IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

CASE NO: 2700/2008

In the matter between:

ANDRE VAN ZYL MULDER Applicant

and

PHILLIP VAN RENSBURG Respondent

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

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DATE SIGNATURE

JUDGMENT

POTGIETER J

[1] This is an application for the rescission of the order issued in this matter on 22 November 2021 awarding the respondent damages in the sum of R 2 576 600.00 together with interests and costs pursuant to his successful claim against the applicant for having committed adultery with his former wife. The claim was for both patrimonial and non-patrimonial loss.

[2] The matter has a long history and is based on a sordid set of facts involving "incestuous" adultery by means of incidents of *fellatio* between the applicant, who is the respondent's paternal uncle, and the respondent's former wife from whom he was divorced as a direct consequence of the adultery.

[3] The merits and quantum of the claim were separated. After considerable delays, the merits were decided in the respondent's favour in a report judgement handed down on 17 December 2014 ("the merits judgment"). The court found that as a result of the applicant's conduct, the respondent suffered a loss of *consortium* and *iniura* and was entitled to such damages as he may prove he suffered. Apparently unbeknown to the parties as well as the court, the Supreme Court of Appeal delivered a judgement on 25 April 2014 abolishing the delictual claim for non-patrimonial damages that was available to the innocent spouse against the offending third party for having committed adultery with the former's spouse. This decision was confirmed by the Constitutional Court on 19 June 2015. The existing claim for patrimonial loss against the third party was not affected by these decisions. It was left open by the Supreme Court of Appeal and was not dealt with by the Constitutional Court. The upshot is that the claim for patrimonial loss remains extant.

[4] The applicant filed a special plea dated 26 February 2020 to the effect that, pursuant to the said decisions, he was no longer legally liable to pay damages based on the finding of adultery in the merits judgment. The special plea was adjudicated and dismissed in a judgement delivered on 5 May 2020 on the basis that this court was *functus officio* and that the appropriate course was for the applicant to pursue an appeal

against the merits judgement. Applicant's counsel in fact conceded this much at the hearing.

[5] The trial in respect of the quantum was eventually set down for 16 August 2021 but could not proceed on that date and was postponed *sine die* because the applicant's attorney was indisposed. The applicant tendered the wasted costs of the postponement. The respondent's attorneys duly served the new notice of set down for a hearing on 22 November 2021, on the applicant's attorneys on 16 August 2021.

[6] The applicant and his legal representatives failed to appear on 22 November 2021 and the matter proceeded in their absence. It appears from the transcript of the proceedings on that day that the attention of the court was drawn to the abolition of the delictual claim for adultery by the Supreme Court of Appeal and confirmed by the Constitutional Court. Counsel for the respondent disavowed any claim for non-patrimonial damages for *contumelia* given the changed legal position. The respondent proceeded only with the claim for patrimonial loss.

[7] The respondent had given an expert notice and filed the report of an actuary with regard to the quantum of the patrimonial loss. The applicant never filed an opposing actuarial report. The respondent's actuary was called to testify and basically confirmed the report and the calculation of the patrimonial loss in the total sum of R 3 122 166.00. This amount exceeded the quantum claimed in the particulars of claim. The respondent, however, elected not to amend the particulars of claim to increase the quantum of the claim. After conclusion of the testimony of the actuary, the respondent did not call any further witnesses and closed his case.

[8] The court granted an *ex tempore* order, without reasons, directing the applicant to pay damages in the lesser amount claimed in the particulars of claim, namely R2 576 600.00 together with interest and costs ("the quantum order").

[9] The applicant is now seeking the rescission of the quantum order in terms of rule 42(1)(a), alternatively in terms of the common law. In order to succeed under rule 42(1)(a), the applicant must show that the impugned order was erroneously sought or granted in his absence. In terms of the common law, the applicant must show good or sufficient cause for the rescission of a default judgement. This entails that the applicant must give a reasonable and acceptable explanation for the default, show that the application is made *bona fide*, and show a *bona fide* defence on the merits, which *prima facie* has some prospect of success (Erasmus *Superior Court Practice* 2ed D1-565).

[10] The pith of the applicant's argument that the quantum order was erroneously granted as envisaged in rule 42(1)(a), is the contention that the respondent's *viva voce* evidence was necessary for the determination of the quantum of damages suffered by him. The respondent countered that this was not necessary because the merits judgement found that he sustained damages and that in any event the applicant had admitted in the plea that he suffered the damages as claimed. These issues require closer consideration.

