

CASE NO: SA 49/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

APPELLANT

and

LM

1st RESPONDENT

MI

2nd RESPONDENT

NH

3rd RESPONDENT

APPELLANT'S HEADS OF ARGUMENT

The issue on appeal

1. Did each of the three plaintiffs give her informed consent to undergo a sterilization operation?
2. Each of the plaintiffs was sterilized by way of a surgical procedure or operation known as a bilateral tubal ligation (BTL). It was carried out at the same time as a caesarean operation. The operations were performed in state hospitals. The plaintiffs sued the Namibian

government for damages in delict alleging that they were unlawfully assaulted when they were subjected to sterilization operations.

3. They allege assault, despite admitting that they had signed written consents authorizing the hospitals to perform caesarean and sterilization operations. They signed the consents for both procedures at the same time.
4. They do not dispute that they gave their informed consent to the caesarean sections. They contend only that when they signed, they had not given their informed consent to the sterilization procedure; i.e. they did not know or appreciate that sterility was a risk or consequence of the BTL procedure. That is because they say that they signed the consent forms while they were in active labour.
5. Hoff J found that signature of the consent forms while in labour would constitute informed consent if there were a 'prior explanation' of the risks and consequences of a sterilization operation. The only relevant risk or consequence in issue in the trial was sterility; i.e. did the plaintiffs understand and appreciate that sterility is a risk or consequence of a sterilization procedure.
6. We submit that the issues before Hoff J were the following:

- 6.1. Did medical staff employed by the government explain to the plaintiffs that sterility is a risk or consequence of a sterilization procedure before they went into labour or before they were prepared for surgery?
 - 6.2. Did the first plaintiff understand and appreciate that sterility is a risk or consequence of a sterilization procedure when Dr Mavetera explained that to her when she was in labour but some time before she signed her consent form?
7. The trial actions of the three plaintiffs were consolidated. The merits were separated. Their consolidated trials on the merits were heard by Hoff J. He found that the government had failed to discharge its onus of proving that the plaintiffs were sterilized without their informed consent. Consequently, he found that the operations were unlawful assaults by public hospital staff employed by the Namibian Government.

What this appeal is about

8. This appeal is directed at the following in the judgment of Hoff J:
 - 8.1. The conclusion that the plaintiffs had not given their informed consent to the sterilization procedures performed on them.

- 8.2. That is a conclusion of law. It was drawn primarily on the factual premise that the plaintiffs signed their consent forms when in labour. That conclusion is wrong in law because it is not supported by the evidence.
- 8.3. The legal conclusion was arrived at by drawing inferences from the facts in the case of each of the three plaintiffs. Hoff J failed to apply the correct legal test to drawing inferences from the facts.
- 8.4. The question before Hoff J was whether the plaintiffs were informed that sterility was a risk or consequence of a sterilization procedure 'on a prior occasion' before they signed their consent forms.
- 8.5. Hoff J misdirected himself in failing to address that question. That is a misdirection in law.
- 8.6. On the question whether there was 'a prior explanation', i.e. whether the plaintiffs were informed that sterility was a risk or consequence of a sterilization procedure before they went into labour or about to go into theatre, there were two mutually destructive versions. Hoff J failed to determine which of those versions was probable or true in accordance with the applicable legal test. That is a misdirection in law.

8.7. If Hoff J did address the question whether plaintiffs were informed that sterility is a risk or consequence of a sterilization procedure before signing they went into labour or were about to go into theatre, then he misdirected himself in failing to answer it in accordance with the proved facts.

8.8. That is a misdirection on the facts. The proved facts are the following:

- All of the plaintiffs were informed that sterility was a risk or consequence of a sterilization procedure in family planning group counselling sessions long before they signed their consent forms;
- The second and third plaintiffs were informed in individual consultations with doctors long before they signed their consent forms;
- The first plaintiff was informed of the risk or consequence shortly before she signed her consent form. But it was at a time when she understood and appreciated the warning despite the fact that she was in labour.

The test for informed consent

9. A surgical operation is a lawful assault if patients consent to the operation. The government admits the operation. But it pleads that the plaintiffs consented to it. The government's defence is a special defence of confession and avoidance. That means that the government (as defendant) had the onus of proving consent.¹
10. Whether the plaintiffs gave their informed consent is a factual inquiry.² Their consent is informed if they knew or appreciated the risks and consequences of the operation before consenting to it; i.e. they must have consented to the operation and its risks and consequences.³ They appreciate the risks or consequences of a surgical procedure if they are given a general warning about them by a surgeon or medical staff.⁴ The warning should inform them of a significant risk which would affect the judgment of reasonable patients, if the information is needed so that reasonable plaintiffs can determine for themselves as to what course they should adopt.⁵

¹ Mabaso v Felix 1981 (3) SA 865 (A)

² Oldwage v Louwrens [2004] 1 All SA 532 (C) at [91]

³ Castell v Greef 1994 (4) SA 408 (C) at 425; Waring & Gallow Ltd v Sherborne 1904 TS 340 at 344

⁴ Chester v Afshar [2004] 4 All ER 587 at [14]

⁵ Pearce v United Bristol Healthcare NHS Trust (1998) 48 BMLR 118 at 124

11. Sterility is the main or most significant risk or consequence of a BTL operation. It is the only risk or consequence relevant in this appeal. As already submitted, the questions before Hoff J were the following:

11.1. Did medical staff employed by the government inform the plaintiffs generally that sterility is a risk or consequence of a sterilization procedure before they went into labour or before they were prepared for surgery?

11.2. Did the first plaintiff understand and appreciate that sterility is a risk or consequence of a sterilization procedure when Dr Mavetera explained that to her when she was in labour but some time before she signed her consent form?

