withdrawal of their attorneys for 'obscure' reasons at the eleventh hour, without proper explanation. One of the litigants received notice of the attorneys' withdrawal on the Saturday preceding the trial date the following Monday and immediately took steps to appoint new attorneys. The other five litigants only received notice of the withdrawal after the default judgments had already been entered against them at the instance of the other party. The court found that their predicament was not solely due to their attorney's negligence or ineptitude and that they could not be absolved from blame as they had not been in touch with their attorney at any stage of the proceedings but had left the conduct of their case entirely in his hands, thereby, manifesting a complete disinterest in the conduct of their case and proffering no acceptable explanation for their failure to keep in touch with their agent (the litigant who had been advised of the attorney's withdrawal but who had in turn failed to notify the others thereof).

52. Although *De Wet* is not on all fours with the facts of the appellant's case, it has various features in common therewith.³² What is apparent from *De Wet* is that the court was more inclined to exercise its discretion in favour of granting rescission in

In *Ascon Trading CC v Anix Trading 401 CC t/a She Sand And Others* (7309/2011) [2012] ZAKZDHC 32 (8 June 2012) para [7], Mnguni J, in commenting on the aforesaid dicta in *Chetty*, stated as follows: 'It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have judgment against him rescinded on the ground that he had reasonable prospects of success on the merits. (see *Chetty supra*)'

³¹ Relevant passages were quoted in full in the court a quo's judgment and will not be repeated herein.

³² Common features relate to the withdrawal of the attorney at the eleventh hour, thereby letting the litigants down; the short period afforded to the advised litigant within which to arrange alternate legal representation; and the litigants having left the conduct of the case in the hands of their attorney.

circumstances where the advised litigant, who had also left the conduct of the litigation in the hands of his attorney and who was faced with a notice of withdrawal at the eleventh hour, immediately set about making the necessary arrangements to be represented at the hearing.

53. I have difficulty in finding that the appellant tendered a reasonable or acceptable or satisfactory explanation for her default of appearance.
54. The reason for the withdrawal of the appellant's erstwhile attorneys was not explained. As mentioned earlier, it is inconceivable that the appellant would not have demanded an explanation from the specific attorney who had been dealing with her matter, especially if he had no valid reason to withdraw. And if he did have a valid reason, this would in all probability have been conveyed to his client and well as to any counsel whom he had briefed. It is unlikely that an attorney would withdraw without valid reason, given that Attorneys act on the instructions of their clients and, unless otherwise agreed, upon payment of their fees. The applicant remained unrepresented, not because her new counsel, who had taken over the matter at short notice was unprepared, but because he was no longer briefed to appear on the appellant's behalf at the hearing. The appellant failed to explain why she did not or could not contact any attorney to brief him. She was, after all, in telephonic contact with a junior associate from the same firm of attorneys after being notified of the withdrawal. And she was also in telephonic contact with counsel.
55. In the circumstances, it has not been demonstrated that the court a quo failed to exercise its discretion judicially, nor has it been demonstrated that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. It follows therefrom that the appeal on this ground cannot succeed.

56. That then brings me to a consideration of whether or not the appellant's claim for information in the underlying PAIA application carried good prospects of success, sufficient to tip the scale in her favour in the application for rescission, in which regard, see *Colyn*³³ *supra* at para [12]; *Chetty*³⁴ *supra* at 768 (C).

Prospects of success in the main PAIA application

57. The appellant sought access to ten items of information from Virgin Active in terms of PAIA pursuant to Virgin Active having informed her, in a letter dated 20 June 2014,³⁵ of the outcome of its investigation into the appellant's complaint pertaining to the underlying incident referred to in paragraph 5 above.
58. The court a quo considered the appellant's prospects of success in the underlying PAIA application and concluded that she enjoyed reasonable prospects of success, at least in relation to items 1 & 2 on her list of requested information.³⁶ The court a quo however concluded that reasonable prospects of success in relation to only two of the items did not, in the circumstances, tip the scales in the appellant's favour and reverse an explanation for default that was otherwise unacceptable.
59. The appeal is directed against the court a quo's findings in relation to items 3-10 on the appellant's list. All such items were refused on the ground that records of the information did not exist and were thus not in the possession or under the control of Virgin Active, with explanations in some instances having been given as to why this was so, and in other instances, the information sought was refused for certain additional reasons.

