SEDUCTION IN NATIVE LAW

Seduction is the carnal connection of a man with a woman who is a virgin, which gives rise to a claim for compensation in damages against the former by the father or guardian of the woman, the damage consisting in the loss of her virginity and the consequent deterioration of her marriageable value in the marriage market.

Seduction and Consent

As a rule in cases of this kind the seduction takes place with the consent of the woman affected. This does not however affect the question of the liability of the defendant especially because in Native Law differing in this respect from the Common Law of South Africa the injury in seduction is presumed to be caused not to the woman concerned but to her father or guardian.

Volenti non fit Injuria

In South African law the action for seduction is regarded as a departure from the general principle that where there has been consent there can as a general rule be no injuria or wrong in the eye of the law, the maxim of S.A.Law being volenti non fit injuria. As seduction implies consent on the part of the woman there ought in that system of law to have been no legal right on her part to an action for damages, but this exception was made to the general rule by the laws of the Netherlands because of the supposed frailty and weakness of women, the action being regarded as sui generis.

In Native Law on the other hand the question of the consent of the woman does not arise; it is of the essence of the seduction in that legal system that because the injury is not to herself but to her father or guardian. It would only be in the .....event of the consent of the latter having been obtained that the question would presumably arise.

Seduction and Virginity

It must be noted that in order that any action for seduction should lie, the woman concerned must have been a virgin at the time of the seduction. If it can be

shown by the defendant that at the time of the alleged seduction, the woman in question was not a virgin, that for example, she had previously had a child by another man, no damages for seduction will be granted. (see Daniel vs Sicinsi, 4 N.A.C.320).

But it must be remembered that under Native Law as is the case in Roman-Dutch Law the virginity of an unmarried woman is presumed and the onus of proving the contrary is upon the person disputing it (Siqonga Nojantsholo vs Nkosana and Mbitwa Godo, 1941 N.A.C.(C&O) 26). In South African Law no action lies for the seduction of a widow or a woman who had prior to the seduction already lost her virginity by sexual connection with some other man. Subsequent connection with other men does no however remove the liability of the original seducer. The position would appear to be the same in Native Law, unless pregnancy supervenes.

Seduction and Pregnancy

Where the seduction is followed by pregnancy amongst most native tribes the seducer is liable for damages even if the woman was not a virgin at the time of the connection. Strictly speaking in such a case the damages are for the pregnancy caused rather than for the seduction. As was stated in the case of Ndawokwelo vs Meleni Tongo, 1941 N.A.C.(C&O)41 damages may be recovered for the seduction of a 'dikazi' (i.e. a woman who is not a virgin) if it is followed by pregnancy. (see also Joel Maqunqu vs Mvakwendu and Elijah Baleni, 3 N.A.C. 259; Njovane Nkohla vs Nqamlana Rakana, 4 N.A.C.321; Qunta vs Qunta, 1940 N.A.C. (C &O)123. In Ndawokwelo's case the question was raised as to whether, in the event of a miscarriage following pregnancy, the defendant is entitled to absolution from the instance in an action for the seduction of a woman who was not a virgin. The court held that the fact that where seduction has been followed by pregnancy the injured party is entitled to damages

for the pregnancy, whether the woman concerned is a virgin or not, and the fact that a miscarriage takes place after the pregnancy does not alter the fact that the pregnancy followed the seduction.

An important element in actions for seduction in Native Law and Custom is the necessity on the part of the party injured to bring the matter to the notice of the seducer timeously. As was pointed out in Dumile Dalisile vs Stephen Dungulu and Anor, 12 NA.C.(C&O)86 failure to report timeously in Native Law is a most detrimental feature in a case for seduction.

A distinction must however be drawn between a report to the seducer by the girl and a report by the parents. The girl may delay in making a report to her parents, or guardian, but if the parent or guardian acts timeously as soon as he becomes aware of the pregnancy, his right to damages will not be affected. (Julius Thai vs Robert Cakata, 1943 N.A.C.(C&O).

The Injured Party

As has been indicated already, the injured party in seduction under Native Law and Custom is the parent or guardian, and consequently the duty to act timeously rests upon him rather than upon the woman. It is therefore his delay in acting after he has become aware of the true facts of the situation either as a result of a report made by her to him or otherwise that may prove fatal to his claim for damages.

