

## **THE PAYMENT FOR AN ORGAN AND THE ADMISSION OF GUILT BY A SOUTH AFRICAN HOSPITAL**

***The State v Netcare Kwa-Zulu Natal (Pty) Ltd – Agreement in terms of section 105A(1) of the Criminal Procedure Act 51 of 1977, Netcare Kwa-Zulu (Pty) Ltd and the State, Commercial Crime Court, Regional Court of Kwa-Zulu Natal, Durban – Case No. 41/1804/2010***

### **1 Introduction**

As the first of its kind in plea bargaining, a South African private hospital group pleaded guilty on charges of trafficking in human organs. The Commercial Crimes Court of the Kwa-Zulu Regional Court (a Specialised Unit of the National Prosecuting Authority of South Africa) made an order in November 2010 in terms of which Netcare Kwa-Zulu (Pty) Ltd (Netcare) entered into a plea and sentence agreement with the state whereby Netcare pleaded guilty to 109 counts related to charges of illegal kidney transplant operations. Charged with the St Augustine's Private Hospital in Durban were the parent company Netcare (Pty) Ltd, its Chief Executive Officer, Richard Friedland, and eight others: four transplant doctors, a nephrologist, two transplant administrative co-ordinators, and a translator. The admission of guilt by the group relates to illegal kidney transplants which took place between June 2001 and November 2003 whereby Israeli patients in need of kidney transplants were brought to South Africa for such transplants to be performed at St Augustine's Private Hospital. The kidneys were bought from Romanian and Brazilian citizens who were willing to sell their organs.

### **2 What is plea bargaining (plea and sentence agreement)?**

In terms of section 105A(1) of the Criminal Procedure Act 51 of 1977 a prosecutor authorised in writing thereto by the National Director of Public Prosecutions and an accused who is legally represented, may enter into an agreement. Kruger defines plea bargaining "as the procedure whereby the accused relinquishes the right to go to trial in exchange for a deduction in sentence; the prosecutor bargains away the possibility of a conviction in exchange for a punishment which would be retributively just and cost the least in terms of the allocation of resources" (Kruger *Hiemstra's Criminal Procedure* (2008) 15-5).

What is the purpose of plea bargaining and why is it used in practice? Bekker and others state that the main object thereof is to lighten the burden which the accused has to bear in the sense that the accused faces less serious implications as far as sentence is concerned, and to spare the state the time and expense involved in a lengthy criminal trial with all of its attendant evidentiary risks (Bekker, Joubert, Geldenhuys, Swanepoel, Terblanche and Van der Merwe *Criminal Procedure Handbook* 9ed (2009) 221).

### 3 The facts of the Netcare case

The basis of the legal action was that South African legislation has been violated in that some of the donors were minors, the donors pretended to be blood relatives of the recipients and the donors were paid for their kidney donations. The charges were a violation of the Human Tissue Act 65 of 1983 (repealed by the National Health Act 61 of 2003 but still in force for the interim) and a violation of the Prevention of Organised Crime Act 121 of 1998 as stipulated in charges 1 to 4 of the charge sheet.

An Israeli organ-broker, Illan Perry, started in 2000 to refer Israeli patients to Netcare's facilities in South Africa for organ transplants (Harper "Oorplant-dokters Dalk Vry" 28 November 2010 *Rapport* 8). In 2001 Belinda Rossi, a Netcare national transplant co-ordinator, flew to Israel to meet with Perry and also handed over false documents to create the impression that donors and patients were related. The necessary blood screening of prospective kidney suppliers were done in their respective countries and again in South Africa in an attempt to ensure sufficient compatibility with the prospective kidney recipients. Those deemed as suitable recipients were accommodated and chaperoned and were given the necessary documents to sign thereby indicating falsely that the donors and recipients were related to each other. This fraudulent activity was meant to circumvent the statutory requirement to gain outside approval, *via* a Ministerial Committee, for transplants of unrelated donors (Harper "Netcare Accused Offered Deal" 21 November 2010 *City Press* 10).

The accused, Netcare, were paid up-front for its participation in the illegal kidney transplants and the people/donors supplying their healthy kidneys were paid in cash after the operations took place. In 2002 Perry secured Brazilian and Romanian donors (the prospective sellers) instead of Israeli's as they accepted US\$6 000 instead of the initial US\$20 000 paid to Israeli donors (Harper 21 November 2010 *City Press* 10). The two recruiters that helped him, namely Captain Ivan da Silva and Gaby Tauber are currently serving an eight-year prison sentence each in a Brazilian jail. Perry, the organ-broker, and Mrs Rossi became state witnesses.

