

***S v Frederiksen* (33/2016) ZAFSHC 161; SACR 29 (FB) (14 September 2017)**

Human tissue in a freezer: a crime or not?

1 Introduction

This case is about applications in terms of section 174 of the Criminal Procedure Act 51 of 1977 (CPA). According to this provision, a trial court may return a verdict of not guilty at the close of the case for the prosecution, if the court is of the opinion that there is no evidence that the accused committed the offence with which he is charged. The focus of this case discussion is only on the request by the accused for discharge on counts 8-17 regarding section 58 of the National Health Act 61 of 2003 (NHA) and counts 18-27 regarding section 55 of the NHA (the first part of the reported case).

Counts 8-17 (S 58 of the NHA) concern the removal of human tissue from living persons without their written consent and outside a hospital or an authorised institution over the period January 2010 to June 2015 (par 5). Counts 18-27 refer to section 55, read with section 56 of the NHA, insofar as human tissue were removed from women without written

consent and the removal was not done in accordance with prescribed manners and procedures (par 5).

Daffue J concluded that the NHA does not create crimes in those sections unlike for example sections 53 and 60. The judge accepted that section 89 of the NHA creates criminal offences, but concluded that none thereof related to the transgressions of sections 55 and 58. Unfortunately, neither the judge nor the prosecution made mention of the Regulations (Regulations Relating to Tissue Banks R 182 in GG 35099 of 2 March 2012 and Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes R 180 in GG 35099 of 2 March 2012) in terms of the NHA. The Regulations do create specific criminal offences in terms of the NHA. The charges put to the accused should therefore have included the relevant sections in the Regulations. The judge should also have used the power given to him in section 86 of the CPA to make an order that the charges should be amended, had he known of the existence of the Regulations.

The accused was granted the discharge he sought purely on the basis that the relevant sections in the NHA do not create crimes as per the legality requirement. It is our submission that the prosecution and the judge erred in not taking cognisance of the Regulations in terms of the NHA. The focus of this discussion is therefore on the specific sections quoted in the charges in the NHA and the Regulations in terms thereof.

2 Background

The accused was Mr P Frederiksen, a Danish national who was charged with 58 counts including *inter alia* rape, child pornography, transgressions of the NHA, fraud, transgressions of the Firearms Control Act 60 of 2000 and conspiracy to commit murder (par 1).

Concerning the transgressions of the NHA a female testified *in camera* that her clitoris was cut out (“harvested”) by the accused. His bedroom served as the “theatre” (par 6). The accused admitted to cutting and or piercing the private parts of females. He also made notes of the various circumcisions. The mentioned human tissue was stored in the accused’s freezer, where it was separately packed and identified with the names of the so-called donors. The witness said she agreed to the circumcison orally for an amount of R2500. The accused denied that payment was made for that purpose. Another female who unfortunately demised before the case, said in statements (considered as hearsay) but allowed by the court, that she was drugged by the accused during the procedure and did not give consent to the removal of the tissue (par 7). The judge concluded that because this was a section 174 application it would serve no purpose to deal with evidence any further pending the outcome of the section 174 application (par 7).

Dealing with the application, it was the judge’s view that the legislature failed to create criminal offences in respect of the transgressions concerning sections 55 and 58 of the NHA. His argumentation started by

him saying that the preamble of the NHA intended to establish a health system bearing in mind the imbalances of the past. The objects of the NHA, as set out in section 3 of the Act, are to provide uniformity in respect of health services. Accordingly, the judge argued that this context must be considered when sections 55 and 58 of the NHA are interpreted (par 9). The judge unfortunately erred in our view by placing too much emphasis on the Act itself. What should have been highlighted is the fact that the Act is the skeleton for health in general in South Africa, but the regulations in terms of the Act, provide the proverbial flesh to the skeleton.

Section 55 of the NHA addressing the removal of tissue from living persons, states clearly that the removal of human tissue can only be done with the written consent of the person from whom the tissue is removed. This written consent must be done in a prescribed manner and in accordance with prescribed conditions. The Act and the regulations are silent on what the prescribed manner or the prescribed conditions are. No crime is established in the Act concerning this provision. However, section 55 must be read with section 56, which provides that tissue may only be used for medical and dental purposes. This was clearly not done by the accused. He did not intend to use the female's clitorises for any medical or dental purpose.

Section 58 of the NHA stipulates that human tissue may only be removed in a hospital or authorised institution, on the written authority of the medical practitioner in charge of clinical services in that hospital or authorised institution, or any other medical practitioner authorised by him or her to give permission for the removal of tissue. An authorised institution is defined in the NHA as an institution designated as an authorised institution in terms of section 54 of the NHA. Section 54 determines that the Minister may designate any institution as an authorised institution. Section 3 of the Regulations relating to Tissue Banks explained how an institution should apply to become an authorised institution. The accused's room was not an authorised institution or a hospital and he clearly transgressed the stipulation in the Act. He also did not have the permission of a medical practitioner or any one authorised by such a practitioner to remove the tissue as required by section 58 of the NHA.

According to the judge, no criminal offences were created in any of the NHA sections as discussed above. If, the NHA is read without due consideration of the Regulations, the judge's interpretation is correct. He also referred to the repealed Human Tissue Act 65 of 1983 (HTA) specifically sections 23 and 34. The HTA "created offences and penalties in respect of the acquiring, using, supplying or removal of any tissue from the body of a living person for any purposes other than permitted in the Act" (par 11). The judge remarked: "For an unknown reason the legislature, supposedly being well aware of the offences created in the former Act, failed to create criminal offences in the Health Act [NHA] for similar transgressions" (par 11).

