

FORCED STERILIZATION

LM and Others v. Government of the Republic of Namibia

[2012] NAHC 211

Namibia, High Court

COURT HOLDING

The defendant government failed to discharge its onus to prove that all three plaintiffs had given informed consent to their respective sterilisation procedures, thus all three procedures were unlawful.

As there was no evidence that the sterilisation procedures had been performed on the plaintiffs due to the fact that they are HIV positive, the plaintiffs failed to discharge their onus to prove that the sterilization procedures were performed on a discriminatory basis.

Summary of Facts

The case was brought against the Namibian Government in 2010 by three patients of various public hospitals who claimed that they had been sterilised by means of bilateral tubal ligations without their having given informed consent. They further claimed that the sterilisation procedure was done on them without their consent, and was thus unlawful, because they were HIV-positive. They claimed that the following rights guaranteed in the Namibian Constitution (Constitution) had been violated:

- The right to life in terms of Article 6 of the Constitution;
- The right to liberty in terms of Article 7 of the Constitution;
- The right to human dignity in terms of Article 8 of the Constitution;
- The right to equality and freedom from discrimination in terms of Article 10 of the Constitution; and
- The right to found a family guaranteed in terms of Article 14 of the Constitution.

Issues

The parties agreed that a sterilisation procedure is unlawful unless informed consent is obtained. The issues before the Court, thus, can be broken down as follows:

Informed consent:

1. Whether the Namibian government state hospital medical practitioners performed sterilisation procedures without obtaining informed consent from the plaintiffs.
2. Whether the medical practitioners' failure to obtain informed consent from the plaintiffs infringed the following constitutional rights:

- i) The right to life
- ii) The right to liberty
- iii) The right to human dignity, and
- iv) The right to found a family

Discrimination on the basis of HIV-positive status

1. Whether the forced sterilisation was in fact due to the HIV positive status of the women and therefore constituted discriminatory practice
2. Whether the following constitutional rights were infringed :
 - i) The rights to life, liberty, human dignity and to found a family, and
 - ii) The right to equality and freedom from discrimination.

Court's Analysis

The Court stated that the defendant government could rely on the defence of *volenti non fit injuria* if able to prove that the plaintiffs signed consent forms that signified consent to the sterilisation procedures. The Court explained what constituted this consent. It referred to the South African case of *Castel v. De Greef* 1994 (4) SA 408 (C), where Justice Ackerman expounded on the doctrine of informed consent, which could be broken down into key components.

(a) First, the doctor had a duty to provide adequate and sufficient information to enable the patient make an informed decision. The information should enable the patient to appreciate the nature and extent of the harm or risk involved.

(b) Second the consent must be clear and unequivocal, given freely and voluntarily, and should not be induced by fear, fraud or force.

(c) Third, the consent must be comprehensive, and must extend to the entire transaction inclusive of its consequence.

The Court noted that the onus was on the defendant government to prove that the plaintiffs had given informed consent. Further, whether the defendant's agents obtained informed consent was a question of fact rather than law. The Court reviewed the evidence to determine whether the defendant's agents had obtained informed consent from the plaintiffs when they administered the sterilisation procedures.

The Court's evaluation of the evidence was as follows : In respect of the first plaintiff, there was no indication that she had requested sterilisation. The plaintiff did not sign any form specifically relating to sterilisation. There were no medical records indicating that the plaintiff requested or expressed any intention to be sterilised. Further, the consent was obtained during labour, and in circumstances in which there was no proper counselling given, including information regarding alternative methods of

contraception to the procedure of sterilisation.

In respect of the second plaintiff, the Court found that there was no medical record indicating that either the procedure or alternative methods of contraception had been explained to the plaintiff. Though the second plaintiff did sign a consent form for the sterilization procedure, the consent was obtained from the plaintiff while she was in labour.

The Court found that there were unjustifiably no medical records indicating that consent was obtained from the third plaintiff. Again, while the plaintiff signed a consent form, the defendant admitted that the consent was obtained during labour.