In 2003 a concerned doctor blew the whistle on the illegal organ scam. In 2004 Netcare denied any wrongdoing but was charged nevertheless. In 2008 the charges were withdrawn against the doctors and Netcare as the state was not ready to proceed at that stage. In 2010 charges were once again laid against Netcare, but although there was speculation of other illegal organ sales in the Milpark and Garden City Hospitals as well as at the Chris Barnard Memorial Hospital in Cape Town, the National Prosecuting

Authority decided to focus only on the illegal operations performed at the St Augustine's Private Hospital, a Netcare facility, in Durban (Eybers "Netcare-organe: 'Dis nie net St Augustine'" 14 November 2010 *Rapport* 12). Netcare entered into a plea-bargaining agreement with the state in terms of section 105A(1) of the Criminal Procedure Act 51 of 1977. In terms of the plea and sentence agreement they pleaded guilty and paid a fine of R4 million and agreed to forfeit assets to the value of R3,8 million (Harper 21 November 2010 *City Press* 10). Netcare made more or less R21 million with their deals (Harper 28 November 2010 *Rapport* 8).

The interpreter/translator who helped with the illegal organ deals also signed a plea-bargain agreement with the state according to which he was fined R50 000 and he got a suspended prison sentence of five years (Liebenberg "Tolk Gestraf Oor Onwettige Orgaanhandel" 24 November 2010 *Beeld* 6).

St Augustine's Private Hospital is the first in the world to be convicted on charges related to trafficking in human organs (Liebenberg "Organe: 6 Verhoor as Hulle nie Gou Skik" 15 December 2010 *Beeld* 4). Four surgeons and two former employees from Netcare are yet to be prosecuted.

#### 4 Assessment of the case

The Human Tissue Act 65 of 1983 regulates issues regarding human organs and human tissue, especially sections 18 and 19. Section 18(a) reads as follows:

- "No tissue, blood or gamete shall be removed or withdrawn from the body of a living person for the purpose referred to in section 19 –
- (a) except in accordance with the prescribed conditions; and
  - (b) unless written consent thereto has been granted –
    - (i) where such a person is a major, by that person;
    - (ii) where such a person is a minor, by the parents or guardians of that person ..."

Section 19(a), read with section 19(c)(ii), however, provides that any tissue of minors is absolutely prohibited from being used for transplantation into another living person (this absolute prohibition was inserted into the Human Tissue Act by an amendment effected by s 13(a) of Act 51 of 1989). Five of the persons used as donors (actually sellers) in the Netcare case at the time of the donation were minors, 19 years of age (Counts 1-5 of Charge 1 in the Charge Sheet). There are therefore no arguments that could validate what Netcare did. By evaluating the seriousness of the crime one should take cognisance of the fact that since the transgressions occurred certain laws have changed in South Africa. The Children's Act 38 of 2005 has changed the age of majority from 21 to 18 (s 17) and according to section 129(4) a person of 18 may consent to a medical operation. The Constitution of the Republic of South Africa of 1996 further states that a child is a person under 18 years old.

Another factor to be taken into account when evaluating the case *in casu* is that South Africa allows a girl of any age to consent to a termination of pregnancy without the assistance/consent of her parent(s) or guardian,

provided she is sufficiently mature and mentally capable of giving informed consent (McQuid-Mason “Some Consent and Confidentiality Issues Regarding the Application of the Choice on Termination of Pregnancy Act on Girl-children” 2009 2 *SAJBL* 48-51). Taking all the above factors into account it might raise questions as to the severity of using sellers of 19 years and the feeling is created that the media outcry that minors were (mis)“used” was in our context unnecessarily emphasised.

The plea-bargaining agreement between the State and Netcare in terms of section 105A(1) of the Criminal Procedure Act 51 of 1977 refers to an agreement between all role players in the healthcare profession in respect of organ transplants. This agreement is called a “Ministerial policy” which *inter alia* states the following:

“2.1.8 Donor organs must be used primarily for South African citizens and permanent residents. Written consent must be obtained from the Minister of Health before any person who is not a South African citizen or a permanent resident is accepted onto a transplantation programme ...

4.1.3 ... for unrelated living donors, in order to reduce the possibility of abuse, applications to perform a transplantation must be approved by the Ministerial Committee established for this purpose.”

