C. of A (CIV)9 of 1982.

IN THE LESOTHO COURT OF APPEAL

In the matter between :

LIMPHO LESOLI — APPELLANT

and

NTHABISENG MPHEULANE — RESPONDENT

HELD AT MASERU

Coram : SCHUTZ J.A.
VAN WINSEN J.A.
STEYN A.J.A.

J U D G M E N T

This matter comes before us by way of appeal from the judgment of the Chief Justice. The appeal is directed at the whole of the judgment in terms of which the following order was made:

> 'Judgment for the Plaintiff in the sum of M4173 with 6% interest from the date of the Judgment, and taxed costs on party and party scale, including the costs of CIV/APN/30/81, such costs to go into the revenue of the Chief Legal Aid Officer under the provisions of s.10(5) of the Legal Aid Act 1978 (Act No. 19 of 1978).'

The above order was made by the Chief Justice pursuant to an action instituted by Respondent, (Plaintiff in the Court a quo, and referred to as such herein) against Appellant (Defendant in the Court below and referred to as such) for damages and certain other financial relief arising out of an alleged seduction.

In the annexure to the notice of appeal, the following grounds on which the judgment of the Chief Justice is challenged are set out:

> '1. That the Honourable Mr Justice T S Cotran erred in finding that Mrs Manthabiseng Pitso was not prepared to become involved more than she had already been and accordingly disregarding her clear evidence contradicting the Respondent.

2. That the Honourable Mr Justice T S Cotran erred in finding that the Appellant is a man without the slightest scruple.

3. That the Honourable Mr Justice T S Cotran erred in accepting Respondent's evidence above that of the evidence given by Appellant.

4. That the Honourable Mr Justice T S Cotran erred in finding that Respondent's evidence need not be corroborated in the claim for seduction.

5. That the Honourable Mr Justice T S Cotran erred in not allowing absolution from the instance under claim A.

6. That, in respect of the claim for seduction, the Honourable Mr Justice T S Cotran erred in awarding damages for the full bohali and not the reduced bohali by virtue of the alleged seduction.'

I proceed to summarise the facts.

Plaintiff, then aged about 16, met the Defendant, then aged about 45, at a bus stop in Maseru town. She was looking for work as a domestic servant. She was an orphan brought up by her grandfather, but he too had died in 1979 and it would seem as if she was then destitute.

Defendant did employ Plaintiff as a housekeeper, but there is a dispute between the parties as to whether there was any agreement about monthly wages and whether such wages were ever paid.

Plaintiff alleges that it was whilst she was in Defendant's employ and some time before May 1980, that Defendant had had intercourse with her and that as a result of this intercourse she became pregnant. The Chief Justice in his judgment summarises her evidence thus :

'The Defendant left Motimposo with the Plaintiff in January 1980 and rented a room in another locality in Maseru from a landlady called Manthabisent Pitso (PW2). The Plaintiff says life went as usual until some days before May 1980 when the Defendant fondled her. After a day or two he invited her to have sex with him, saying she 'had many pimples on her face'. She testifies that she did have pimples on her face then but refused his suggestion. She had never been with a man before. She says he slapped her and sjamboked her with a small whip. She screamed (not for long) but finally submitted. He had intercourse with her several times during that one night, but no intercourse took place thereafter.'

Plaintiff called Mrs Pitso to testify, but her evidence did not provide corroboration for the Plaintiff's version that Defendant had had intercourse with her. What is of significance is that Mrs Pitso, having observed Plaintiff's condition at the end of November or early December, informed the Defendant about it. According to her, Defendant gave her some money (M1.20) to take the Plaintiff to consult a doctor. She took Plaintiff to the Queen Elizabeth II Hospital where it was confirmed that she was some 7 months pregnant.

Defendant gave evidence. He denied the Plaintiff's allegations that he had intercourse with her on that one night in 1980. He alleged that she was a girl of loose character and that he had seen her out with boys and had consistently warned her about the dangers of her conduct.