³³ Referred to in para 48 of the judgment.

³⁴ Referred to in para 50 of the judgment, read with fn 30 *supra*.

³⁵ The contents of the letter are quoted in full in the judgment of the court a quo and will therefore not be repeated herein.

³⁶ Items 1 & 2 on the appellant's list comprised written statements/affidavits made by the other members involved in the alleged incident.

60. The items of information requested were conveniently grouped into three categories for purposes of evaluation in the judgment. They are: [i] items not disclosed by Virgin Active on the grounds that they do not exist (numbers 3-6 and 8-10); [ii] items relating to statements made by the other persons involved in the allegedly racist incident (items 1 and 2), and [iii] information relating to Virgin Active's statement on 20 June 2014 that all parties involved in the underlying incident were guilty (item 7).
61. As regards the first category, the court a quo concluded that PAIA operates through the concept of a record, as envisaged in section 50 read with section 1 of PAIA³⁷ and that, where information is not contained in records, PAIA does not impose the obligation to create records. A reading of the court a quo's judgment within the context of the discussion outlined in paragraphs 28 to 30 thereof, reveals that the court a quo found that the request within the first category carried slim prospects of success, *inter alia*, because it had not been demonstrated in the rescission application that any recorded information to which the appellant sought access, existed. As regards the third category, the court a quo found that the request in item [7] was 'more in the vein of a request for reasons rather than a request for access to information via records in terms of PAIA'.

³⁷ Section 1 defines a 'record' as follows:

" 'record' of, or in relation to, a public or private body, means any *recorded information*-
 (a) regardless of form or medium;
 (b) *in the possession or under the control* to that...private body...; and
 (c) whether or not it was created by that ...private body..." (own emphasis)

Section 50 reads, in relevant part, as follows:

"(1) A requester must be given access to any *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.

...
 (3) A request contemplated in subsection (1) includes a request for access to a *record* containing personal information about the requester or the person on whose behalf the request is made. "

62. It will suffice, for present purposes, to paraphrase items 8-10 of the appellant's request, together with Virgin Active's additional reasons for refusing the request, where relevant:³⁸
- 62.1. Item 3: Statements of the managers of Virgin Active setting out what the other members had said to them orally, when relaying their versions, including dates and times when this was conveyed;
 - 62.2. Item 4: Written proof of Virgin Active's request to the appellant to depose to an affidavit for the sole purpose of opening a case with the SAPS; [Virgin Active denied ever having made a request in the terms suggested. In the rescission application, Virgin Active put up letters evidencing a request that the appellant substantiate her version on affidavit, ostensibly to reinforce or strengthen the probative value thereof.
 - 62.3. Item 5: The name of the lawyer who advised that only the appellant would have to depose to an affidavit and not the other 4 members involved in the incident; [Virgin Active denied ever so advising the appellant. In the rescission application, Virgin Active confirmed that all the other members involved in the incident had willingly deposed to affidavits in support of their version.]
 - 62.4. Item 6: The rule contained in Virgin Active's rule book that empowers it to request an affidavit from a member in lodging a complaint; [In refusing the request, Virgin Active explained that no rule as such exists that specifically empowers it to do so; that members are informally requested to depose to statements under oath; and that that a member so requested is not obliged to provide an affidavit.]
 - 62.5. Item 7: A request for various particulars pertaining to Virgin Active's finding that all the parties were guilty of unbecoming and unacceptable conduct in terms of the good order and character of the club, Virgin Active and its members; [Virgin Active contended that it owed a duty of

³⁸ Virgin Active's response to the appellant's request for information was contained in a letter 11 July 2014 in which it set out the reasons for denying the appellant's request for access to information. The letter was quoted verbatim in the judgment of the court a quo and need not be repeated herein.

confidence to the relevant third parties and that it was prohibited from granting access to the information in terms of section 65³⁹ of PAIA.]