12. The government discharges its onus if it can show that plaintiffs gave their informed consent to the operation. What that means is that the government had to establish in evidence the following:

12.1. All the plaintiffs were informed that sterility is a risk or consequence of a sterilization operation at group counselling sessions during antenatal visits long before they signed their consent forms:

12.2. The second and third plaintiffs were informed by doctors in consultations that sterility is a risk or consequence of a sterilization operation;

- 12.3. When Dr Mavetera informed the first plaintiff in response to her request for sterilization that sterility was a risk or consequence she understood and appreciated that warning and information.
13. The plaintiffs admit that they signed their consent forms. By that admission, the government discharged its evidentiary burden of adducing evidence of informed consent. That admission shifted the evidentiary burden to the plaintiffs; i.e. they had to adduce evidence to prove that despite their signature, they had not given their informed consent. Put differently, they had to adduce evidence proving that when they signed, they did not know, understand or appreciate that sterility was a risk or consequence of a sterilization procedure.
14. If it is found that signature of their consent forms did not shift the evidentiary burden, then the government bore the evidentiary burden of adducing evidence to show that when they signed their consent forms, the plaintiffs knew or appreciated that sterility (not having children again) was a risk or consequence of the sterilization operation they were about to undergo.

The case of the government on appeal

15. The government admits that the plaintiffs signed consent forms while in labour and when being prepared for caesarean and sterilization procedures and not long before these operations were performed.

But it submits that when they signed those consent forms, they knew and appreciated that they risked sterility or not having children again. That submission is made on the strength of the evidence summarized below. In support of the summary, we attach a schedule of the chronology of the relevant events for each plaintiff.

All the plaintiffs

16. The plaintiffs were informed that sterilization was a risk or consequence of the operation, during antenatal group counselling sessions attended by them. These ante-natal sessions took place when they were not in labour and a considerable time before they underwent the operations. The attached chronologies show the dates when they attended antenatal counselling sessions. When they signed their consent forms, they knew or appreciated or could reasonably be expected to know or appreciate that sterilization was a risk or consequence of the operation.⁶

First plaintiff

17. She asked to be sterilized before her operation. That was about 15 minutes before she signed her consent form on 13 June 2005.

⁶ Dr Krönke Evidence V16 p1804/5-21; p1805/3-14; p1826/21-26; p1827/7-21; p1828/3-5; p1828/15-22; p1829/19-27; p1830/3-10; p1831/5; p1831/10-18
Nurse Tjimbudu Evidence V12 p1360/30–p1361/7; p1361/9-27
Dr de Klerk Evidence V13 p1484/9-12

She signed shortly before her operation. When she asked to be sterilized, she was informed by Dr Mavetera (confirmed by nurse Angula who translated for Dr Mavetera) that sterility is a risk or consequence of a sterilization operation.⁷ At the time, she understood and appreciated the warning.

Second plaintiff

18. She opted for a sterilization operation at a consultation with Dr de Klerk on 26 October 2007. During this session, Dr de Klerk informed her that sterility was a risk or consequence of a sterilization operation. She chose sterilization despite being informed that sterility is a risk or consequence. This is corroborated by the documentary evidence in the form of her health passport. Her choice of sterilization was made about one and a half months before the operation was carried out on 8 December 2007 when she signed her consent form.⁸

Third plaintiff

19. She was informed that sterility was a risk and consequence of a sterilization operation at (a gynaecological consultation) with

⁷ Dr Mavetera Evidence V14 p1591/19-30

Nurse Angula Evidence V14 p1674/26-p1675/15

⁸ Dr de Klerk Evidence V13 p1482/3-5, 20-21, 25-26; p 1483/15-17; p1484-1486; p1489/14-21; Exhibits V1 p91; p89

Dr Krönke on 30 March 2005; i.e. some six months before the procedure was performed on 12 October 2005. This is corroborated by the documentary evidence in the form of her health passport.⁹

20. Sterility is not a risk or consequence because in her case sterilization can be reversed.¹⁰

21. She was 46 years old at the time of the sterilization operation and had already had 6 normal deliveries and 1 caesarean section and she was unlikely to have another pregnancy due to her age.¹¹

No causation

22. If it is found that despite this evidence, the government failed to adduce evidence that the plaintiffs knew and appreciated that the sterility is a consequence of a sterilization operation, that does not mean that Hoff J should have found for the plaintiffs.

23. They only succeed on the merits if they prove that they would not have consented to the operation, had they known of and appreciated that sterility is a risk or consequence of the operation. If not, they have failed to prove causation; i.e. they have failed to prove that but

⁹ Dr Krönke Evidence V16 p1802/27-p1803/6; p1814/18-23; Exhibits V1 p104-105

¹⁰ Judgment V17 p2031 [23]

¹¹ Judgment V17 p2031 [23]

for the failure to inform them that sterility is a risk or consequence of sterilization, they would not have consented to the operation.

24. It is submitted that they failed to adduce evidence that had they known that sterility is a risk or consequence of a sterilization procedure, they would not have consented to that procedure.

The approach to the factual inquiry into informed consent

Mutually destructive versions on warnings

25. There are mutually destructive versions about whether plaintiffs appreciated and understood that sterility is risk or consequence of a BTL operation.
26. The plaintiffs dispute that they were informed that sterility is a risk or consequence of a sterilization procedure on the following occasions:

26.1. All the plaintiffs - at antenatal group counselling sessions;¹²

¹² First plaintiff Evidence V7 p791/9-11 and 19-28; p795/9-11; V8 p854/3-7; Exhibits V1 p4 and p6
Second plaintiff V8 p865/27-p866/10; p867/6-9; p904/5-15; p904/22-p905/5; p912/3-10; p917/7-28; Exhibits V1 p90
Third plaintiff V9 p1022/10-15; p1044/25-31; p1045/26-p1046/5; p1051/28-30; p1057/10-17

26.2. The first plaintiff – at group counselling sessions held on 5 January 2005, 10 February 2005 and 24 March 2005¹³ and by Dr Mavetera not long before she signed her consent form on 13 June 2005;¹⁴

26.3. The second plaintiff – a group counselling sessions¹⁵ held on 12 September 2007¹⁶ and by Dr de Klerk on 26 October 2007 about 43 days before she signed her consent form on 8 December 2007;¹⁷

26.4. The third plaintiff by Dr Krönke on 30 March 2005¹⁸ (about 6 months before she signed her consent form on 12 October 2007).