As to what period of delay must be regarded as detrimental in a case of seduction will depend upon circumstances. Where a report of seduction and pregnancy was only made three months after the birth of the child, the delay was regarded as fatal,(see Tsoali vs Lebenya, 1940 N.A.C.(C&O). But in another case where the delay amounted to only 14 days the delay was condoned (Julius Thai vs Robert Cakata, 1943 N.A.C.(C&O). As was emphasised in this case: "Courts are entitled to draw adverse conclusions from any delay in reporting a pregnancy,

(presumably the same principle would apply to a seduction not followed by pregnancy), but the law as enunciated in Tsaali's case in which a report was only made three months after the birth of the child should not be extended to apply to cases where the circumstances are entirely different and thus deny an injured litigant the right to prosecute his case". In a case in which there had been a delay for 19 years in bringing an action for seduction and pregnancy the court pointed out that although prescription as such was not known or recognised in Native Law, native assessors in quite a number of cases had stated that delay in bringing action, for which no satisfactory explanation can be given, militates, in most cases very strongly against a Plaintiff and in some cases even debars him entirely from succeeding, and in the case in question the court accepted this expression of opinion, although it was argued by the Plaintiff that prescription was unknown in Pondo custom on which he was relying. This latter view was, however, not supported by the Pondo assessors who adhered to the opinion that a Plaintiff must take action forthwith (see Mbizwa Ndezi vs Nkosile Gxonono, 1941 N.A.C.(C&O) p.36).

Seduction and Ukumetsha:

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Where there is conclusive proof of the seduction as is evidenced by the pregnancy it only remains to decide whether the defendant is responsible for it. It the defendant admits having indulged in the practice of ukumetsha with the woman, but denies actual connection whereas the woman alleges actual connection, corroboration of her word is supplied by the fact of her actually having given birth to a child. (See Makuta vs Fihla, 1936, NAC(C&O)10) Under the custom of ukumetsha full intercourse does not as a rule take place, but semen is emitted between the thighs of the girl in close proximity to the vagina and it is therefore possible that some of the protozoa may find their way into the womb and so cause pregnancy. That conception may take place as a result of incomplete penetration is clear from the case of Selbourne Bokwe vs Dorothy Kabane,

Makuta vs Fihla, 1936

man and he can only escape ~~xxix~~ liability by conclusive proof of the impossibility of the child being his (See Stander vs Macdonald, 1935 H.C.S.W.A.). The position under Native custom is set out in James Sontunda vs Student Damane and Jongilanga Damane, 3 N.A.C.261 in which the Native Assessors stated:- "Under Native custom, if intercourse is proved the woman's statement as to the paternity is usually believed although more than one man may have visited (i.e. "metsha"-ed with) her, but there are cases where if it is shown that these men all visited her about the time the conception took place, then the case ~~goes~~ is postponed until the birth of the child, and the case goes against the man to whom it bears its resemblance". (See Siqonga Nojantsholo vs Nkosana and Mbitwa Godo, 1941 N.A.C.(C&O)26. Reference may also be made to the case of Maseti vs Maciti (1 N.A.C.26) which is instructive on the question of what the defendant who denies paternity where carnal connection is established must prove in order to escape liability. The Court said:- "It is a well established fact that the only person who can positively state whether paternity ensues or not from an act of co-habitation is the woman. No sufficient reason has been advanced why greater benefit or advantage would accrue to the woman from charging the defendant as the father of the child than if she had attributed that responsibility to anyone else. It is a most unusual thing for an unmarried girl to deny the paternity of her child, such an act being regarded as not only disgraceful to herself but to her offspring. Natives consequently attach very great importance to a mother's evidence and in that view this court agrees".

(In an ~~x~~ unusual case which was heard by the Native Appeal Court (Cape and Orange Free State) the defendant in an action for seduction and pregnancy brought forward medical evidence to show that at the time the conception was supposed to have taken place he was suffering from a venereal disease, and that if he had been responsible for the seduction and pregnancy the woman concerned would have contracted the disease and would not have given birth, as she had in fact done, to a healthy normal child. Expert medical opinion, which was called, was to the effect that "it is possible but improbable for a man infected with gonorrhoea to live with a woman and not infect her with the disease.

The defendant was granted absolution from the instance (Abegail Potwana vs Nelson Sigcau, 1943 N.A.C.(C&O).