- 62.6. Item 8: A request that Virgin Active define the meaning of 'conduct unbecoming and unacceptable' within the context of the alleged incident;
 - 62.7. Item 9: How Virgin Active knows that the other members involved in the incident were not racially derogatory or demonstrated extreme prejudice to the appellant; and
 - 62.8. Item 10: a report from Virgin active confirming that no complaint regarding the appellant's driving has been lodged against her during the currency of her membership at Virgin Active.
63. It is well established that PAIA itself leaves no doubt that what may be requested is a 'record'. A record is defined in section 1 as 'any *recorded* information'.⁴⁰ 'Plainly, PAIA does not facilitate an open interrogation about 'information' more broadly. Further, PAIA ought not to be construed in a manner to make it perform a role for which it was not designed'.⁴¹
64. Section 53(2) of PAIA requires the requester to provide (on the prescribed form) sufficient particulars to enable the head of the private body concerned, *inter alia*, to identify *the record or records* requested. As pointed out by Sutherland J in

³⁹ Section 65 expressly prohibits any request from being granted should the said disclosure constitute an action for breach of a duty of confidence owed to a third party.

⁴⁰ Section 1 is quoted in fn 37 above.

⁴¹ Per Sutherland J in the unreported judgment of *Afriforum NPC v Deputy Information Officer of the Presidency* (7376/14) [2015] ZAGPPHC 933 (30 October 2015) at para [7], and, albeit that the case was decided within the context of public organs, the principle remains applicable within the context of private bodies.; See too: Klaaren and Penfold, *Constitutional Law of South Africa*, Chapter 62, paras 62.3 and 62.4. As pointed out by Sutherland J, the authors quip that the name of the statute might better have been 'Access to Records' act. Information sought from a private body that is not contained in a record (regardless of form or medium) could be obtained by means of other channels, such as the institution of litigation invoking, where appropriate, directly, the provisions of the Bill of Rights.

Afriforum supra,⁴² '...These injunctions contemplate the requester being given exactly what was requested and, in my view, no more than what, reasonably construed, was requested. The *defacto* burden of making sure what, exactly, is being requested, falls on the requester... A document is identified by name and by its contents. In my view, the label is *per se* unimportant; what is important is that the description that is given, affords a reasonable official 'sufficient particulars' to identify the document being requested; ie whatever 'record' that exists that contains the information.'

65. In the rescission application, the appellant set out her reasons for wanting access to the information mentioned in her list. In relation to items 8 – 10 on the list, Virgin Active consistently maintained that the information sought was not contained in any records that were in its possession or control. It is clear from the appellants affidavits filed in the rescission application that she was dissatisfied with the findings made by Virgin Active in their letter of 20 June 2014.⁴³ The letter is quoted in full in the judgment of the court *a quo* and for that reason, will not be repeated herein. Suffice it to say that Virgin Active was faced with two contradictory accounts of what had transpired during the incident which formed the subject matter of the appellant's complaint. It was ostensibly for that reason that Virgin active was unable to make a definitive finding against one party in favour of the other. It must be remembered that Virgin Active was not determining guilt or liability pursuant to the infringement of the appellant's statutory⁴⁴ or constitutional rights⁴⁵ or whether or not the persons against whom the appellant had lodged a complaint, were guilty of criminal conduct, for such a determination resides within the jurisdiction of the courts. Virgin Active was merely determining whether or not

⁴² Albeit that *Afriforum* involved a consideration of information that was sought from a public organ, in my view, the remarks of the learned judge would equally find application in the sphere of requests for information directed to private bodies.

⁴³ In that letter, Virgin Active stated that '*all parties involved in this unfortunate car park incident were guilty of conduct that is unbecoming and unacceptable in terms of the good order and character of the Club, Virgin Active and its members.*' In the answering affidavit, the rules of the club, particularly rule 30 and 32 were identified as the relevant rules that had been contravened by all the parties. In relation to the appellant, the finding was made based on statements that were made by the appellant vis-à-vis her own conduct as mentioned by her in her written complaint (at pp. 333-346 of the papers). Incidentally, the appellant's written complaint was introduced for the first time in the answering affidavit.