The test for determining mutually destructive versions

27. Courts resolve mutually destructive versions by conducting a qualitative assessment of the inherent probabilities that arise from all the oral and documentary evidence and of the truth of the oral

¹³ V7 p791/9-12 and 19-28; p795/9-11; Exhibits V1 p4 and 6

¹⁴ V8 p823/17-32; V14 p1589/14-30; Exhibits V1 p15

¹⁵ V8 p917/8-28

¹⁶ Exhibits V1 p90

¹⁷ V8 p922/16-17; p922/29-p923/7; p927/30-31; Exhibits V1 p91

¹⁸ Evidence V10 p1080/30-p1081/13; p1082/21-28; p1085/10-13; Exhibits V1 p104-

evidence of the witnesses, to determine which of the two versions is more probable.

28. They do that by assessing which of the two versions is more logical, coherent, cogent, plausible and credible because it is supported by or consistent with admitted and objective facts such as documents, the evidence assessed in its entirety and the probabilities.¹⁹

29. Where witnesses testify about events that have taken place a long time ago. The **documentary evidence** is the most **objective** means of determining whether the witnesses can be believed and what they say is accurate. Depending upon the circumstances the probabilities can be equally important.²⁰

30. If the government's version is less probable, or the probabilities of the two versions are equal and the court finds that the version of the government witnesses is not truthful, then the government has failed to discharge its onus of proving its defence of informed consent.²¹

¹⁹ Stellenbosch Farmers' Winery Group Ltd v Martel et Cie 2003 (1) SA 11 (SCA) 14I-15E

²⁰ Galison Manufacturing (Pty) Ltd v Set Point Industrial Technology (Pty) Ltd 2009 JDR 0047 (CP) at [21]

²¹ Stellenbosch Farmers' Winery Group Ltd v Martel et Cie 2003 (1) SA 11 (SCA) 14I-15E

The findings by Hoff J and why they are wrong

The operation rendered all 3 plaintiffs incapable of bearing children²²

31. This finding is wrong. Hoff J accepted the evidence of Dr Kimberg (the expert who testified for the plaintiffs). His evidence (and the case of the third plaintiff) is that with her, sterilization is reversible. But she is also unlikely to have any more children because of her age.

The question and the test

32. The question to be decided was whether plaintiffs gave their informed consent for the BTL procedures.²³ He found that informed consent means that plaintiffs had to have knowledge and appreciation that sterilization is a risk or consequence of a BTL operation. Whether they had knowledge and appreciation depended on whether they were provided with adequate information so that they could make an informed decision.²⁴
33. Hoff J never decided what information would be adequate to help the plaintiffs make an informed decision. It is submitted that if they were informed that not having children was a consequence or risk of the

²² Judgment V17 p2026 [7]

²³ V17 p2026 [6]

²⁴ V17 p2028 [16]

operation, that would be adequate. There is no other information needed to decide whether to undergo a sterilization operation.

Prior explanation

34. Hoff J then turned to decide whether plaintiffs gave informed consent and were provided with adequate information by considering first the evidence of Dr Kimberg.
35. He found that the government had the onus to prove informed consent. And whether informed consent was given is a factual, not legal issue.²⁵
36. Hoff J did not consider or decide, as he should have, whether signature of the consent forms shifted the evidentiary burden. Had he considered whether signature shifted the evidentiary burden, he should have decided that it did. That would have meant that he had to ask whether the plaintiffs had adduced evidence to show that they did not know or appreciate that sterility was a risk or consequence of a sterilization operation when they signed their consent forms.
37. Hoff J found that Dr Kimberg found it acceptable that state hospital patients sign a consent form when they are prepared for surgery, as

²⁵ V17 p2033 [27]-[28]

long as there has been a prior explanation.²⁶ That finding meant that Hoff J had to consider whether there was a prior explanation. Even if he found that the burden had not shifted, he would still have had to consider and find whether there had been a prior explanation.

38. If there were a prior explanation, then whether the burden shifted or not, the government would have discharged its burden of adducing evidence to prove that the plaintiffs knew and appreciated that sterility was a risk or consequence of a sterilization operation.

Group counselling sessions

39. The plaintiffs admit that they attended antenatal classes. But they deny that they were informed that sterility is a risk or consequence of sterilization at their antenatal classes.²⁷
40. There are mutually conflicting versions on this question. It is submitted that the version of the government is more plausible,

²⁶ V17 p2035 [32]; V17 p2054 [68]

²⁷ First plaintiff V7 p791/9-11 and 19-28; p795/9-11; V8 p854/3-7; Exhibits V1 p4 and p6
Second plaintiff V8 p865/28-p866/10; p867/6-9; p904/5-15; p904/22-p905/5; p912/3-10; p917/7-27; Exhibits V1 p90
Third plaintiff V9 p1022/10-15; p1044/25-31; p1045/26-p1046/5; p1051/28-30; p1057/10-29

cogent and credible. The evidence of all the witnesses for government was this. As a general rule of practice at antenatal group counselling sessions, information on all forms of contraception is provided. That includes sterilization - a permanent form of contraception.²⁸

41. We set out below why we submit that generally, the versions of the plaintiffs are less plausible than the version of the government.

First plaintiff

42. Hoff J found that Dr Mavetera and nurse Angula made three assumptions, and that they relied on those assumptions to dispense with a need for a proper explanation of the procedure and its risks and consequences.²⁹
43. The three assumptions were that she knew what sterilization was, she understood that sterility was a risk or consequence of a sterilization operation because she attended antenatal classes, and

²⁸ Dr Krönke V16 p1804/25-p1805/14; p1805/3-14; p1826/21-26; p1827/7-21; p1827/31-p1828/5; p1828/15-22; p1829/19-27; p1830/3-10; p1831/3-5, 10; p1831/10-18

Nurse Tjimbundu V12 p1360/30-p1361/7; p1361/9-27

Dr de Klerk V13 p1484/9-12

²⁹ Judgment V17 p2039 [38]

she was informed of all aspects concerning sterilization at antenatal classes.³⁰

44. Although he does not find this explicitly, Hoff J must have found that it was wrong of Dr Mavetera or nurse Angula to make these assumptions.

