

COMMENTS ON THE CURRENT LESOTHO BRIBERY PROSECUTIONS

by Guido Penzhorn SC

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1. In this paper I will briefly set out the work done in combating bribery in Lesotho involving multi-national construction companies and consultants. I will then express a few thoughts and make some suggestions from my experience in leading these prosecutions. In doing so I will deal in particular with the role played by the international community and the role it can play through international donor/lending agencies such as the World Bank.

Introduction

2. The Lesotho Highlands Water Project is the result of a treaty between South Africa and Lesotho dating back to 1986 in terms of which water is dammed in the mountains in Lesotho for the purposes of supplying water to the Gauteng province of South Africa as well as hydro-power to Lesotho. Phases 1A and 1B have recently been completed and negotiations are underway in respect of phase 2. This is a multi-billion dollar project and in fact one of the biggest dam projects in the world.
3. In the mid 1990's an audit by Ernst & Young led to the dismissal of the Chief Executive of the project authority, Mr Masupha Sole. This in turn led to civil litigation against him in the course of which it was discovered that he had bank accounts in Switzerland. An application to the Swiss authorities followed from which it was discovered that he was receiving enormous sums of money, mostly through intermediaries, from contractors

and consultants involved in the water project. I was then briefed to lead the prosecution of Mr Sole and the others involved in what was clearly a bribery scandal unprecedented in Southern Africa.

4. Mr Sole was the first to be charged. He was convicted and on appeal¹ sentenced to 15 years imprisonment. Acres International, a firm of consulting engineers from Canada, followed and also on appeal² it received a fine of R15 million (the exchange rate between the Dollar and the Rand is presently approximately 6.1 to 1). Lahmeyer International, the engineering consultancy from Germany, was then prosecuted, convicted and sentenced to a fine of R10.6 million. It appealed against the convictions and on appeal the fine was increased to R12 million. Judgement was delivered on 7 April this year³.
5. In June 2003 one Du Plooy, the intermediary who acted on behalf of Impregilo of Italy, the lead partner of the consortium that built the main dam, pleaded guilty to bribing Mr Sole on behalf of Impregilo. In exchange for co-operation with the prosecution he was fined R500 000, coupled to a lengthy period of imprisonment which was conditionally suspended.
6. On 25 February 2004 Schneider Electric SA (formerly Spie Batignolles), the multi-national French construction company involved in building the transfer tunnels, pleaded guilty to 16 counts of bribing Mr Sole. A fine of R10 million was agreed with the prosecution and was paid.
7. Other prosecutions are pending.

International assistance:

8. The institution of these proceedings in 1999 was met with praise from the role players involved and the countries from where they came. This included a number of European countries as well as the United States and Canada. This praise was however coupled with a fair degree of scepticism. The thinking seemed to be that the prosecutions would be confined to the demand side, i.e. the Chief Executive, Mr Sole. Once he had been duly punished the point would have been made and everybody could go on with their business. When, however, the prosecutions moved to the international contractors/consultants involved and it was shown that the Lesotho authorities were serious about prosecuting these companies there was a discernable change in attitude. This was even more so when convictions followed and these convictions were confirmed on appeal by the highest court in Lesotho.
9. The initial praise to which I have referred was also accompanied by offers of assistance. The extent and nature of such assistance, how it assisted us and what lessons can be learnt therefrom is what I propose touching on in this paper.
10. Offers of and actual assistance should firstly be seen against the mounting resistance to these pending prosecutions in Lesotho once word leaked out about the application to the Swiss authorities relating to Mr Sole's bank records. The institution of these prosecutions was questioned by for instance suggesting that they were unlikely to succeed, that they were too expensive, and so on. Such resistance only quietened down once the convictions started coming in. These attempts to undermine the prosecutions in my view illustrate the very insidious nature of the crime of bribery. It may well be that certain prominent persons genuinely questioned the prosecutions because they thought they were too expensive or they thought that they were unlikely to succeed. It is also possible

however that the criticisms stemmed from a desire to keep a lid on things. The point is that one simply does not know. When prosecuting bribery, and this is what these cases have taught us, one is met with an almost impenetrable wall of silence. Even Sole, who is now serving his time in prison, is still not willing to come forward and place it all on the table despite a clear indication to him that this could well result in a reduction of sentence.