[11] The respondent's contention that the applicant had admitted the damages claimed is based on the following averments in paragraph 8.1 of the plea, which responded to details of the damages suffered by the respondent as set out the particulars of claim:

> *"The Defendant has no knowledge of the Plaintiff's damages and cannot, therefore, admit or deny same."*

[12] The respondent relied on the provisions of rule 22(3) for the contention that the applicant is deemed to have admitted the respondent's damages. It turned out that the respondent might have relied on an erroneous version of the subrule that appears in some of the well-known textbooks on the rules of court. The correct version of the subrule as published in Government Notice R48 of 12 January 1965 is as follows:

> *"Every allegation of fact in the combined summons or declaration which is not stated in the plea to be denied or to be not admitted, shall be deemed to be admitted. If any explanation or qualification of any denial is necessary, it shall be stated in the plea."*
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> (emphasis supplied)

In some publications the word "*not*" is omitted in the second line above between the words "*to be*" and "*admitted*". The applicant might have been misled by this omission. It is not hard to imagine that the omission makes a significant difference to the proper construction of the subrule.

[13] The contention of the respondent is that paragraph 8.1 of the plea amounts to neither an admission nor a denial. The averments in the particulars of claim specifying the damages suffered by the respondent and to which paragraph 8.1 of the plea responded are thus deemed to be admitted by the applicant. The quantum court could therefore have entered judgement in favour of the respondent without hearing any evidence. It is thus wrong to argue that the quantum order was erroneously granted. Furthermore, according to the respondent, the applicant would in any event not have been entitled to cross-examine the actuary, given the nature of his plea. Reliance was placed in this regard on *Ntshokomo v Peddie Stores* 1942 EDL 276 at 283 [*"Ntshokomo"*] and *Standard Bank Factors Ltd v Furncor Agencies (Pty) Ltd* 1985(3) SA 410 (C) [*"Standard Bank Factors"*].

[14] The applicant contended that paragraph 8.1 of the plea is a non-admission, which on the relevant authorities, amounts to a denial (*Standard Bank Factors supra; N Goodwin Design (Pty) Ltd v Moscak* 1992(1) SA 154 (C) at 163G-H) [*"Goodwin"*]. The damages claimed by the respondent was accordingly never admitted but in effect denied by the applicant. It was therefore incumbent on the respondent to establish the claim. The respondent's submission to the contrary was unfounded and based on an

incorrect version of the subrule. This caused the quantum court to err by granting the quantum order without any evidence from the respondent himself.

[15] In my view, paragraph 8.1 of the plea in fact amounts to a non-admission as envisaged in both subrules 22(2) and (3). The former allows the defendant the option to "*… state which of the said facts* [in the combined summons or declaration] *are not admitted and to what extent".* I agree with the applicant's submission that the effect of a non-admission is similar to a denial. I incline in this regard towards the view expressed by Van den Heever J in *Goodwin* that where the plea responds to averments in the particulars of claim that do not or cannot fall within the knowledge of the defendant, as in the present matter, there is no difference in effect between a denial and not admitting an allegation. The distinction is a matter of emphasis, a denial being more emphatic than a non-admission. In either case, the defendant is entitled to cross-examine the plaintiff's witnesses and to lead rebutting evidence. The comments in *Ntshokomo* concerning the right of the defendant to cross-examine does appear to go too far and to be an *obiter dictum.* It is not necessary for present purposes to express a final view in this regard. In any event, the situation in *Ntshokomo* is distinguishable. It concerned an exception to a plea raising a non-admission in circumstances where the defendant's allegation that he had no knowledge of the plaintiff's averments was not likely to be *bona fide,* since it was based on apparent ignorance of the defendant's own affairs. In the present matter, the quantum of the respondent's damages claim is not a matter of which the applicant should ordinarily be aware but rather an issue, which does not involve any knowledge on his part. A similar situation obtained in *Goodwin.* Furthermore, *Ntshokomo* was decided before promulgation of the present subrule 22(3) in 1965. It follows that paragraph 8.1 of the plea cannot be deemed to have admitted the damages as claimed in the particulars of claim. If this were so, there would have been no need to separate the merits and quantum of the claim. The respondent's submission that the damages were admitted in the plea, is therefore misguided.

[16] In my view, however, it was not necessary for the quantum court to hear *viva voce* testimony from the respondent in order to decide the quantum of damages. The

patrimonial loss that the respondent claimed and that was awarded to him was dependent on actuarial assessment for purposes of quantification. The respondent could not add anything in this regard. The actuary confirmed that his calculation was an accurate reflection of the evidence and the extensive discovered documentation. There was nothing new that the respondent could add in the circumstances and his evidence would have been superfluous. The actuary's calculation was clearly based on documentary sources and there was no need, contrary to the applicant's contention, for the respondent to confirm any data undergirding the calculation. In any event, the discretion of the court to determine what would be a fair and reasonable damages award in the light of all the facts and circumstances remained unfettered and was not bound by the evidence of the actuary, which was but one of the relevant factors.