45. The question though is not whether it was right or wrong of them to make those assumptions. It is whether at the time that Dr Mavetera spoke to her, she knew and understood that sterility followed upon a sterilization operation. Hoff J failed to appreciate that this was the question he had to answer. His failure to appreciate that this was the question meant that he was unable to get to the right answer.

46. Hoff J failed to consider the following evidence:

46.1. The first plaintiff had been to antenatal classes on 3 occasions.³¹ It was more likely than not that at these classes she would have been informed that sterility is a risk or consequence of sterilization.

46.2. She had two previous deliveries. It is likely and more plausible than not, that she attended antenatal classes and that she

³⁰ Judgment V17 p2039 [37]

³¹ Exhibits V1 p4 and p6

would have been informed that sterility is a risk or consequence of sterilization at previous classes.

46.3. Had he considered particularly this evidence, he should have found that this constituted a prior explanation. Signature long after such an explanation but shortly before the operation is sufficient for informed consent because it is a prior explanation.

46.4. Her own evidence that she knew and understood that a sterilization operation resulted in sterility.³² She understood at the time that she signed her consent form. There was no need to explain it to her before signing her consent form. Nor would there have been a need, as Hoff J found,³³ to delay the operation for 6 weeks.

46.5. The evidence of Dr Mavetera and nurse Angula that the first plaintiff had herself asked for sterilization and that Dr Mavetera had informed her that sterilization results in sterility.³⁴

³² V8 p832/30-p833/7

³³ Judgment V17 2039 [39]

³⁴ Dr Mavetera V14 p1591/19-30
Nurse Angula V14 p1674/26-p1675/15

46.6. This exchange took place between 12h30 and 13h20.³⁵ The second plaintiff signed her consent form at around 13h20.³⁶ The conversation with Dr Mavetera took place before she signed her consent form; i.e. there was a prior explanation.

46.7. The question is, did she during her conversation with Dr Mavetera understand that sterility was a risk of a sterilization operation?

46.8. Dr Mavetera testified that during this exchange the following happened:³⁷

- She informed him that she was on highly active anti retroviral treatment;
- He established that she was on the prevention of mother to child transmission programme;
- He informed her that she had to undergo a caesarean section because of cephalopelvic disproportion;
- She asked for a sterilization operation;

³⁵ Exhibits V1 p15

³⁶ Exhibits V1 p15 and p18

³⁷ V14 p1592/3-25; p1587/26-p1588/3; p1589/14-30; p1590/19-21

- He informed her that sterility was a risk or consequence of a sterilization operation;
- He spoke to her about sterilization because she asked for it. He would not have spoken to her about had she not asked.

46.9. The evidence suggests that she understood why she had to undergo a caesarean section.³⁸

46.10. The second plaintiff admits that Dr Mavetera spoke to her. But she denies that she asked for sterilization or that he spoke to her about sterilization at all.³⁹

46.11. There are two mutually destructive versions on the question whether Dr Mavetera informed her that sterility was a risk or consequence of a sterilization procedure.

46.12. Hoff J should have but failed to ask which was the more probable or credible. Had he done so, he should have found that the version of Dr Mavetera is more probable for the following reasons:

³⁸ V8 p828/20-26; p836/14-15; p837/4-6

³⁹ V8 p823/17-32

- It is supported by a contemporaneous note in objective documentary evidence in her health records;
- The first plaintiff said that she understood what sterilization meant. She did not object to consenting to sterilization because she thought that the operation would be performed later;⁴⁰
- She said this for the first time under cross-examination. Her case changed. Under examination in chief she denied that she knew what sterilization meant. She said nothing about not objecting to sterilization because she thought it would be performed later;
- She said that a nurse spoke to her about removing her uterus because all HIV positive women have their uteruses removed⁴¹ and that she felt compelled by the nurse to sign the consent form;⁴²

⁴⁰ Evidence V8 p832-3

⁴¹ Evidence V8 p832-p833

⁴² V7 p811/3-14; p814/3-4; V8 p827/3-5

- That is unlikely. First, because her uterus was not going to be removed, nor was it. Second, because it is implausible that a nurse would have told her that all HIV positive women have their uteruses removed. If 'removal of uterus' was the court interpreter's shorthand for sterilization, then it is equally implausible that the nurse would have said that all HIV positive women are sterilized. It was not proved. Hoff J found rejected that allegation.

- Third, why would the nurse have compelled her to sign? The first plaintiff herself asked for sterilization. She said she understood what it meant. She signed because she thought the operation would be performed later. There was no need for compulsion here;

- She said that Dr Mavetera only told her that she was having a Caesar because she was too tired to deliver naturally.⁴³ That is unlikely. His note confirms his evidence that he informed her that a Caesar was necessary because of cephalopelvic disproportion;

⁴³ V7 p802/15-22; p809/24-30; V8 p830/23-27

- She was testifying some 5 years after the event. Her evidence should not be relied on where it is contradicted by contemporaneous documentary evidence;
- If she was sufficiently rational to explain what drugs she was on, why would she not understand that sterility was the risk of a sterilization operation? It is submitted that it is more likely than not that she knew, understood and appreciated that sterility resulted from a sterilization procedure.