11. The prosecutions were and still are largely based on bank records received in terms of the Swiss mutual assistance legislation. The Lesotho government approached the Swiss federal authorities in Berne for assistance which in turn referred the application to Zurich where it was dealt with. The prompt and efficient manner in which the Swiss authorities dealt with what eventually became a complex and multi-layered application contributed immeasurably to the successful outcome of these prosecutions. Without this prompt response and continued co-operation which kept the momentum going these prosecutions may well have been scuttled already at a very early stage.
12. Apart from the Swiss authorities, we also received considerable assistance from OLAF, the EU anti-corruption unit. Over the last year or so it has given us enormous support which support has to date for instance impacted directly on the conviction of Schneider Electric SA.
13. At about the time the bribery scandal surfaced in Lesotho several overseas companies that were involved in the water project changed their corporate structure. Despite what the companies may say, we believe that this may well have been done in order to evade prosecution. One such company was Spie Batignolles. OLAF helped us access its company records in order to ascertain the nature and effect of its merger with Schneider Electric SA

on criminal liability. But for the help of OLAF we would not have been able to show that Spie Batignolles, which was involved as lead partner of one of the consortia, in fact survived the merger with Schneider Electric SA. Together with OLAF we are presently investigating other companies that we are considering prosecuting and good progress is being made here as well.

14. The point is that for a small country like Lesotho with its limited resources to investigate matters such as these without the assistance of institutions such as OLAF is quite simply not feasible.
15. The World Bank as a major sponsor of the water project took an interest in these prosecutions from early on, to the extent that there was World Bank funding involved, which was the case with among others Acres, Lahmeyer and Spie Batignolles. The interests of the World Bank and those of Lesotho largely coincided and this resulted in close co-operation between the Bank's investigation and ours. The World Bank lawyers visited Lesotho on a number of occasions to share our information and we did likewise when visiting Washington. The resulting benefits were considerable. On the one hand the World Bank lawyers had access to our documentation and witnesses which they could use in proceedings against the contractors/consultants involved, and we had similar access to World Bank documentation as well as any responses by the contractors/consultants in answer to the charges levelled against them by the Bank.
16. Assistance by the European Union and the individual countries from where the accused contractors/consultants came was far less encouraging. Initial approaches for assistance from the Maseru office of the EU came to nothing. In fact, our approaches were met with what bordered on suspicion.

17. As to actual financial assistance, I make mention of a meeting held in Pretoria at the commencement of these prosecutions in November 1999. This meeting was called by the World Bank in order to discuss the pending prosecutions in Lesotho and ways in which Lesotho could be assisted by the international community. It was attended by representatives from South Africa, Britain, the European Union, the European Investment Bank, individual banks in Europe, as well as others. Various promises of assistance were made by those attending. The official minutes of the meeting also record such promises, such as the representative of the EU undertaking to "contribute to the cost of the process" and the British High Commissioner in Lesotho saying "that DFID could possibly offer direct assistance, even though a part of the EU". The World Bank representative that chaired this meeting, Pamela Cox, assured the Lesotho Attorney-General in the context of assistance that "the World Bank has deep pockets". Unfortunately none of this help has been forthcoming. I can only surmise that someone higher up in the World Bank did not share Pamela Cox's willingness to assist.
18. The EU did send out a team (not OLAF) a few years ago to investigate the involvement of European companies. We placed all our information and resources at its disposal. The team could find virtually nothing untoward and largely gave the European companies a clean bill of health (this included Lahmeyer which was convicted and Spie Batignolles which pleaded guilty). We also noted a reluctance on the team's part to give us the evidential material gathered by them which led to their findings. I regret to say that they left us with the impression that they were not so much concerned with helping us than with white-washing EU spending.
19. Apart from Switzerland, and to some extent France which helped with an application for mutual legal assistance, no assistance was received from any

other overseas country. This despite the fact that these prosecutions have received considerable publicity overseas and interest groups such as NGO's have taken up the question of funding with various governments. When addressing the EU Committee on Development and Co-operation in June last year I also raised the question of assistance in the form of funding. Nothing has come of any of this. Faced with its own economic and social problems, such as a frightening Aids pandemic, Lesotho cannot really afford the costs incurred in these prosecutions. But it did what it had to do and this involved the allocation of funds which could well have been used for such other purposes. This clearly illustrates Lesotho's measure of commitment to fighting corruption. From our vantage point we do not see any such commitment on the part of other countries, i.e. those whose companies were and still are involved in the water project.