In all three cases, the Court found that although the plaintiffs had signed consent forms, there was no evidence that the health providers had given adequate and sufficient information to the plaintiffs under circumstances in which they fully appreciated the consequences of sterilisation. There were no records to capture that informed consent was properly obtained. The Court therefore held that the defendant had not proved that its agents had properly obtained informed consent from all three plaintiffs before undertaking the sterilisation procedure.

On the second claim, of discrimination due to the plaintiffs' HIV-positive status, the Court held that the plaintiffs failed to substantiate their claim based on the evidence laid before it.

Conclusion

The plaintiffs succeeded on the first claim that they were sterilised without informed consent, and thus that such sterilisation was unlawful. The plaintiffs had a fall-back (alternative) claim which was that the conduct of the defendants infringed on the plaintiff's constitutional rights. However, since the Court decided that the plaintiffs had succeeded in their main claim, it decided not to make a determination on the alternative claim. The plaintiffs failed on the second claim that the sterilisation was based on discrimination on the basis of their HIV positive status.

Significance

Though this was technically a sound judgment which impugned the paternalistic practice of denying individuals' reproductive decision-making, the Court focused on the doctrine of informed consent within the confines of the law of delict (equivalent to law of torts in common law), and missed the opportunity to develop human rights jurisprudence. This case is a reminder of the point that advocates made at the International Conference on Population and Development (ICPD) in Cairo in 1994, that population control should not be pursued through control of women's bodies, but through respect for human rights. Advocates at the ICPD agitated for what have come to be known as (sexual and) reproductive rights. Reproductive rights were defined in the ICPD Program of Action as "... human rights that are already recognised in national laws, international human rights documents and other relevant United Nations consensus documents."¹⁰¹ These include the rights of all to make decisions concerning their reproduction, free of discrimination, coercion and violence. These rights are recognised in national laws, including the Constitution of Namibia. The Court could have used this opportunity to advance human rights norms relating to the relationship between health providers and their clients or patients.

The Court dismissed the claim that the plaintiffs were discriminated against on the basis of their HIV status. A question that may be asked is whether it was coincidence that all the women who were forced to be sterilised were also HIV positive. Though the plaintiffs did mention in their testimonies that health providers indicated their HIV status was one of the reasons for the sterilisation, this alone was appreciably unconvincing to the Court as demonstration that the hospital had a deliberate policy, written or unwritten. Yet courts need not require plaintiffs to prove that hospitals have a written or unwritten policy around sterilization of women living with HIV. The pattern presented in the Namibia case should have been adequate to demonstrate discriminatory intent.

The Court's decision to dismiss the claim of discrimination was unfortunate since in 2009, the International Community of Women Living with HIV/AIDS reported evidence that health providers in Namibia pressured and forced HIV positive women to undergo sterilisation.¹⁰² It is perhaps unfair to expect the Court to have been more active to pursue the question of discrimination when it was given little reason to do so. Counsel could have tried to be more persuasive, but perhaps this was understandably difficult since there was no written policy, nor was it likely that the health providers would volunteer the information if such discriminatory practices existed. It is therefore plausible that discriminatory sterilisation, based on HIV status, was present in this case. Nevertheless, this case is important, because it sent the message that informed consent is a high threshold and a woman's autonomy in making reproductive choices should be taken seriously.

Government of the Republic of Namibia v. L.M. & 2 Others
[2014] Case No. SA 49/2012, NASC 19
Namibia, Supreme Court

COURT HOLDING

The Appellant's agents had performed the sterilisation without having properly obtained informed consent from the respondents.

Summary of Facts

This was an appeal against a decision of the High Court, discussed immediately above,¹⁰³ that found the Appellant government liable for the sterilisation of the respondents without their informed consent.

Issues

The Supreme Court isolated one issue: Whether the agents for whose conduct the Appellant was responsible had performed sterilisation procedures without obtaining informed consent from the respondents.

Court's Analysis

One thing that was notably different from the decision of the High Court was that the Supreme Court related informed consent to the rights recognised in the Namibian Constitution, especially the rights to dignity, to physical integrity and to found a family. Further the Court recognised that it was the woman's choice to decide to bear children or not, and that the decision must be made freely and voluntarily.