This alleged “Ministerial Policy” is questionable as this “policy” referred to in the agreement is still only a “Draft document for discussion”. To date there is no official Ministerial Policy concerning the Human Tissue Act regarding organ transplants. The draft document and draft regulations have been drawn up to be implemented when chapter 8 of the National Health Act 61 of 2003 is promulgated. The National Health Act 61 of 2003 came into effect on 2 May 2005. Section 93 of this Act repeals the Human Tissue Act 65 of 1983 in total, but it will only be effected on a date to be fixed/determined by the President in a Government Gazette – this has not been done yet. In the interim the Human Tissue Act and the regulations in terms thereof still remain in force.

It must be emphasised that currently there is no specific piece of legislation nor any official legal document requiring organ-donors to be blood-related nor that transplants may only be done on South African citizens and permanent residents. It is common practice though, in hospitals where transplants are performed to get Ministerial consent if the donor is not blood-related to the recipient or if the recipient and/or donor is from a foreign country. The practice of hospitals to get Ministerial consent was specifically instituted to reduce the possibility of abuse, especially abuse of vulnerable groups. Although it is not the law, but a general practice, it is part of an Internal Policy which applies at all Netcare facilities. By using unrelated organ donors (sellers) and performing the transplants on foreigners Netcare did not violate any legislation, but violated an established practice as well as their own Internal Policy.

Section 28(1) of the Human Tissue Act further reads:

“No person except –

- (a) an authorised institution or, in the case of tissue or gametes imported in term of this Act, the importer concerned, may receive payment in respect of the import, acquisition or supply of any tissue or gamete for or to another person for any of the purposes referred to in section 4(1) or 19.”

Section 34(j) of the Human Tissue Act provides that any person who contravenes or fails to comply with any provision of section 28, shall be guilty of an offence and liable on conviction to a fine not exceeding R2 000, or to imprisonment for a period not exceeding one year, or to both the fine and the imprisonment.

Thus the only two things Netcare did legally wrong according to the Human Tissue Act were to use minors as donors and paying all the donors for their kidney donations. The payment for organs is against the law (Charge 2 in the Charge Sheet) but one should remember that the law was promulgated 28 years ago and it could be argue that times have changed. The question to be asked is if it is still so morally repugnant to think there is monetary value for an organ. As Kishore said “Millions of people are suffering not because the organs are not available, but because ‘morality’ does not allow them to have access to the organ” (Kishore “Human Organs, Scarcities, and Sale: Morality Revisited” 2005 31 *Journal Med Ethics* 362). He goes on to say: “When a person sells an organ he or she acts both selfishly, in advancing him or herself, and altruistically, in contributing to a public good. The presence of considerations is not a sufficient reason to transform a simple act into a sin [crime]. Otherwise selling water to the thirsty would be an equally big sin, in fact a rather bigger one” (Kishore 2005 31 *Journal Med Ethics* 363). The act of selling an organ saves at least two lives; one of the terminally ill (the recipient/patient) while the other is saved from hunger or poverty (the donor/seller). The concept of human dignity does not demand that people should be forced to die a premature death where an illness can be cured nor that people who donate organs should die of hunger and their families left to starve. To do this is rather contrary to human dignity (Kishore 2005 31 *Journal Med Ethics* 363; see also Slabbert and Oosthuizen “Establishing a Market for Human Organs in South Africa Part 1: A Proposal” *Obiter* 2007 28(1) 44-69; Slabbert and Oosthuizen “Establishing a Market for Human Organs in South Africa Part 2: Shortcomings in Legislation and the Current System of Organ Procurement” *Obiter* 2007 28(2) 304-323, and also Slabbert “Ethics, Justice and the Sale of Kidneys for Transplantation Purposes” *PER* 2010 13(2) 77-104).

Charge 3 in the Charge Sheet concerned the contravention of section 6 of the Prevention of Organised Crime Act 121 of 1998, read with sections 1 and 8 of the Act. Section 6 provides that:

- “any person who
- (a) acquires;
  - (b) uses; or
  - (c) has possession
- of property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence.”

The Netcare company pleaded guilty to its employees for having received payment, the proceeds of an unlawful activity; Netcare admitted that “in the circumstances” it knew “that the aforementioned property (the donated kidneys) formed part of the proceeds of unlawful activities” (Plea Agreement 8). When the employees of Netcare performed the illegal kidney transplants they were performing these functions as servants and/or employees connected with or attached to the transplant unit of the St Augustine’s Private Hospital in Durban.