3 Discussion

The judge's argument, which is a very technical view of the NHA, was that no crimes are created by sections 55 and 58 directly in the Act itself. He is correct as mentioned earlier if one only reads the wording in the specific sections in the NHA. Daffue J referred to *Cool Ideas v Hubbard* 2014 (4) SA 474 (CC) on the principles applicable to statutory interpretation, amongst others that the words in a statute must be given their ordinary grammatical meaning and statutory provisions should always be interpreted purposively (par 13). He also referred to *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (2) SACR 183 (SCA) where the principle of legality was considered. In the *Prins* case, it was emphasised that the judiciary may not fulfil the role of the legislature (par 14). Daffue J also made mention of the principle of *nulla poena sine lege*, which requires that punishment, whether determinate or indeterminate has to be founded in the common, or statute law. The court cannot venture into the arena of the legislature by creating criminal offences merely because it might be of the view that a crime has occurred (*S v Molendorff and Another* 1987 (1) SA 135 T) at 169 C-J). Reference was also made to section 35(3)(l) of the Constitution of the Republic of South Africa, 1996 that states:

every accused person has a right to a fair trial, which includes the right - ... not to be convicted for an act or an omission that was not an offence under either national or international law at the time it was committed or omitted (par 12).

The judge therefore concluded that according to the rules of statutory interpretation, the principle of legality, the principle of *nulla poena sine lege* and section 35(3) of the Constitution that no criminal offences were created in the NHA concerning sections 55 and 58. He therefore granted the discharges based on section 174 of the CPA concerning the transgressions of the NHA.

It is our view that the prosecution and the judge should have taken cognisance of section 68 (1) of the NHA which authorises the Minister to make regulations regarding anything which may or must be prescribed in terms of the Act. The NHA repealed the HTA and organ and tissue donations are now addressed only in a chapter in an Act (Chapter 8 of the NHA). The rationale behind condensing the previously separate HTA to only a chapter in the NHA was based on the fact that supplementary regulations would be promulgated in terms of Chapter 8 stipulating the processes involved with organ and tissue transplantation. Regulations are easily amended, whereas to amend an act is a lengthy process. Because organ and tissue donations and transplantation evolves with time, the Minister decided it would be better to regulate the processes than by explaining the detail in the NHA itself. The Minister did promulgate Regulations in terms of the NHA in 2012. The Regulations concerning Tissue Banks in section 1 states that "no person shall remove ... human tissue from any living ... person ... store ... pack ... or in any

other manner dispose of human tissue whether in its original or in any altered form ... unless he or she is authorised with the Department in terms of regulation 3(3)(c)". Thus, the accused transgressed this section of the Regulations.

Section 6(1) of the Tissue Bank Regulations states that a tissue bank must record all information concerning a donation. It is specifically stated that the name of the competent person who removed the tissue must be recorded. A competent person is defined in the Regulations as a medical practitioner and registered as such in terms of the Health Professions Act 56 of 1974. In other words, the accused in this case was not allowed to remove the tissue from the females, because he is not a competent person, meaning he is not a medical practitioner registered according to the Health Professions Act. Section 21 of the same Regulations specifies offences and penalties. It states that any person who contravenes or fails to comply with any provision of these Regulations shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 and / or imprisonment for a period not exceeding two years. If the prosecution or the judge consulted the regulations of the Act, they would have realised that crimes are indeed created concerning sections 55 and 58 of the NHA.

Cognisance should also have been taken of the Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes. In terms of section 3(1)(a) of these Regulations the only purpose for which a tissue may be removed from a living person is for medical or dental purposes. Section 4 of the Regulations also stipulates who is allowed to be in possession of human tissue. S 25(a) of these Regulations specifically also makes it an offence for any other person not allowed according to the Act or the Regulations who has human tissue in his / her possession to be criminally liable. Section 25(a) states:

Any person who – (a) except in so far as it may be permitted by or under any other law, acquires, uses or supplies ... any tissue, ... of a living ... person in any other manner or for any other purpose than that permitted in the Act and these regulations; ... shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period of 10 years or to both fine and imprisonment.

By having the clitorises (human tissue) in his freezer, the accused clearly transgressed this section. The NHA is by no means perfect (Slabbert "The law as an obstacle in solid organ donations and transplantation" 2018 *THRHR* 70). However, the regulations in terms of the Act help with clarity in certain aspects. It is essential that chapter 8 of the NHA and the regulations in terms thereof should be seen as a whole when determining whether an accused has transgressed any stipulation.

4 Conclusion

This case is an example of a literal interpretation of the NHA without taking notice of the regulations in terms of the Act. The Act specifically

authorises the Minister to make regulations as pointed out above. This the Minister has done. In both sets of the regulations discussed, offences are created. It is thus our submission that the accused should have been charged on all the counts relating to transgressions of the NHA. The prosecution, or the judge, should have amended the charges to include reference to the relevant sections in the Regulations. It is clear that offences have been committed and it is not necessary for the legislature to change the Act.

BONNIE VENTER

Lecturer, Steve Biko Centre of Bioethics, University of Witwatersrand

MAGDA SLABBERT

Professor, University of South Africa