Second plaintiff

47. The question that crystallized before Hoff J at the trial was whether it had been explained to the second plaintiff that sterility was a risk or consequence of the sterilization operation, before she signed her consent form.
48. Instead of considering that question and in particular whether the evidence showed that there had been a prior explanation, Hoff J found that the government failed to discharge its onus of proving informed consent on the version of its own witnesses.⁴⁴ His reasons for this finding are the following:

⁴⁴ Judgment V17 p2056 [71]

48.1. Dr Gurirab saw the second plaintiff on 6 December 2007.⁴⁵

He failed to explain the advantages or disadvantages of alternative methods of contraception;

48.2. Nurse Ndjala confirmed that the second plaintiff signed her consent form while in labour;

48.3. Dr de Klerk who consulted with the second plaintiff on 26 October 2007 made three concessions.

48.4. They were that her inscription on the antenatal record would not necessarily be read as an accepted option by the second plaintiff; that the fact that second plaintiff had opted for sterilization as a family planning method cannot be relied on for the purpose of claiming that she had given her informed consent; and that she would not have been satisfied with a consent form signed at her discussion with second plaintiff if she were the surgeon.⁴⁶

49. It is submitted that these findings are wrong for the reasons set out below.

⁴⁵ Exhibits V1 p94

⁴⁶ Judgment V17 p2056 [70]

50. Hoff J failed to ask or consider whether there was a prior explanation at an antenatal class attended by the second plaintiff or at a consultation with Dr de Klerk. She does not dispute that she attended those classes. It is more likely than not that medical staff would have informed mothers at those classes that sterility is the result of a sterilization operation.
51. The second plaintiff does not dispute that she consulted with Dr de Klerk on 26 October 2007. She disputes that at that consultation Dr de Klerk informed her that sterility was a risk or consequence of a sterilization operation.
52. It is more likely than not that Dr de Klerk would have informed the second plaintiff that sterility is the result of a sterilization operation. Dr de Klerk testified that the second plaintiff came to see her at the PMTCT Clinic to determine whether she is eligible for antiretroviral treatment.⁴⁷ Why would she not have informed the second plaintiff about the consequences of her choice of sterilization? That is what a diligent, reasonably skilled doctor would do. Her contemporaneous note of that consultation entered on the medical record of the second plaintiff supports her version that the second plaintiff was informed.⁴⁸

⁴⁷ V13 p1473/10-20

⁴⁸ Exhibits V1 p91

53. What Hoff J should have done but failed to do, was to decide which of the two mutually destructive versions was more probable or true. Had he done that, he should have decided that the version of the government was more probable, plausible and credible. First because the second plaintiff's version is not supported by the objective documentary evidence. And second because it is so unreliable, incoherent and inherently contradictory.
54. So, for example, her case changed dramatically under cross-examination. There she said for the first time that she was coerced by Dr Gurirab into consenting to sterilization on 6 December 2007. She agreed to sterilization because he told her that the hospital would not perform a caesar if she did not agree to sterilization.⁴⁹
55. This is not only a fundamentally different case from the one pleaded or advanced in cross-examination. It is also highly unlikely. The note by Dr Gurirab says nothing about sterilization.⁵⁰ He confirmed that he never spoke to her about sterilization.⁵¹ Her case changed again in re-examination when she said that she regarded Dr Gurirab as a person of authority, and that he should have asked her whether she wants sterilization instead of putting it to her.⁵²

⁴⁹ V8 p885/25-p886/19

⁵⁰ Exhibits V1 p94

⁵¹ V14 p1575/27-p1576/4; p1576/28-29

⁵² V9 p979/20-p980/4

56. The fact that Dr Gurirab had not informed the second plaintiff that sterility was a risk or consequence of a sterilization operation, does not mean that there was no prior explanation at an antenatal class or by Dr de Klerk.
57. The failure by Dr Gurirab to explain the advantages or disadvantages of other contraceptive methods is irrelevant for two reasons. The first is that Dr de Klerk had warned plaintiff that sterility was a risk or consequence of a sterilization procedure.
58. The second is that it would not have been necessary to explain the advantages or disadvantages of other contraceptive methods. She should have been warned about the risk or consequence of a sterilization procedure, not other methods of contraception. In any event, Dr de Klerk explained them. They do not have the risk of permanent sterility. A sterilization procedure does have that risk.
59. Similarly, the fact that nurse Ndjalo confirmed that the second plaintiff signed her consent form while in labour, does not mean that her consent was not informed. Hoff J did not apply his own test here. He failed to ask whether the second plaintiff was informed that sterility was a risk or consequence of a sterilization operation on a previous occasion. His failure to do so is a misdirection and wrong.

60. The concessions by Dr de Klerk are not evidence that she did not inform the second plaintiff that sterility was a risk or consequence of a sterilization operation.⁵³ She testified that she had. Her evidence is supported by the medical records of the second plaintiff.⁵⁴ Hoff J should have found that as a fact (or on the probabilities) Dr de Klerk had informed the second plaintiff that sterility was a risk or consequence of a sterilization operation.

61. Had he made that finding, he should have found that there was a prior explanation of the risks or consequences of a sterilization operation. If there were a prior explanation, before the second plaintiff signed her consent form, then Hoff J should have found that the government had discharged its evidentiary burden of proving informed consent.

62. The concessions by Dr de Klerk (and they are not really concessions against her own evidence) do not help in deciding whether there was a prior explanation for the following reasons:

62.1. It was never contended that the inscription on the antenatal record constituted informed consent. The question was always whether when the second plaintiff signed her consent form, her consent was informed by a prior explanation of the risk or consequence of a sterilization operation.

⁵³ V13 p1482; p1490/11-20; p1492/3-7; p1494/3-16; p1499/22-25

⁵⁴ Exhibits V1 p91

62.2. Conceding that the option of sterilization chosen by the second plaintiff does not show informed consent, is a concession by an opinion witness about an inference to be drawn by the court from the proved facts. It is a misdirection by Hoff J to rely on such a concession for the purpose of exercising his judicial duty to draw inferences from the facts.

62.3. The 'concession' by Dr de Klerk is irrelevant for the purpose of deciding whether the inference of informed consent is consistent with the proved facts.

62.4. That inference or conclusion should have been drawn by Hoff J by asking whether it is a more plausible inference. If a patient is given a general warning about the risks or consequences of a surgical procedure, that is enough for informed consent.⁵⁵ The evidence of Dr de Klerk is that when the second plaintiff opted for sterilization, she informed her that sterility was a risk or consequence of a sterilization procedure. That was sufficient warning to help the second plaintiff make an informed decision later.