The selling of organ does not happen in isolation; many people are part of the crime, making it easy to be labelled as “an organised crime”. But the question arises whether “organised crime” refers to an act or to a group (Leong “Definitional Analysis: The War on Terror and Organised Crime” 2004 8(1) *Journal of Money Laundering Control* 19, for a definition on organised crime see Burchell *Principles of Criminal Law* (2006) 974-976). On the one hand “organised crime” seems to refer to an act, for example the sale of human organs. On the other hand, it also refers to a group of people (syndicate) involved in the specific crime, for example the people working together in the Netcare case. It thus seems that “organised crime” should include both the “act” and the syndicate. The concept “organised” is a bit more problematic, because it is not clear what organise includes. It may simply refer to a well-planned operation which it is. It is thus acceptable that the sale of the organs in the Netcare case was part of organised crime. The group, although it consists only of short term partnerships, operated in a smooth well-planned way; the group thus have all or most of the attributes of other criminal organisations. However, because the people involved usually take part on a cash basis and only as the need arises, one can also argue that the undertaking is as such unorganised, consisting of isolated acts and that different legislation should apply (see also Burchell (2006) 970-1019 for a discussion on organised crime and the Acts, see also Slabbert “Combat Organ Trafficking – Reward the Donor or Regulate Sales 2008 73(1) *Koers* 11-12). Unfortunately this case was a plea and sentence agreement (plea bargaining) and not an open court case where the facts could be argued and tested yet it is a step in the right direction that Netcare was also punished in relation to the Prevention of Organised Crime Act 121 of 1998.

The United Kingdom’s Human Tissue Act 2004 in section 32 specifically prohibits organ-trafficking. Subsection 1 stipulates:

A person commits an offence if he –

- (a) gives or receives a reward for the supply of or for an offer to supply any controlled material;
- (b) seeks to find a person willing to supply any controlled material for reward;
- (c) offers to supply any controlled material for reward;
- (d) initiates or negotiates any arrangement involving the giving of a reward for the supply of, or for an offer to supply, any controlled material;
- (e) takes part in the management or control of a body of persons corporate or unincorporate whose activities consist of or include the initiation or negotiation of such arrangements.

According to subsection 2 of the UK's Human Tissue Act advertising for suppliers of material for reward is also prohibited. If the South African Human Tissue Act is compared to the Human Tissue Act of the United Kingdom there is a definite shortcoming in South African law – British legislation addresses the crime of organ trafficking, but it is not addressed in South African health legislation (see Allain Commentary “Trafficking of Persons for the Removal of Organs and the Admission of Guilt of a South African Hospital” 2011 *Medical Law Review* 117-122). This is a sure shortcoming because the demand for transplantable organs, especially kidneys, is so high, illegal transactions will not stop and need to be addressed thoroughly in our health legislation (see Slabbert 2008 73(1) *Koers* 75-99).

## 5 Conclusion

Given the shortage and the demand for organs, organ-trafficking has to be expected. It is specifically the large amounts pocketed by the middlemen for services rendered as part of a syndicate, operating across borders that necessitate a review of our current health legislation. As long as there is the huge demand for transplantable kidneys, there will be a market for illegal sales and there will be illegal entrepreneurs willing to organise such sales. Nancy Scheper-Hughes, a member of Organ Watch – a non-governmental organisation against the sale of human organs, based at the University of California – documented that organ-trafficking happens in many parts of the world; notably Argentina, Brazil, Cuba, Israel, Turkey, South Africa, the United States of America, the United Kingdom and India (Scheper-Hughes “A Grisly Global Trade: A Taboo Tumbles: The Market for Fresh Human Organs is Expanding Worldwide, with the Poor Providing the Rich” 3 August 2003 *Los Angeles Times* 2).

South Africa has no national organ register in which every transplant is recorded. The door is left open for transplants to be performed, without any questions asked especially in the private sector. As mentioned above it is a requirement in South African hospitals that a donor should be blood-related to the recipient or the patient's spouse. Yet in the private sector it is possible that few questions are asked or little research done in order to determine whether this is in fact the case. The prospective “donor” (actually the seller) may be coached by the organisers of the transplant to act as a relative of the patient. This indeed happened in the Netcare case.

The Netcare case is giving us a golden opportunity to revisit current and future laws and to re-think whether paying the donor is not the just way to go.

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