Insofar as the appeal on the merits of the matter is concerned, the issue was one of credibility. The Learned Chief Justice made the following comment concerning the Plaintiff.

> 'Her evidence was, however, given in a matter-of-fact way, devoid of emotion, and rather impressive for an 18 year old.'

The Learned Chief Justice goes on to say that the Defendant struck him as 'a man without the slightest scruple'. He (the Chief Justice) goes on to find that the Defendant was capable of inventing evidence and it is clear from his analysis of the Defendant's testimony that he found him to be unworthy of credence, whilst on the other hand he was "completely convinced that what she (Plaintiff) told him about the Defendant was substantially true".

The Chief Justice found that the Plaintiff was entitled to damages for the assault to which she deposed. He held that this was not a major assault and he awarded her M100 under this head. On the issue of damages for the seduction, the Learned Chief Justice had the following to say :

> 'Damages for seduction is a more difficult matter. If she had a father, or a person who stands to her in loco parentis, in a rural or even an urban atmosphere or society, he would have been able to claim and succeed in getting from the guilty party 6 heads of cattle or the present equivalent of M200 per head making a total of M1200 (laws of Lerotholi Part II s.6 and see Duncan Sotho Laws and Customs page 107). But from that source she has no one to claim and most probably her breach with custom is now complete or nearly so. Should this Court adopt this measure of damages? I think not :
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> In Basotho society the parents do not, on their daughter's seduction, lose her or the wealth she might bring. She remains for all intents and purposes part and parcel of their household and if she gives birth to a child that child is theirs and bringsit up accordingly. Her seduction is often converted into a fully fledged marriage. Were this not to happen

> true her marriage prospects are diminished, and it is even more true that if a suitor does in due course emerge, that he or his parents, would insist, or try to, on paying less 'bohali' than the normal one of 20 heads. Nevertheless, the girl and her child (or children) are at least assured, for the duration of her parents life time perhaps beyond, of a great measure of sympathy and support. The Plaintiff in the case before me has none of these advantages. I think I have to, in the assessment of damages for seduction, bear this in mind. It would be inequitable not to. Under this head I think I am justified in awarding her the full equivalent in money terms of what her parents, if she had any, would have benefited (that is 20 heads at M200 viz M4000.'

The above brief summary forms the basis upon which the order against which the appeal is directed, was made. Defendant appeared before us in person. Regrettably, his argument was of little assistance to us. In fact much of the time was taken up with attempts on his part to give evidence or to make completely unsupported allegations of prejudice against the presiding judge and officials of the court.

It accordingly is necessary for us to examine the evidence and the findings of the Chief Justice with reference to the grounds of appeal set out in the notice. A reconsideration of the evidence convinces me that no reasonable grounds exist why we should conclude differently from the court a quo on the critical issue of the credibility of the two principal actors. There is certainly considerable ground for finding that Defendant was a lying witness and that he deliberately fabricated evidence in order to impugn the character of the Plaintiff. The deliberate fabrication of this evidence must, as indeed it did, have weighed heavily against him in determining whether or not the Plaintiff had discharged the onus which rested upon her.

7/....

I wish to deal specifically with a ground of appeal on the merits which perhaps requires more serious consideration than the others. I refer to the ground which contends that the Learned Chief Justice 'erred in finding that Respondent's evidence need not be corroborated in the claim for seduction'.