62.5. The concession by Dr de Klerk that she would not have been satisfied with a consent formed signed at her discussion with the second plaintiff, is also irrelevant. The evidence is not that

⁵⁵ See *Chester v Afshar*, *supra*

the second plaintiff signed her consent form at that discussion. Nor is the evidence that the second plaintiff gave her consent to a sterilization operation at that discussion.

62.6. The evidence is that the second plaintiff gave her consent later. The question arising from that fact is whether she was informed that sterility was a risk or consequence before she signed. The evidence is that she was informed and she was informed long before she signed or went into labour.

Third plaintiff

63. Here too, instead of asking and considering whether the third plaintiff had been informed that sterility was a risk or consequence of sterilization before she went into labour or was about to go into theatre, Hoff J found that the government had failed to discharge its onus of proving informed consent on the version of its own witnesses.⁵⁶

64. His reasons for coming to that conclusion are the following:

64.1. Dr Krönke testified that she would not have obtained the consent of the third plaintiff at her consultation with her on 30 March 2005;⁵⁷

⁵⁶ V17 p2058 [77]

⁵⁷ V17 p2057 [72]

64.2. Dr Krönke conceded that there is no indication in the hospital records that the third plaintiff had given her consent before surgery,⁵⁸

64.3. Dr Sichimwa assumed from the notes made by Dr Krönke on 30 March 2005 that the sterilization procedure was canvassed with the third plaintiff and explained to her on that day. This was an incorrect assumption based on the evidence of Dr Krönke.⁵⁹

64.4. Dr Sichimwa conceded that he had no independent recollection of what he said to plaintiff before she signed her consent form. There is no reason apparent from the medical records why a sterilization procedure was performed. His reason for failing to make a note is a poor excuse.

64.5. Nurse Tjimbundu testified that group sessions do not constitute counselling and that individual counselling is required. She contradicted the evidence of government witnesses who testified about the kind of information that is conveyed during group counselling sessions about the different contraception methods and who testified that

⁵⁸ V17 p2057 [75]

⁵⁹ V17 p2057 [73]

individual counselling is not only unnecessary but impractical.⁶⁰

65. It is submitted that Hoff J is wrong for the reasons set out below.
66. Hoff J failed to ask or consider whether there was a prior explanation at an antenatal class attended by the third plaintiff or in an individual consultation with Dr Krönke on 30 March 2005.
67. Had he done that, he should have found (as he should have with the other two plaintiffs) that it is more probable than not, that the third plaintiff would have been informed that sterility is the result of sterilization, at antenatal classes.
68. The third plaintiff admits that she consulted Dr Krönke but disputes that Dr Krönke gave her that warning. Her denial is a bald denial with little or no substance.
69. What Hoff J should have done but failed to do, was to decide which of the two mutually destructive versions was more probable or true. If he considered and decided that question, he should have decided that the version of Dr Krönke was more probable, plausible and credible. It is supported by objective documentary evidence.

⁶⁰ V17 p2057 [74]

70. Dr Krönke, is presumed to be a diligent, reasonably skilled gynaecologist. She testified that she consulted with the third plaintiff on 30 March 2005.
71. At that consultation she advised the third plaintiff to go for sterilization. She gave this advice because the third plaintiff wanted to terminate her pregnancy (she was 46 at the time) her advanced maternal age, her problems with previous pregnancies and her HIV status. In the course of advising her to go for sterilization, Dr Krönke informed her that sterilization meant that she would not have children again.⁶¹
72. Tellingly, the note by Dr Kronke says that the third plaintiff had used condoms with poor success and that she had thought about sterilization after her last delivery.⁶²
73. It is submitted that it is more likely than not that a diligent, reasonably skilled gynaecologist would have informed the third plaintiff that sterility is the result of sterilization. Why would she not? The reason the third plaintiff saw her was to ask to terminate her pregnancy. They talked about not having any more children because the third plaintiff did not want to have any more. It is more plausible than not, that Dr Krönke would have talked to her about sterilization and informed her of that sterility would result from a sterilization operation.

⁶¹ V16 p1802/31-p1803/6

⁶² Exhibits V2 p104

74. In finding that the third plaintiff had not given her consent on these occasions, Hoff J misdirected himself. He failed to answer the question before him. If he addressed the question before him, he should have found that the evidence was that the third plaintiff was informed 'on a prior occasion' before signing her consent form.
75. Hoff J found that Dr Sichimwa assumed wrongly from the entry in the hospital records that Dr Krönke had informed the third plaintiff of the risk or consequence of a sterilization procedure on 30 March 2005. Hoff J found that he could not make that assumption because the evidence of Dr Krönke was that the third plaintiff had not consented to a sterilization procedure during her consultation on 30 March 2005.
76. It is true that the third plaintiff had not consented to a sterilization operation during that consultation. She asked for a termination of her pregnancy. She only gave her consent in writing later just before her operation.
77. But the question was never and could not be whether the third plaintiff had consented to a sterilization operation during her consultation with Dr Krönke. That was never suggested by anyone. The question was whether Dr Krönke had informed her of the risk or consequence of the procedure. She had. She confirmed this in evidence. Her evidence is supported by the note on the medical records of the third plaintiff. Dr Sichimwa was correct in assuming that Dr Krönke had informed the third plaintiff from the entry in the hospital records.

78. The evidence of nurse Tjimbundu, that individual counselling is better than group counselling in antenatal sessions, is irrelevant. The third plaintiff had an individual consultation with Dr Krönke at which she was informed of the risk or consequence of a sterilization procedure.
79. The version of the third plaintiff is unreliable because it is so implausible. She consulted Dr Ithete on 10 March 2005. She requested a termination of pregnancy on medical grounds because she experienced various problems during previous pregnancies.⁶³
80. She denies that she spoke to him about termination. But her medical records, particularly the notes by Dr Ithethe and Dr Kronke confirm that she must have visited the hospital to request termination and that she must have appreciated that sterility is the result of a sterilization operation.⁶⁴
81. The third plaintiff could not recall or understand any of the explanations to her during her hospital visits, either because she was in severe pain when she came to hospital to request a termination of pregnancy, or because they did not speak in a language she understood.