⁴⁴ A violation of the provisions of The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 ('PEPUDA').

⁴⁵ As enshrined in the Bill of Rights.

a contravention of its own club rules by one or all of the members involved in the incident, had occurred. The appellant submitted that the information sought was to enable her to consider her options 'to take this matter further.'⁴⁶ The rights which the appellant wanted to exercise or protect were specified in the prescribed form that she submitted in terms of PAIA.⁴⁷ Paragraph [G2] of the form required her to explain why the 'record' requested was required for the exercise or protection of the rights mentioned in paragraph [G1] of the form. In paragraph [G1] the appellant indicated, *inter alia*, that she could 'only quash the guilty verdict' [arrived at by Virgin Active] in the event that she was provided with the information that she requested.⁴⁸

66. As pointed out by Virgin Active in the answering affidavit, even if the disclosure of information sought was ordered, it would have no practical effect on its finding since the contractual arrangement between the parties does not permit of any internal appeal against the decision arrived at.
67. Regard being had to that which has been stated in paragraph 7 above, I am unable to conclude that the court a quo was influenced by wrong principles or a misdirection of the facts. It follows therefrom that the appeal on this ground too must fail.

Point in limine

68. The appellant raised a point *in limine* in the replying affidavit for the dismissal of the respondents' affidavit and defence with costs, on grounds that the deponent to the answering affidavit 'does not have sufficient direct knowledge of the facts, cannot swear positively to the facts, and cannot verify the cause of action.'⁴⁹ The

⁴⁶ Para 40.4 at p.236;

⁴⁷ This information is set out in paragraph [G1] at p.263 of the papers.

⁴⁸ The appellant's reasons in paragraph [G1] appear at p.264 of the papers.

⁴⁹ See paras 21 & 22 at p. 208.

appellant takes issue with the fact that the court a quo did not make a ruling on the issue or consider it in the judgment.

69. As appears from the judgment of Klaaren AJ, the issue was not mentioned or dealt with in the judgment.
70. The deponent to the answering affidavit, one Phila Nkosinathi Sikhululu Zulu, is the Legal Director of Virgin Active. In the answering affidavit, he states as follows: 'The contents of this affidavit fall within my personal knowledge, *unless otherwise indicated, or if it appears otherwise from the context*, and is both true and correct. I dealt with this matter personally and I base the contents of this affidavit on the information contained in the documents that are in my possession and under my direct and personal control.'⁵⁰ (own emphasis)
71. Confirmatory affidavits of *inter alia*, the second to fifth respondents were provided in the application. In the replying affidavit, the appellant acknowledged that the second to fifth respondents were the persons who possessed personal knowledge of the matter.⁵¹ Notwithstanding, she persists, on appeal, with the point raised in the court a quo, namely, that the deponent to the answering affidavit did not have personal knowledge of the facts of the matter.
72. In *The Master v Slomowitz* 1961 (1) SA 669 (T) at 672A-D the following was said:

"In general an application must be based on proper evidence (not e.g hearsay) and it must appear from the petition and annexures as a whole that the foundation for relief is so evidenced – it is not merely a question of the petitioner stating that the facts are within his personal knowledge. The very nature of the papers may belie such a statement even though it does appear; or make it unnecessary where it is absent...In exceptional cases an application may be based on hearsay but then the deponent must state that the allegations of fact are

⁵⁰ See para 1.3 at p.290.

⁵¹ See para 50 at pp. 422-423.

true to the best of his information, knowledge and belief and state the basis of the knowledge or belief. The mere omission...of an allegation that the facts are within the personal knowledge of the petitioner is not conclusive - the petition and annexures must be approached as a whole..."