The South African courts held for many years that in seduction and paternity cases, a woman's testimony against a man's, requires corroboration. This rule of practice was, however, finally abandoned in Mayer vs Williams 1981 (3) S.A. 348 (A). In summarising the reasons for this conclusion, Trengove, J.A. says the following :

'(a) the rule is based on a misunderstanding of Roman-Dutch procedure in actions of this nature (see Davel vs Swanepoel (supra at 388); F P van den Heever Breach of Promise and Seduction in SA Law at 51-59; Schmidt Bewysreg at 48);

(b) it seems to me to be an anomaly that

"in any field of investigation a greater certainty of proof may be required where civil rights are in issue than when a person is being tried criminally". (See R v W (supra at 779-780));

(c) the rule as formulated is, in my view, inappropriate in our modern system of civil trial procedure. (See F P van den Heever (op cit at 59); Hoffman SA Law of Evidence 2nd ed at 410); and

(d) the rule appears to have been excluded by the provisions of s 16 of Act 25 of 1965.

I am of the opinion, therefore, that courts should no longer, as a matter of law, insist upon corroboration of the evidence of complainants in paternity or seduction cases.'

He continues in his judgment, however, to confirm that in cases of this nature there is a need for special caution in scrutinising and weighing the evidence of the complainant. He goes on to say -

'Experience has shown that it is essential for the purpose of doing justice between the parties in this class of case -

where allegations of paternity are so easily made and with such difficulty rebutted, and where there is often a strong temptation either to conceal the identity of the real father or to impose liability upon the person who is best able to bear it - that the evidence of the complainant should be approached with caution. As a rule of practice the trial court should, therefore always warn itself of the inherent danger of acting upon the testimony of the complainant in a paternity case.'

This reasoning commends itself to me. The importation of an artifical criterion of corroboration in a particular class of case as a prerequisite for the Court's finding, does seem to me to be 'inappropriate in a modern system of civil trial procedure'. At the same time, however, I would confirm the need for caution in adjudicating upon the responsibility of a complainant's testimony in cases of this kind for the cogent reasons advanced by Trengove, J.A.

Applying these criteria to the facts of the present case, I am satisfied that -

(a) the Learned Chief Justice did not err in holding that corroboration of the Plaintiff's evidence was not required as a matter of law;

(b) a careful scrutiny of his judgment confirms that he approached the evaluation of the Plaintiff's testimony with the requisite degree of caution and that his acceptance of her evidence as clearly preferable to that of the Defendant, should be sustained.

For these reasons the appeal on the merits should be dismissed.

Insofar as damages for the assault is concerned, it seems to me that there is no basis upon which this court is entitled to interfere with the award of M100 as damages for the assault.

I have set out above the Learned Chief Justice's reasoning which underpinned his substantial award for damages in respect of the seduction.

To the uninitiated, the approach of the Learned Chief Justice may, at first blush, appear to be somewhat unusual. However, there is support for his view in the authority he cites. I must also record that a first reaction to the quantum of damages awarded is that it is clearly generous. The following considerations do, however, have to be taken into account:

1. Plaintiff was at the time the seduction took place, a very young girl of 16 or at the most 17 years of age.

2. She was to the Defendant's knowledge an orphan and totally destitute.

3. By taking her into his home at this youthful age he, in a sense, assumed a kind of trusteeship over her.

4. He is a mature man whose judgment and sense of responsibility should have been well developed.

5. He acted throughout in a callous, inconsiderate manner. Moreover he persisted, right up to the time that he appeared in this court, in maintaining an arrogant attitude totally devoid of compassion or concern.

In Defendant's favour one must take into account the fact that he did not persist in his seduction of the Plaintiff and that the pregnancy was the consequence of a single series of aberrations during the one night.

Weighing up these factors, I have come to the conclusion that whilst the award is clearly generous and may well have been more than I would have awarded, the disparity is not such that I deem it appropriate for this court to interfere.

I would accordingly dismiss the appeal with costs. I order that such costs are to go into the revenue of the Chief Legal Officer under the provisions of Section 10(5) of the Legal Aid Act 1978 (Act No. 19 of 1978).

J H STEYN
ACTING JUDGE OF APPEAL

I agree:

W P SCHUTZ
JUDGE OF APPEAL

I agree:

L VAN WINSEN
JUDGE OF APPEAL

Delivered at MASERU this 6th day of July 1983.