20. There is a lingering impression in Lesotho, as well as in South Africa, that the interest of first world countries in the present prosecutions lies not so much in the successful outcome of these prosecutions but rather in protecting the interests of its companies that are involved. Hopefully this impression will in time prove to be not correct.
21. There is a close working relationship between South Africa and Lesotho in matters such as these and here we also received considerable assistance from South Africa, particularly in the form of bank records.
22. The actual assistance I have referred to, particularly that from overseas, apart from the direct impact it has on the actual prosecutions, has also had a wider beneficial effect in Southern Africa. It is this. Lesotho is a member of SADC, the Southern African Development Community. This assistance and encouragement coming from institutions such as the World Bank and OLAF has been a subject of discussion at various meetings of SADC. I have

no doubt that this will serve as encouragement to other Southern African countries when deciding whether or not to tackle high level corruption.

Lessons learnt:

23. Corruption is a world wide industry. What Lesotho has shown is that something can indeed be done about it. All that is required is real and not merely token resolve.
24. Such resolve pre-supposes a prosecuting arm that is not hamstrung by political considerations or, more importantly, skeletons in cupboards of persons in a position to influence prosecuting decisions. After all, the one sure way to get away with bribery is to compromise those that make the decision whether or not to prosecute. This may explain why in so many countries, i.e. in Africa, little seems to be done about what appears from the outside to be obvious corruption. My team and I were fortunate in that we did not have this problem. We were given an open mandate by the Lesotho Attorney-General to do what we considered had to be done and throughout he gave us his full support.
25. International bribery is notoriously difficult to detect. It is clearly not in the interests of those involved to have their conduct known. The injured parties, i.e. the State and the public at large, would then not normally get to know of it. Having said that, however, where bribery is actually discovered, prosecuting it is not that difficult, that is once the prosecution gets past all the various legal hurdles placed in its way. On the one hand you have a contractor seeking a contract and on the other a State official who is in a position to exercise his influence in the award of the contract. There is no relationship between them other than this fact. If money then passes between them, particularly in suspicious circumstances such as

through Swiss banks, then, in the absence of some or other convincing explanation, the only inference to be drawn is that this money constitutes a bribe. In law we would call this compelling circumstantial evidence. To everyone else, it would simply amount to common sense.

26. Bribery involves two parties, the briber and the bribee. In a given situation it is normally difficult to establish who initiated the corrupt transaction. There seems to be a perception in the first world that in the context of construction contracts in the third world the initiative comes from the bribe taker rather than the bribe giver. In the African context this has been described as an "African problem". No doubt corruption can be initiated by the bribe taker. This has however not been the evidence in the present prosecutions in Lesotho. The evidence has shown that Mr Sole's first Swiss accounts were opened for him by the intermediary acting on behalf of French contractors, whereafter the payments commenced. Also that the payments were then normally linked to so-called representative agreements between the contractor/consultant and its agent (to which I will return below). Only once these agreements were in place were funds transferred to the intermediaries who in turn transferred the funds wholly or in part to Mr Sole. This would suggest that the initiative came from the briber and not the bribee.
27. The sophistication of the way in which it is done, and by for instance ensuring that the bribe payments come out of the receipts that the bribe giver receives as payment for its services for its contractual services under its contract with the employer, suggests an established practice and fine tuning by the bribe giver so as not only to protect itself but to also suit its financial accounting purposes. This will hardly come from the bribe taker.

28. The purpose of these prosecutions has not only been to obtain convictions. The objective has also been to get to the bottom of this problem and to seek to prevent it from recurring. To this end overtures have been made to various of the persons or entities involved to rather co-operate with the prosecuting authorities, in return for possible exemption from prosecution. All this has fallen on deaf ears. Even Mr Sole, now languishing in prison, has chosen to remain silent. At the time when all the accused were still together (they were initially charged together but the Court ordered a separation of trials) there also seemed to be a clear conflict of interests between them. Despite this they presented a unified front. What precisely it is that makes persons involved in the shadowy world of bribery stick together is not clear. Perhaps it is akin to some sort of honour among thieves. The more likely explanation would seem to be that once you get involved in bribery particularly of this magnitude you are not at liberty to simply look after your own interests when things go wrong.

