



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 216/2012

In the *ex parte* application of:**ARSÉNIO ABEL CHINGUFO****APPLICANT**In re: **EFIGENIA SEMENTE****EFIGENIA SEMENTE****APPLICANT**

and

ARSÉNIO ABEL CHINGUFO**RESPONDENT**

Neutral citation: *In re Efigenia Semente; Semente v Chingufo* (A 216/2012)
[2012] NAHCMD 2 (25 September 2012)

Coram: PARKER AJ**Heard:** 15 September 2012**Delivered:** 25 September 2012

Flynote: Medical treatment – Adult patient – Consent to treatment – Freedom to refuse treatment only subject to patient being competent to exercise such freedom and need to save life of another, eg unborn baby.

Summary: Medical treatment – Adult patient – Consent to treatment or refusal to treatment – Patient's right based on his or her freedom of individual (or personal) autonomy – Patient refusing blood transfusion on basis of her religious faith as a

Jehovah's witness – Right to decide one's own fate presupposes a capacity to do so
– Where patient is *comptos mentis* patient is not competent to exercise right to refuse medical treatment – Court entitled to order suitable treatment.

ORDER

- (a) that Mrs Efigenia Semente's (applicant's) non-compliance with the forms and service provided in the rules of court is condoned and the rescission application is heard as one of urgency.
- (b) that Mrs Efigenia Semente's rescission application is dismissed with costs.
- (c) that Dr Gideon Herbert Burmeister or any other suitable medical practitioner or practitioners as directed by Dr Burmeister or by any other doctor in accordance with the practice at the Medi Clinic Hospital, Windhoek, is authorized and directed to render appropriate medical treatment or medical procedures to Efigenia Semente, and such medical treatment or procedure shall include a blood transfusion.
- (d) that Mrs Efigenia Semente shall pay costs of the rescission application and the counter application on the scale as between party and party.

JUDGMENT

PARKER AJ:

[1] The instant proceeding is multifaceted. It consists of a rescission application and an opposition to it and a counter application and an opposition to it. On 13 September 2012 the court heard an *ex parte* application on urgent basis brought by the applicant Arsénio Abel Chingufo in *In re Efigenia Semente*.

[2] The court there took the view that the matter was urgent so much so that it permitted the applicant Chingufo to move his application without any papers have been filed. In that behalf, Mr Corbett, counsel for the applicant Chingufo, adduced viva voce evidence from Chingufo. Chingufo is the older brother of Mrs Semente (the subject matter of the ex parte application and in the present proceeding (as fully discussed below) and from Dr Burmeister. Dr Burmeister is a Specialist Obstetrician treating Mrs Semente at the Medi Clinic Hospital, Windhoek, where Mrs Semente is hospitalized. I accept that Chingufo is the older brother of Mrs Semente and he brings the application as a member of 'the family' and on behalf of 'the family'.

[3] The court having been satisfied that a case had been made out for the grant of the relief sought made the following order ('the 13 September 2012 order'):

- '(a) The forms and procedures provided for in the rules of court are dispensed with and the matter is heard on an urgent basis;
- (b) The applicant, Arsénio Abel Chingufo, is appointed as a curator to the person of Efigenia Semente;
- (c) The curator so appointed is authorised to instruct a medical practitioner(s) to render appropriate medical treatment to Efigenia Semente and consent to any such medical procedure on her behalf, such medical procedures to include a blood transfusion and any other procedure and/or treatment considered appropriate by such medical practitioner(s).'

[4] On 15 September 2012 Mrs Semente represented by Mr Heathcote SC (assisted by Mr Denk before Mr Denk was asked by the Court to withdraw for conduct unbecoming of a legal practitioner practicing without a Fidelity Fund Certificate and thereafter assisted by Mr Rukoro), brought an urgent application by notice of motion in which she seeks the rescission and setting aside of the 13 September 2012 order and costs on the basis that that order was erroneously sought or erroneously granted. Mrs Semente's application is supported by her founding

affidavit, an affidavit of Mr Emmanuel Semente (the husband of Ms Semente) and an affidavit of Dr Reinhardt Sieberhagen, 'a psychiatrist in private practice'.

[5] Chingufo has not only moved to reject the rescission application, he has also brought a counter application to the application of Mrs Semente whereby Chingufo seeks the relief set out in the notice of motion (as amended by Mr Corbett from the Bar on account of the oral evidence given by Dr Burmeister that a moment before the commencement of the present proceeding he received a call from Mr Semente that Dr Burmeister had been removed as Mrs Semente's doctor. No evidence was led to establish upon what authority Mr Semente did that. Anyway, I have only mentioned this piece of evidence to explain Mr Corbett's submission from the Bar to amend the relevant portions of the prayers in the counter application.

[6] Mr Corbett adduced the evidence of Chingufo, Dr Burmeister and Prof. Dr Pieper, a Specialist in pediatrics and neurotomy, or suchlike field (as I could gather from Prof. Dr Pieper's evidence) in support of Chingufo's case.