⁶³ Evidence V13 p1456/3-5; 19-25

⁶⁴ Exhibits V1 p97-8, 102, 104-105, 110, 114,

82. Dr Ithete is from her ethnic background. He had a lengthy discussion with her in her language which he specifically recalled.⁶⁵ Dr Krönke and the medical staff testified that translation is always provided.

Conclusion/relief

83. Hoff J was wrong in law in finding that the plaintiffs had not given their informed consent to a sterilization procedure when they signed their consent forms while in labour and while being prepared for surgery.
84. Whether they gave their informed consent depended on whether they were given a prior warning that sterility was a risk or consequence of a sterilization procedure.
85. The plaintiffs were given a prior warning at antenatal classes. The second and third plaintiffs were given a prior warning by Drs de Klerk and Krönke in individual consultations long before they signed their consent forms.
86. The first plaintiff was given a prior warning shortly before she signed her consent form. But at the time, she knew, understood and appreciated that a sterilization procedure resulted in sterility.

⁶⁵ Dr Ithete V13 p1455/21-26; p1459/16-24

87. The sterilization is reversible in the case of the third plaintiff. But at the time of her operation she was already 46 years old and unlikely to have any more children.

88. The order on appeal sought by the government is the following:

88.1. The appeal is upheld and the judgment and order by Hoff J dated 30 July 2012 are set aside on appeal.

88.2. The order of Hoff J is amended and substituted with the following order: The plaintiffs' first and second claims are dismissed.

T J Bruinders SC

E Schimming-Chase

14 February 2014

FIRST PLAINTIFF

DATE OF DELIVERY: 13/06/2005

CONSENT FORM: EXHIBITS V1 PAGE 18

<u>DATE</u>	<u>TIME</u>	<u>EVENT – AS TRANSCRIBED IN ANTENATAL CARE RECORD (HEALTH PASSPORT) AND EVIDENCE</u>	<u>WITNESS/ EXHIBIT</u>	<u>RECORD</u>	<u>EXHIBIT</u>
05/01/2005		Antenatal care provided	Health passport		V1 p4
10/02/2005		Antenatal care provided	Health passport		V1 p4
24/03/2005		Antenatal care follow up provided	Health passport		V1 p6
13/06/2005	13h00-13h20	Dr Mavetera saw first plaintiff. He made a note that she was prepared for caesarean section due to cephalopelvic disproportion and BTL, and that she was on antiretroviral treatment	Hospital Records Dr Mavetera	V14 p1585/26	V1 p15; p24
		Dr Mavetera was called by Nurse Angula to examine first plaintiff. He ordered a caesarean section and explained the procedure to her. She then decided that she wanted to be sterilised. He advised her that should she want to be sterilised, she would no longer have children. This was translated to first plaintiff by the nurse.	Dr Mavetera	V14 p1589/14-30	
		Dr Mavetera testified that it is normal procedure for him to ensure that the patient understands the procedure before he leaves	Dr Mavetera	V14 p1589/31- 1590/7	
	13h20	Inscription made by a nurse that she was prepared for caesarean section and BTL, that she signed the consent form herself and that routine premedication was given			V1 p15
		The first plaintiff requested sterilisation. The doctor explained to her that if she wanted to be sterilised, it is a permanent thing, and she would not be able to bear children again. Nurse Angula translated what the doctor said and explained it again.	Nurse Angula	V14 p1674/26- 1675	
		After the doctor left, Nurse Angula called a student nurse and prepared first plaintiff for operation. She explained the procedures she would be undergoing as well as the consequences of sterilisation.	Nurse Angula	V14 p1675/20- 1676/7	
		It is standard that the procedure a patient is to undergo is explained her before she signs a consent form.	Nurse Angula	V14 p1676/29-31	
		Nurse Angula omitted to record that the sterilisation procedure was explained to first plaintiff but she knew she would have explained it.	Nurse Angula	V15 p1677/5-7	
	14h22	Time of delivery	Hospital Records	V1 p20	V1 p20
	14h50	Post operative inscription by Dr Mavetera that caesarean and BTL procedures performed	Hospital Records		V1 p22

SECOND PLAINTIFF

DATE OF DELIVERY: 09/12/2007

CONSENT FORM: EXHIBITS V1 PAGES 52 AND 54

<u>DATE</u>	<u>TIME</u>	<u>EVENT – AS TRANSCRIBED IN ANTENATAL CARE RECORD (HEALTH PASSPORT) AND EVIDENCE</u>	<u>WITNESS/ EXHIBIT</u>	<u>RECORD</u>	<u>EXHIBIT</u>
12/09/2007		Group Education was provided on routine antenatal care, breastfeeding, PMTCT and HIV/AIDS	Health passport		V1 p90
26/10/2007		Second plaintiff visited PMTCT Clinic. She was seen by Dr de Klerk, who made inscription on the second plaintiff's health passport including "Family Plan: BTL". She also made the inscription "BTL" on the front of her health passport.	Dr De Klerk	V13 p1472/20-26	V1 p89; p91
		Second plaintiff opted for bilateral tubal ligation at her consultation with Dr de Klerk	Dr De Klerk	V13 p1473/13	
		Dr de Klerk discussed and explained various forms of contraception to the second plaintiff, including bilateral tubal ligation.	Dr De Klerk	V13 p1476/11– p1477/19; p1477/9-21	
08/11/2007		Second plaintiff had an antenatal care follow up	Health passport		V1 p92
06/12/2007		Second plaintiff was seen by Dr Gurirab. He made an inscription of the visit on her health passport relating to the breech presentation of the foetus, and that an elective caesarean was advised.	Health passport		V1 p94
		Second plaintiff was referred to him for confirmation of breech presentation in her pregnancy.	Dr Gurirab	V14 p1567/21-22	
		He explained the risks and benefits of the caesarean section procedure to her. He would have made sure she understood.	Dr Gurirab	V14 p1568/10-14	
		He would not have discussed a sterilisation procedure with the second plaintiff if there was no recording of such discussion in his notes.	Dr Gurirab	V14 p1575/9-15	
08/12/2007	23h44	Second plaintiff admitted in ward			V1 p47
09/12/2007	00h39	Second plaintiff seen (presumably by doctor)... Note made to prepare her for caesarean section	Hospital Records		V1 p47; p48
		Nurse Ndjalo prepared the second plaintiff for the operation and signed both consent forms as a witness. (the time that signature was made is not indicated)	Nurse Ndjalo	V13 p1510/16-23; p1512/4-9	V1 p 52; p54
		She provided an explanation in relation to the consent form for operation as well as the consent form for sterilisation.	Nurse Ndjalo	V13 p1512/19– p1513/19	
		She saw the words "BTL" inscribed on the front of the health passport.	Nurse Ndjalo	V13 p1514/3-10	
	01h35	Time of delivery	Hospital Records		V1 p61