The Right to Sue

Under Native Law and Custom the proper person to sue in an action for seduction is the father or guardian of the seduced woman. As already indicated the principle of Native Law is that the injury caused by the seduction is suffered by the father or guardian of the woman concerned. Her father or guardian has a vested interest in the property which by custom must be made over to him by the prospective bridegroom upon her marriage, and the deterioration of her marriageable value in the marriage market as a result of the seduction affects adversely his (i.e. the father or guardian's) property rights. It is these property rights that he seeks to make good in an action for seduction. It is presumed that no prospective bridegroom will be willing to give as much by way of lobola or bogadi for a woman who has lost her virginity as for one who had not and this impairment of her marriage prospects must be made good by the seducer (see Lesley Mkatshwa vs Daniel Tabalaza 1942 N.A.C. (C&O)3. Property rights in Native Law devolve only on males through males and therefore it is only her legitimate father or his male heir in whom these rights are vested.

A difficulty may arise in this connection where the seduced woman is herself an illegitimate child. Among some tribes the property rights in an illegitimate girl are vested in a male member of her mother's family, i.e. either in her mother's father or in his male heir irrespective of whether damages have been paid for such seduction or not. Among other tribes, e.g. the Pondo, it is permissible for the natural father of an illegitimate child upon the payment of damages for the seduction and pregnancy of the mother of such a child to have vested in him the property rights in such a child, so that he would be entitled to claim damages for the seduction and pregnancy of such a child, if a female. (James Qelane Matole vs Aaron Xakekile, 1940 N.A.C.(C&O)104).

The mother of an illegitimate daughter, or indeed the mother of a legitimate daughter has no locus standi in judicia in an action for seduction. "Under Native Law and Custom a woman has not the right to sue for damages for the seduction of her daughter". The proper person

to sue is the girl's father or the heir of the girl's father or if he is a minor, his guardian (Keke and Samuel Mkwane vs Jane and Richard Banganè, 1937 N.A.C.(C&O).

The attempt of a woman to assert the right to claim damga damages for the seduction of her daughter is a matter of fairly recent origin and must be attributed to the disintegration of Native family life under modern agencies of acculturation and detribalisation. A native widow who had lived together with her husband prior to his decease in relative independence of his other relatives is loth to recognise the position that upon her husband's death she falls under the guardianship of a male member of her husband's family, not infrequently nowadays an individual who has had no share, directly or indirectly in the fortunes of their domestic life. When the daughter of such a widow is involved in a seduction, her mother may feel that she is the proper person to prosecute the action. If the action is brought under Native Law she will at once be met with the plea of lack of locus standi in judicio.

The Assessment of Damages

As has already been pointed the essence of the injury caused by seduction in Native Law lies in the loss of virginity on the part of the woman due to the act of defloration by the defendant. the consequent impairment of her marriage prospects and the deterioration of her lobola value in the event of her marriage.It is this depreciation in lobola value which the defendant is called upon to make good in an action for seduction. Where the seduction is followed by pregnancy not only is the case for damages strengthened but the claim is as a rule increased. If the lying-expenses of the girl during confinement have been borne by her father or guardian he is entitled to claim an additional amount for maintainance of the child during that period from the defendant who as the natural father of the child is held liable for its maintainance.

In a number of seduction cases that have been heard by the Native Appeal Court the women affected have been school teachers or women of some education and attempts have been made to put in claims for special damages such as "injury to her good name and reputation" (Lesley Mkatshwa vs Daniel Tabalaza,1942 N.A.C.(C&O)3), "school outfit rendered

practically worthless by the defendant's act" (Kalisile Maka vs Nancy Rongana, duly assisted, 1941 N.A.C.(C&O), loss of employment as a result of the seduction (Ndungane vs Jessie Nxiweni, 2 N.A.C.140). While the court has been inclined in these cases to take into consideration the genegal social standing of the parties in assessing the damages, it has been reluctant to give any weight to the factors mentioned above in the absence of evidence of any loss of prestige or other special damages suffered directly as a result of the seduction. Thus in the case of Ellen Magwentshu vs George Molete, 1930 N.A.C.(C&O)40 the Court refused to take into consideration in the assessment of damages the ~~evidence~~ seduced woman's loss of employment as a result of pregnancy on the ground that the pregnancy occured from connection subsequent to her defloration. Presumably where the pregnancy follows a single act of defloration the Court might have accepted the view that the pregnancy was a direct result of the seduction, and consequently that the damages due to the loss of employment would then not have been regarded as too remote to be taken into consideration.