73. In my view, the point *in limine* was a non-starter. In approaching the matter as a whole, there was proper evidence before the court, in the form of an affidavit deposed to by the Legal Director of Virgin Active who disclosed the basis of his knowledge of the facts of the matter, which appears from his position⁵² and from the papers as a whole. In my view, the confirmatory affidavits of various persons, including the second to fifth respondents⁵³ effectively scuppered the appellant's argument. The fact that Klaaren AJ failed to mention it in his judgment is of no real moment in the circumstances.

Appeal against court a quo's Cost order

74. The appeal is directed against the court a quo's finding that 'as for the potential applicability of the principles of the Biowatch case⁵⁴ 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 award costs on a party and party scale to the respondent.'
75. The appellant contended that this was a case involving constitutionally protected rights to information and as such, the court a quo erred in not applying the principles set out in *Biowatch*.

⁵² In which regard, see the comments made by Salduker JA in *Rees and Another v Investec Bank Limited* 2014 (4) SA 220 (SCA) at para 15.

⁵³ Such confirmatory affidavits were provided in the answering affidavit.

⁵⁴ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC) ;

76. *Biowatch* dealt with the proper approach to costs awards in constitutional litigation. The principle which emerged from *Biowatch* is the following: If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door.
77. In *Biowatch*, the Constitutional Court reaffirmed the basic principle that a court of first instance has a discretion to determine an award of costs in the light of the particular circumstances of the case, and that a court of appeal will require good reason to interfere with the exercise of this discretion.⁵⁵
78. Albeit that the appellant was asserting rights protected by the Constitution in the underlying PAIA application, the rescission application involved the invocation of ordinary common law principles to the question of whether or not the appellant had made out a case for rescission for the entitlement to assert her constitutionally protected rights to information in the underlying PAIA application.
79. Much of the debate centred around whether or not the appellant had provided an adequate explanation for her default, and if not, whether a failure to meet this requirement ought to be overlooked, in the event that the appellant enjoyed, *prima facie*, good prospects of success in regard to her request for access to records in which the information sought by her in terms of PAIA was contained. A determination of the rescission application did not therefore primarily involve issues of constitutional import which underpinned the relief sought in the main application. At the end of the day, the rescission application had both its structure and meaningful content based on principles of common law.

⁵⁵ *Biowatch supra*, at para 29.

80. In my view, it has not been shown that the court a quo did not act judicially in exercising its discretion, whether in the sense outlined in paragraph 6 above or in the sense described by Cloete J in *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (T),⁵⁶ namely, whether in exercising the discretion the court committed some ‘demonstrable blunder’ or reached an ‘unjustifiable conclusion.’ It follows that on this ground too, the appeal cannot succeed.

Costs of appeal

81. What remains is the question of the costs of appeal. The basic rules were stated as follows by the Constitutional Court in *Ferreira v Levin NO and Others*:⁵⁷

“The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of litigants and the nature of proceedings.”

82. In my view, the circumstances of this case do not warrant a departure from the general rule that costs should follow the result.
83. A few concluding remarks: A reading of the appeal record reveals that the appellant’s affidavits contain a host of general and broad-sweeping statements and inflammatory comments, which, although understood within the context of an

⁵⁶ Id at 807G-J and 808A-B.

⁵⁷ 1996 (2) SA 621 (CC) at 624B—C (par [3]).

impassioned stance, were predominantly lacking in factual foundation. The appellant's application for leave to appeal, notice of appeal and heads of argument also made reference to certain additional facts which were not contained in the appellant's affidavits to the rescission application, a point which was not lost to counsel who appeared for the respondents, since he alluded thereto in the respondents' heads of argument. Suffice it to say, that such a practise is to be deprecated, not at the very least because it requires a judge to wade through pages of passages in search of evidence that does not exist.

84. For all the reasons given, the appeal falls to be dismissed with costs.

ORDER:

1. The appeal is dismissed with costs.


MAIER-FRAWLEY AJ

I agree:


MAUMELA J

I agree:


FISHER J

Date of hearing:
Judgment delivered

8 October 2018
06 November 2018

APPEARANCES:

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Attorneys for Appellant: Mokuena Attorneys
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