[7] The present proceeding involves a tug of war around the hospital bed (at the Medi Clinic Hospital, Windhoek) of Efigenia Semente (the applicant in the rescission application and respondent in the counter application). Mrs Semente, according to the evidence of Dr Burmeister (who at all material times was treating Mrs Semente, as aforesaid), which I accept, needs a blood transfusion to survive after a Caesarian section to deliver her baby and thereafter an operation to remove her uterus. If he had a free hand, Dr Burmeister would have administered a blood transfusion but felt prevented from doing that because while preparing Ms Semente for the Caesarian section prior to going into the theatre Mrs Semente gave him a copy of 'Durable Power of Attorney for Health'. Dr Burmeister understood that document to indicate that upon her religious beliefs as a member of the Jehova's Witness, Mrs Semente did not want a blood transfusion.

[8] The instant proceeding revolves around the enjoyment of basic human rights guaranteed by the Namibian Constitution. In that regard, at the outset, I make the crucial point that from the oral evidence adduced in support of the case of Chingufo,

I find that it is not the case of Chingufo that Mrs Semente is not entitled to enjoy her right to freedom to practice any religion and manifest such practice guaranteed to her by Article 21(1)(c) of the Namibian Constitution. That being the case, whether or not there has been a 'law' in Namibia that has imposed 'reasonable restrictions on the exercise of' that freedom is of no moment in this proceeding. Up to and during the hearing it was never the case of Chingufo that Mrs Semente's enjoyment of her Article 21(1)(c) right should be restricted. Furthermore, the motive of Mrs Semente for refusing blood transfusion is also of no consequence in the present proceeding. Mr Chingufo does not ask the court to look into any such motive.

[9] Nor is that all. As I understand Mrs Semente's case, which is ably argued by Mr Heathcote, Mrs Semente also seeks protection of her personal liberty under Articles 7 and 8 of the Namibian Constitution. In that behalf, as I see it, Mr Heathcote correctly conflates these two apparently related basic human rights, which – as I say – are guaranteed by the Namibian Constitution into what some text writers refer to as freedom of 'individual autonomy' (eg Mark Janis *et al*, *European Human Rights Law*, 1996 at 268) or freedom of 'personal autonomy' (eg S A Strauss, *Doctors Patient and the Law* at 31-32, referring to John Stuart Mill's famous essay *On Liberty* (1859), Cambridge University Press edition (1989) at 13).

[10] I did not hear Chingufo (in his oral evidence) or Mr Corbett to say that Mrs Semente should be denied her personal liberty or her freedom of individual autonomy. From the evidence I do find rather that the essence of the case of Mr Chingufo is based on two pillars. The first pillar is that Mrs Semente is not *compos mentis* to exercise her right to refuse treatment in the form of blood transfusion. The second pillar is that Mrs Semente's enjoyment of her freedom of individual autonomy should be considered against the child rights of Mrs Semente's eight-day's old baby boy that was delivered by Caesarian section and, indeed, the child rights of her other two children and the interests of the larger family and society in general.

[11] The case of Mrs Semente is that the two pillars upon which Mr Chingufo relies for his case have no merit: they cannot stand in law. I shall now proceed to consider the first pillar first for obvious reasons. The exercise of Mrs Semente's freedom of

individual autonomy depends upon whether she is competent to exercise such freedom.

[12] Geoffrey Robertson QC writes in his insightful and famous work *Freedom, the Individual and the Law* (1993) at 459 thus:

‘As a Canadian court pointed out, in stopping a hospital from transfusing blood to save the life of a card-carrying Jehovah’s Witness:

“At issue here is the freedom of the patient as an individual to exercise her right to refuse treatment and accept the consequences of her own decision. Competent adults are generally at liberty to refuse medical treatment even at the risk of death. The right to determine what shall be done with one’s own body is a fundamental right in our society.” ’

This statement was approved by the English Court of Appeal in *Re T (Adult: refusal of medical treatment)* (1992) 4 ALL ER 649 (CA) which also involved a tug of war around the hospital bed of a woman who had been brought up as a Jehovah’s Witness, and who needed a blood transfusion to survive after an operation. In a drugged state, and after talking to her mother (a Jehova’s Witness), she indicated she did not want a transfusion and lapsed into unconsciousness. Her father and her boyfriend, who were not members of the faith, urged a High Court judge at 11 p.m. at night to save her life by ordering medical staff (who were twiddling their thumbs) to give her a transfusion. The Court of Appeal approved the order, because of doubt about T’s real wishes (her mother had exerted undue influence) but confirmed the right of patients to decide their own treatment if they were capable of doing so by ratiocination, even if their conclusion was irrational.