There can be no doubt that in original Native Law the social standing of the parties was taken into account in the assessment of damages for seduction. Thus among ~~the~~ most tribes the seduction of the daughter of a Paramount chief gave rise to higher damages than the seduction of a petty chief, just as a higher lobola was given for the daughter of a Paramount chief than for the daughter of a petty chief. Similarly the damages for the seduction of the daughter of a chief were higher than for the daughter of a commoner. Due regard had to be paid in the assessment of damages to the principles of social stratification obtaining in the tribe. Since the advent of western civilisation to South Africa and the resultant accultration of the Bantu-speaking tribes the bases of social grouping in most Bantu tribes have undergone change. Nowadays it is common knowledge that in addition to the old factors of social grouping such as relationship to the chief new factors such as education and Christianity have come into operation. Educated parents demand and receive highter lobola for their daughters than the uneducated, and it is not surprising that they should demand higher damages for seduction of their daughters. Similarly as a general rule the labour of educated natives command a higher wage than that of uneducated native

A daughter who possesses a teacher's qualification and holds a post as such is a greater economic asset to her father or guardian than one who does not. It is submitted that the recognition and application of Native Law implies, among other things, that the Courts established for the settlement of disputes between natives must in the exercise of their discretion to apply Native Law, take cognisance of changes in the structure of native society and in the factors governing relations between members of such society, providing that such changes are not contrary to statute or to natural justice or public policy. (see 11 of Act 38/1927). Only in this way can the application of Native Law be brought into line with the dynamic reconstruction of native life which is taking place under the impact of modern civilisation. To take any other view, it is submitted, would result in Native Law becoming a static thing out of touch with the facts of native life. On the principle that the law must follow the facts (of life), not the facts of the law the Native Appeal courts must surely look upon themselves as courts of equity whose function is twofold, namely, on the one hand to safeguard the interests of those who in their lives and in their relationships with their fellows are still guided by the principles of Native ~~Law~~ Custom, and on the other hand to dispense justice to those who accept neither the common law in its entirety nor Native Law in its original form in spite of the fact that it has been held that it does not necessarily follow that because an individual was educated and baptized and married in a Christian church he had abandoned all methods of native life and custom (D.B.Magadla vs Isaiah Harris, 1936 N.A.C.(C&O). This view is further strengthened by the fact that increasing sections of the native population are rapidly being brought under the process of acculturation, not to say detribalisation.

In any event as far as the assessment of damages in an action for seduction is concerned in view of the fact that in original Native Law these damages were based primarily on material considerations (the impairment of lobola value) it is submitted that to take into account in modern Native Law such factors as loss of employment can hardly be regarded as a violation of the fundamental principles of Native Law.

In a number of the cases to which reference has been made above it would appear that action was brought under the common law, the girl herself being allowed to sue. It is submitted that in such cases in an assessment of damages the court must be guided by all the circumstances of the case, including the social standing of the parties and the circumstances in which the seduction took place (see Botha vs Peach, 1939 W.L.D.154 which was referred to with approval in Tabalaza' case supra).

THE AMOUNT OF DAMAGES:

On the question of the amount of damages to be awarded for seduction and pregnancy the Native Appeal Courts are guided by the usage in the tribe whose law is being applied. It has been found that tribes differ in what they condider to be adequate damages in cases of this kind. Thus among the Hlubi the customary damages for seduction and pregnancy are five head of cattle and a horse (Magwanya Qunta vs Ralarala Tatayi, 1937 N.A.C.(C&O). Among the Pondo five head of cattle are regarded as adequate damages for seduction. Among the Bapedi damages are "not supposed to exceed three head of cattle" (Harries: "Laws and Customs of the Bapedi" p.107).