[17] In those circumstances, the quantum court did not err as envisaged in rule 42(1)(a) by issuing the quantum order on the available evidence. This is what is required of the court in making damages awards: to do the best it can to make a determination of the quantum of a claim on the available evidence where it is clear that the claimant suffered a loss, such as in this case. By the same token, there is no merit in the applicant's argument that the evidence of the actuary lacked any probative value in the absence of *viva voce* testimony by the respondent. It was for the quantum court to decide the weight that had to be attached to the evidence of the actuary. Even if it possibly erred in this respect, it does not constitute a ground for rescission in terms of Rule 42(1)(a) in contradiction to being a possible ground for appeal. There is also no merit in the contention that the actuary usurped the role of the quantum court by commenting on the reasonableness of the quantum as assessed by himself. This is a perilous submission. The actuary's comment in this regard was clearly aimed at the reasonableness of the calculation in the light of the supporting evidence and documentation. It was clearly not aimed at dictating to the quantum court what damages award should be made. Even if it were, it is clear from the transcript that it was ineffectual and did not serve to *"displace"* the function of the quantum court that patently exercised an independent discretion in this regard.

[18] The applicant has accordingly failed to make out a case for the rescission of the quantum order in terms of rule 42(1)(a).

[19] The alternative ground for assailing the quantum order is based on the common law. It is trite that at common law a judgement can be set aside where it had been granted by default. The requirements in this regard have been set out earlier in this judgement. To recap, the applicant must give a reasonable explanation for the default, show that the application is *bona fide*, and the existence of a *bona fide* defence on the merits, which *prima facie* has some prospects of success. These requirements are conjunctive.

[20] The applicant fails in my view on the first requirement. The explanation offered for the default was that the applicant was unaware of the date for the quantum trial. It is not in contention that the applicant's legal representatives were aware of the initial hearing date, being 16 August 2021, when the matter could not proceed because his attorney was indisposed. The notice of set down for the new date, being 22 November 2021, was duly served on the applicant's attorneys also on 16 August 2021. Proper and sufficient notice of the new date was duly given to the applicant. The applicant alleges that his previous attorney informed him that the notice of set down for the new date was somehow misplaced in their office. The fatal flaw in this regard is that there is no affidavit from the attorney substantiating this allegation. It is to be expected, if this were so, that the attorney (as an officer of the court) would have grabbed the opportunity to explain to the court that she was not to blame for the failure to appear on 22 November 2021. This is particularly so in view of the fact that the applicant's new attorneys have threatened her with legal action. The fact that her relationship with the applicant might have become strained, would not have detracted from, but would have reinforced the attorney's desire to set the record straight. The applicant appears to imply that the strained relationship is the reason why there is no affidavit from the attorney. However, he does not indicate that he or his new attorneys took any steps to obtain such affidavit, which is pivotal to the explanation for his default. It is also strange that his former attorney, well knowing that the matter was being postponed at her request, would not

have followed up in the period subsequent to 16 August 2021, when the matter was postponed, with the respondent's attorneys with regard to the new date. A period of more than 3 months had elapsed before the matter was heard on 22 November 2021. Even if the applicant had engaged new attorneys during that period, there is no reason why the new attorneys or even the applicant himself would not have similarly followed-up with the respondent's attorneys with regard to the new date. It is also peculiar that in the threatening letter dated 6 April 2022 (which preceded the answering affidavit which was deposed to on 8 April 2022 and filed on 14 April 2022) from the applicant's new attorneys to his former attorney, there is no mention of the allegation in the answering affidavit that the notice of set down for 22 November 2021 was misplaced in the offices of his former attorney. This was clearly material information explaining the default, which could be expected to have been dealt with in the letter. This explanation does not have the ring of truth and strikes me as an afterthought and an attempt to conjure up an explanation, which shifts the blame for the default away from the applicant and on his former attorney. It is not clear whether the former attorney is even aware of any of these allegations.

[21] In my view, the explanation for the default is neither reasonable nor acceptable in the circumstances. It is therefore not necessary for me to deal with the remaining requirements, save to say that the rescission application has not struck me as being *bona fide* given the surrounding facts nor that the applicant has shown that he has a *bona fide* defence with *prima facie* prospects of success. The applicant has accordingly also failed to make out a case for the rescission of the quantum order in terms of the common law.

[22] In the result, the application is dismissed with costs.

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D.O. POTGIETER

JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff:	Adv Paterson, instructed by Helen Ellis Attorney, c/o Pagdens Attorneys, 18 Castle Hill, Central, Gqeberha
For the Defendant:	Adv Theron, instructed by D Gouws Inc. Attorneys, 136 Cape Road, Mill Park, Gqeberha
Date of hearing:	01 September 2022
Date of delivery of judgment:	15 November 2022