[13] Thus, it was held in *Re T* that although prima facie every adult had the right and capacity to decide whether he would accept medical treatment, even if a refusal might risk permanent injury to his health or even lead to premature death, and regardless of whether the reasons for the reasons for the refusal were rational or irrational, unknown or even non-existent, if an adult patient did not have the capacity at the time of the purported refusal and continued not to have that capacity, or if his capacity to make a decision had been overborne by others, it was the duty of the

doctors to treat him in whatever way they considered, in the exercise of their clinical judgment, to be in his best interests. On the facts, the doctors had been justified in disregarding T's instructions and in administering a blood transfusion to her as a matter of necessity since the evidence showed that T had not been fit to make a genuine decision because of her medical condition and that she had been subjected to the undue influence of her mother, which vitiated her decision to refuse a blood transfusion. The appeal was therefore dismissed.

[14] In my opinion the golden thread that runs through the Canadian case and *Re T* is that just because adults have the right to choose, it does not follow that they have in fact exercised that right 'The right to decide one's own fate presupposes a capacity to do so' (*per* Lord Donaldson of Lynton MR in *Re T* at 661f-g).

[15] From the evidence of Dr Burmeister who, at all material, as I have said more than once, is the Specialist doctor treating Mrs Semente, I make the following factual findings. Mrs Semente is awake at the Intensive Care Unit and she has been put on a respirator. As a result of massive bleeding following upon the Caesarian operation and the subsequent removal of her uterus, her blood count is so low – that is, at below the normal blood count of 7 – that she does not get enough oxygen to the brain and all her vital organs at this stage. The consequence of this is that 'she is not 100% functioning mentally' (to use Dr Burmeister's words). I understand Dr Burmeister to mean that Mrs Semente is not fully in control of her mind: she is not *compos mentis*.

[16] Mrs Semente on the other hand, relies on the affidavit evidence of Dr Reinhardt Sieberhagen (mentioned previously) to challenge Dr Burmeister's evidence that Mrs Semente is not *compos mentis*. I make the following crucial and critical factual finding about the conduct of Dr Sieberhagen and his affidavit. Dr Sieberhagen is not involved in treating Mrs Semente. He does not say he practices at the Medi Clinic Hospital. He did not have – at least – the professional courtesy to ask Dr Burmeister to allow him 'to perform(ed) a psychiatric evaluation in respect of Mrs Semente', as he states in his affidavit. In this regard, I accept Dr Burmeister's evidence (given in response to the court's question) that it is not permissible and,

therefore is unethical in medical practice for a doctor to have professional consultation with a patient in a hospital that he or she is not treating. On that account it would be unjudicial for this court to accept Dr Sieberhagen's affidavit on any 'psychiatric evaluation' that, he says, he performed on Mrs Semente. To accept the affidavit and deal with it as evidence in this court would amount to judicial encouragement of unethical behaviour in the medical profession and bring the administration of justice into disrepute. Accordingly, I reject Dr Sieberhagen's affidavit as irrelevant. It cannot be admitted into evidence in this proceeding.

[17] It follows inevitably that the only medical evidence respecting the competency or otherwise of Mrs Semente to exercise her freedom of individual autonomy is that of Dr Burmeister. And I find that Dr Burmeister's evidence on the point under consideration is not so far-fetched that it can be rejected. I rather find it to be cogent, credible and relevant. His evidence is that Mrs Semente is not *compos mentis*. Consequently, I hold that, upon the authorities referred to previously, Chingufo has established that Mrs Semente is not *compos mentis*, and so she is not competent to exercise her freedom to refuse blood transfusion upon the basis of her freedom of individual autonomy. Having so found, it is otiose to consider Chingufo's second pillar mentioned previously. It is for this reason that I do not find it necessary to consider the evidence of Prof Dr Pieper, a highly qualified medical specialist in her field.

[18] Accordingly, I hold that the 13 September 2012 order was not erroneously sought or erroneously granted. Mrs Semente's rescission application therefore fails. By a parity of reasoning I hold that Mr Chingufo has established that he is entitled to the relief sought in the counter application. His counter application, therefore, succeeds.

[19] For all these reasoning and conclusions, the following order is made:

- (a) that Mrs Efigenia Semente's (applicant's) non-compliance with the forms and service provided in the rules of court is condoned and the rescission application is heard as one of urgency.

- (b) that Mrs Efigenia Semente's rescission application is dismissed with costs.
- (c) that Dr Gideon Herbert Burmeister or any other suitable medical practitioner or practitioners as directed by Dr Burmeister or by any other doctor in accordance with the practice at the Medi Clinic Hospital, Windhoek, is authorized and directed to render appropriate medical treatment or medical procedures to Efigenia Semente, and such medical treatment or procedure shall include a blood transfusion.
- (d) that Mrs Efigenia Semente shall pay costs of the rescission application and the counter application on the scale as between party and party.

C Parker
Acting Judge

APPEARANCES

APPLICANT: R Heathcote SC (with him A Denk), replaced by
R Rukoro)
Instructed by LorentzAngula Inc., Windhoek.

RESPONDENT: A Corbett
Instructed by Du Plessis, Roux, De Wet
Attorneys, Windhoek.