THIRD PLAINTIFF

DATE OF DELIVERY: 13/10/2005

CONSENT FORMS: EXHIBITS V1 p153 and p155

<u>DATE</u>	<u>TIME</u>	<u>EVENT – AS TRANSCRIBED IN ANTENATAL CARE RECORD (HEALTH PASSPORT) AND EVIDENCE</u>	<u>WITNESS/ EXHIBIT</u>	<u>RECORD</u>	<u>EXHIBIT</u>
10/03/2005		Third plaintiff was seen by Dr Ithete. He authored the reference transfer form and referral to gynaecologist.	Reference transfer form	V13 p1455	V1 p97-98
		He made a similar inscription in her health passport.	Health passport	V13 p1454/9-10	V1 p102-103
		Third plaintiff came to request termination of pregnancy on medical grounds because she experienced problems in her pregnancy.	Dr Ithete	V13 p1456	V1 p97
		Dr Ithete advised her and her partner to practice barrier method contraception.	Dr Ithete	V13 p1457/11-21	V1 p103
		He spoke to her in Oshivambo.	Dr Ithete	B13 p1456/10-11	
		Dr Ithete is Oshivambo speaking.	Dr Ithete	V13 p1454	
30/03/2005		Third plaintiff saw Dr Krönke for a gynaecological appointment. She made inscriptions on health passport. Patient plan was antenatal care and elective caesarean and BTL.	Health passport	V16 p1800/17-24	V1 p104-105
		Third plaintiff requested termination of pregnancy due to previous pregnancies. Dr Krönke advised her to consider sterilisation due to her request for termination, advanced maternal age, problems in previous pregnancies and HIV status.	Dr Krönke	V16 p1802	
		Dr Krönke explained to third plaintiff what sterilisation was about and that she would no longer be able to have children.	Dr Krönke	V16 p1802/30- p1803/4; p1814/18-23	
21/04/2005		Third plaintiff seen by medical practitioner, indication that she requested termination of pregnancy on medical grounds but pregnancy was too far. Plan: elective caesarean and BTL.			V1 p109-110
17/05/2005		Inscription in health passport that health education given on breastfeeding and PMTCT.			V1 p115; p117
12/10/2005	18h50	Nurse Tjimbundu admitted and prepared third plaintiff for her operation.	Nurse Tjimbundu	V12 p1351/16- p1352/25	
		Nurse Tjimbundu made inscription – “Plan – admit to the ward, observe, inform the doctor because pt is for elective C/S & BTL, reports in green passport”.			V2 p125
		She obtained the information that the third plaintiff wants to be sterilised from her health passport.	Nurse Tjimbundu	V12 p1353/3-7	
13/10/2005	08h35	Third plaintiff examined.			V2 P127
	09h00	Consent to operation signed by third plaintiff and witnessed by Nurse Tjimbundu.			V2 p153
	09h15	The following inscription on the third plaintiff's health passport was made by Nurse Tjimbundu: “Patient prepared for C/S + BTL consent signed by patient self after the drs explained the operation to her and she agreed”	Nurse Tjimbundu	V12 p1354/21-27	V2 p127

		After the doctors explained the procedures to the patient and she understands, then the patient is prepared for the procedure. This is the standard procedure for obtaining consent at Katutura State Hospital.	Nurse Tjimbundu	V12 p1355/10-12; p1356/17-25; p1358/22-24	
		If a patient does not understand a language, a translator is called to explain everything.	Nurse Tjimbundu	V12 p1359/3-8	
		Third plaintiff was informed of the sterilisation procedure, it involved tying her fallopian tubes and was the most effective form of contraception available in her case. Thus the nature of the operation including the risks were explained.	Dr Sichimwa	V11 p1242/27- p1243/17; p1244/10-22	
	10h36	Time of delivery.			V2 p 134

CASE NO: SA 49/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

APPELLANT

and

LM

1st RESPONDENT

MI

2nd RESPONDENT

NH

3rd RESPONDENT

LIST OF AUTHORITIES

1. Mabaso v Felix 1981 (3) SA 865 (A)
2. Oldwage v Louwrens [2004] 1 All SA 532 (C) at [91]
3. Castell v Greef 1994 (4) SA 408 (C) at 425
4. Waring & Gallow Ltd v Sherborne 1904 TS 340 at 344
5. Chester v Afshar [2004] 4 All ER 587at [14]

6. Pearce v United Bristol Healthcare NHS Trust (1998) 48 BMLR 118
at 124
7. Stellenbosch Farmers' Winery Group Ltd v Martel et Cie 2003 (1) SA
11 (SCA) 14I-15E
8. Galison Manufacturing (Pty) Ltd v Set Point Industrial Technology
(Pty) Ltd 2009 JDR 0047 (CP) at [21]