In modern Native Law although the damages claimed are usually assessed in cattle, their value in money is invariably claimed as an alternative. Sometimes the claim for damages is made in money only without an alternative claim for cattle. Thus in the case of Kolisile Maka vs Nancy Rangana duly assisted, 1941 N.A.C.(C&O) P, a girl of 17 assisted by her father sued D for £75 damages for seduction and causing her pregnancy. The damages claimed included

£11 7s .... School outfit rendered practically worthless by D's act

£8 .... School fees

£10 .... Lying-in expenses

These were claimed as special damages in addition to the general damages for seduction and pregnancy which made upt the rest of the claim of £75. The Native Commissioner granted £50 damages. Against this judgment D appealed on the grounds that (i) the judgment was against the weight of evidence, (ii) that the damages were excessive, (iii) that the special damages claimed were not incurred by the plaintiff. The Native Commissioner in giving his reasons for the damages

awarded said: "Plaintiff's career as a potential teacher was not only ruined but being of a respectable type she is more disgraced than the average native would be. In addition she has the care of the child". In disallowing the special damages the Native Appeal Court said: "In so far as the first of these reasons is concerned there is absolutely nothing to show that the Plaintiff whould have become a teacher. She had only commeneed her first year in the teaching course and might never have completed it, and further there is not a word of evidence as to the social status of the girl or her father. In so far as the care of the child is concerned that is not a factor to be taken into consideration in assessing damages for seduction, i.e. defloration, for the Defendant, being the natural father of the child is still liable to maintain it and can be sued for maintainance".

On the question of the quantum of damages the Appeal Court went on to say "A court of appeal does not readily interfere with an estimate of damages made by the court appealed from, but it does not follow that a court of Appeal must renounce its functions as a court of appeal by deferring the estimate of a Trial Court in a case of doubt or difficulty " (Hulley vs Cox 1923 A.D. p.246; Flint vs Lovell, 1935 K.B. pp 359, 360). Seeing that an appeal is a re-hearing of all questions involved in the action, including the quantum of damges, a Court of Appeal must necessarily decide upon the figure which it thinks should have been awarded. When it has done that, if the figure arrived at, considered from all aspects differs substantially from the figure awarded, the Court of Appeal must give effect to it (Louis Sandler vs Wholesale Coal Supplies Ltd, A.D. 1941 P.H).

"In assessing damages in cases of seduction in the absence of evidence of any loss of prestige or other special damage suffered, the Court must necessarily be guided by other cases of a similar nature between persons of the same standard as the parties in the present case".

The court then went on to refer to the following cases:-

1. Ndungane vs Jessie Nxiweni (2 N.A.C.320) in which the plaintiff, a school teacher who lost her post as a result of seduction, claimed £75 damages and was awarded £35 which was confirmed on appeal.

2. J.D.Obose vs Amelia Mgcanga, (4 N.A.C.320) in which the plaintiff, a school teacher, sued the Defendant for £100 for seduction and preg-

pregnancy and obtained judgment in the Magistrate's court. This was re-duced on appeal to £50, £100 being considered excessive.

3. Ellen Mogwentshu vs George Molete, 1930 N.A.C.(C&O)40 in which plaintiff, a teacher, sued defendant, a clerk, for (a) £25 damages for seduction, (b) maintainance for the child born as a result. The Plaintiff was awarded £25 damages and £5 maintainance by the Magistrate On appeal the court after refusing to take into consideration in the assessment of damages the Plaintiff's loss of employment as the result of the pregnancy which occured from connexion subsequent to her defloration went on to say:-

"In view, however, of the fact that the Plaintiff was an educated native girl, having held a position as teacher, the court is of the opinion that damages should have been assessed on a higher scale than that usually applied in cases between uneducated and uncivilised natives and that in all the circumstances the sum would have been a more equitable award. The judgment in the court below was amended to £55 (i.e. £50 damages and £5 maintainance). It may be pointed out that if the court took the line that the damages awarded in the circumstances were inequitable and should be raised from £25 to £50, the amount awarded for maintainance ought to have been raised in the same proportion because admittedly the standard of living of educated natives of the class of the Plaintiff is on the whole higher than that of "uneducated and uncivilised natives." The court concluded by saying: "In all the three cases above-mentioned the plaintiff was a qualified teacher who lost her position as a result of the seduction and the highest award was £50. In the present case there has been no actual loss of position nor are there any other special circumstances which would justify such a high award." The judgment was altered to £25.

It must be noted that in all the cases referred to above the plaintiff was the girl seduced and not her father and that presumably the principles of European Law, not Native Law, were applied.

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