The use of agents:

29. Multi-national contractors/consultants almost invariably it would seem rely on so-called representative agreements. In terms of these agreements the contractor/consultant would engage a local agent ostensibly to perform various services in the country where the contract is sought. Included among these is then also the obligation to secure the contract coupled to a stipulation that unless the contract is obtained the agent will not be paid.
30. I have heard and read various presentations at conferences and the like as to how contractors should seek to prevent corruption by its officials. Without wanting to sound too simplistic, at the heart of the problem lies the control of the agent. Certainly an agent can serve a legitimate purpose. However, if he is given carte blanche to obtain a contract and especially on

the basis of a contingency fee, he is almost invited to obtain the contract through corrupt means. In this context the presiding judge in the Sole case had the following to say, thereby really stating the obvious as judges are sometimes obliged to do (at pp 203 – 204 of the judgement):

“If the consultant is bribing a public official, then he is doing so for a purpose: either he is securing confidential information leading to an award of a contract, or he is securing such award outright. Surely, in that case, the results produced by the consultant speak for themselves? How can the principal be unaware of the consultant’s activities, particularly where they are extended over a period?

It will be seen that under the consultancy agreement between HWV and Mr du Plooy, the latter undertook to supply not alone the necessary information, but also undertook in effect to secure the award of the contract that is, to the extent that his fee would only become payable with the award of the contract. How can a consultant give such an undertaking *bona fide*? Surely the consideration which he offers and which he executes is the services which he renders and not the results thereof. In some jurisdiction legal practitioners have been known to offer their services on a result basis; while the system does not gain general approval, it cannot be said to be *mala fide*: there the confidence of the practitioner is based upon the strength of his client’s case. The construction industry gives rise to different considerations, however. Where many tenderers are involved, vying with one another for the award of a contract at an undisclosed sum, there is little basis for confidence, and any agreed undertaking by a consultant to secure the award, is then surely suggestive of bribery

on the part of both consultant and principal: indeed it suggests that the consultant has already prepared the ground for such undertaking.”

31. Although in Lesotho we are only dealing with the involvement of construction and consulting companies in the water project, it would be naïve to think that the use of representatives to hide bribery is confined to the construction industry. Instead and as a matter of overwhelming probability this is the way it is done in other large contracts involving public officials.

Preventative steps:

32. The Lesotho Court of Appeal (Lesotho’s highest court) in the Lahmeyer appeal judgement observed as follows, at page 55:

“However, it is also incumbent on the international community and particularly the funding agencies to revisit those practices and procedures it has in place and to use those sanctions it has the power to impose whenever contraventions of the kind proved in respect of this project occur. One of the devices employed in various cases that served before this Court was the use of “representative agreements”. They were used extensively as mechanisms through which payments intended as bribes were clothed with contractual respectability. They were in fact, in all the cases before us, used as cloaks to disguise and obfuscate the money trail. It required intensive research, expensive court procedures across international boundaries and tiresome and time-consuming efforts to obtain the necessary information to unravel the complex evidential strands required to determine and thus to provide the

necessary evidence. Above all it required political will and the provision of the necessary resources. To their credit the Lesotho authorities did this in full measure. They should be commended for their resolve.”

And in paragraph [65] at page 56 it stated as follows:

“This Court trusts that the various funding agencies will have regard to the above comments; that it will revisit its practices and procedures in general, but for present purposes, more particularly the practice of the employment of representatives who can play the obfuscating role played so frequently in this mammoth project. But also, that it will be firm and resolute in enforcing its disciplinary proceedings on any agency, company, individual or institution who participates in the practice of bribing those employed on development projects.”

33. These sentiments were obviously addressed at funding institutions such as the World Bank. Were the World Bank to act firmly against contractors and consultants involved in third world corruption, this would firstly have the effect of deterring corruption of the nature we are dealing with in Lesotho. Secondly, and equally importantly from the Lesotho vantage point, it would have the effect of encouraging a country such as Lesotho in its efforts to fight corruption. Lesotho would be told that it is not alone in fighting corruption which, after all, was largely initiated outside Lesotho and more particularly where the contractors come from. Perhaps most importantly what such action would be saying is that corrupting officials in a third world country such as Lesotho is not in any way condoned by the donor/lending agencies.

34. In the Lahmeyer case the Lesotho Court of Appeal remarked as follows on the World Bank's approval of the use of agents (at p 19):

"The World Bank suggests that it may be helpful for a consultant operating in a foreign country to employ a local representative who knows the country and can keep the consultant informed, particularly in the early stages of a project cycle when most consultancy business occurs. Detailed information concerning the World Bank's approach to RAs [representative agreements with agents] was not placed before us. It obviously does not envisage the RAs being used for improper or unlawful purposes. But the potential for abuse, without proper control being exercised, is very real and, on the evidence, not unknown. Whether in a particular case a RA was intended for unlawful purposes, and put to unlawful use, is a matter for evidence and/or inference given the circumstances of that case. In short, a RA cannot simply be taken at face value."

35. As to steps that contractors can take to ensure that the agent does not act corruptly, the Lesotho Court of Appeal in the Acres case offered the following "advice" (p 38):

"The genuineness of the agency contract would be best evidenced by proof that the services to be delivered by this mandate:

- i) Were genuinely required by the consultant concerned;
- ii) Could be delivered by the representative;
- iii) Were in fact delivered; and

iv) Generated remuneration that was commensurate with the anticipated and the actual service delivery.”

36. This, with respect, amounts to no more than common sense and the fact that contractors and consultants do not take such basic precautionary steps when engaging agents tends to militate against their professed good faith. In our prosecutions none of the consultants/contractors put up any invoicing, memos, faxes, correspondence or any other evidence pointing to a bona fide relationship with the agent.
37. In addition to the Court’s above sentiments, it is suggested that the World Bank make greater use of the contractual provisions that entitle the beneficiary of World Bank funding to audit the entity that it is contracted with. These prosecutions have shown that the bribe in engineering/consulting contracts is normally built into the mark-up factor. That is one of the things that such an audit would then focus on. This in turn would assist in the prosecution in that prosecutors have great difficulties otherwise in obtaining access to company records.

Other observations:

38. There is one big difference between prosecuting a natural person and prosecuting a company and that relates to punishment. A company cannot be sent to prison and neither does it suffer the social stigma of a conviction. The best the courts can do is to impose a fine which in most cases the company involved can easily pay out of its profits.
39. Or the company simply does not pay the fine, as is the case with Acres which still owes a large portion of the fine which was imposed. Here the

difficulty is that criminal sanctions (which fines are) are normally not enforceable in other countries. What the solution here is I do not know but something must be done to ensure that companies cannot simply walk away.

40. Another problem here is companies changing their corporate structure through for instance mergers in order to escape prosecutions. This practice also needs to be looked at. This the Italian authorities have indeed done by making the take-over company also criminally responsible for the acts of its predecessor.
41. The real punishment is sanctions by the international donor/lending agencies. By taking away the contractor/consultant's means of livelihood is the only real punishment which would match for instance the taking away of a natural person's liberty. Despite a somewhat inauspicious start, the World Bank seems to now be acting firmly against firms involved, starting with Acres. This is to be welcomed and hopefully the EU will follow suit.
42. Corruption has both a supply and demand side and in a country like Lesotho where international contractors/consultants are involved it is from the vantage point of the recipient of the bribe that one is able to view matters. This brings about obvious problems when having to deal with the payers of the bribes, such as bringing them before court and obtaining evidence from the countries where they are based.
43. Overseas prosecutions could then focus on the supply side. Countries on the demand side, such as Lesotho, could then obviously assist and it would then not be necessary for for instance Lesotho to also seek to prosecute the alleged payers. (Clearly when you prosecute the one you must also prosecute the other. As the Lesotho Attorney-General is apt to say, "it

takes two to tango".) Similar help could then also be extended in the other direction. This is what is already happening with OLAF.

Guido Penzhorn SC

Durban South Africa

(Lead counsel on behalf of the Lesotho government in the present bribery prosecutions relating to the Highlands Water Project.)

¹ M E Sole v The Crown, Lesotho Court of Appeal, case number C of A (CRI) 5 of 2002, judgement delivered on 14 April 2003. Smalberger JA, Melunsky JA (both former judges of the South African Supreme Court of Appeal) and Gauntlett JA (Senior Counsel in South Africa and former Chairman of the South African Bar Council).

² Acres International Limited v The Crown, Lesotho Court of Appeal, case number C of A (CRI) 8 of 2002 delivered on 15 August 2003. Steyn President of the Court, Ramodibedi JA and Plewman JA (a former judge of the South African Supreme Court of Appeal).

³ Lahmeyer International GmbH v The Crown, Lesotho Court of Appeal, case number C of A (CRI) 6 of 2002, delivered on 7 April 2004. Steyn, President of the Court, and Grosskopf JA and Smalberger JA (both former judges of the South African Supreme Court of Appeal).

(All three judgments referred to are electronically available.)