

Lesotho Highlands Water Project – Corruption and Debarment¹

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1 Introduction

The purpose of this study is to highlight some of the difficulties inherent in prosecuting corporations for bribery, and to examine the relationship between prosecution and debarment, particularly by reference to the sets of criminal prosecutions which have occurred recently in Lesotho, some of which were still unfolding as this analysis was prepared.

2 Background

The background to these trials is complex. The Lesotho Highlands Water Project (LHWP) was the largest infrastructure project of its type in the world. The project was officially launched in 1986, with the signing of a Treaty by the governments of the Republic of South Africa, and the Kingdom of Lesotho.

The Treaty set up the administrative mechanisms and rules which would govern the construction of the dams and transfer tunnels to control the flow of the River Senq/Orange, providing water for South Africa and electricity and income for Lesotho. The two countries shared responsibility for the parts of the project which lay within their borders. Two parastatal authorities were created, namely the Lesotho Highlands Development Authority (LHDA), and the Trans-Caledon Tunnel Authority (TCTA) in South Africa.

At the outset of the project, Mr Sole was appointed Chief Executive of the LHDA. The position was inherently powerful and influential. Over the course of the next decade he

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abused his powers of office, increasing the control and influence he had over the award of contracts in the project to the point where he appears to have answered to no-one.

In 1993, the web of deceit and corruption began to unravel, with the election of a civil government in Lesotho. The LHDA was subjected to an audit, in which classic indications of corruption now showed up. A disciplinary enquiry followed, and its findings led to the dismissal of Sole. Sole vigorously resisted each stage of his departure from the organisation: in court, he challenged the Minister's powers in respect of both the enquiry and his dismissal.

In 1996, the LHDA began civil proceedings against Sole, for the return of the moneys which he had appropriated during his employment at the LHDA. During the course of the proceedings, it emerged that Sole had received moneys, from various companies, contracting and consulting at work on the LHWP, via agents/intermediaries

The list of companies who had made such payments was extensive: generally, payments were made under the auspices of their agreements with the middlemen/representatives they used, with each party using numbered Swiss bank accounts in their dealings with each other. Sums of money finding their way into those bank accounts amounted to millions of dollars. The Lesotho Attorney General took the decision to embark upon the most comprehensive series of prosecutions for corruption. At the outset, in December 1999, the indictment contained nineteen groups or individuals, charged variously with the common law offences of bribery, fraud and perjury.

In May 2000, the corporate defendants met, to discuss the tactics they might use in resisting their prosecutions. A programme of cooperative litigation was carefully designed to draw out and frustrate the prosecution. *Over a hundred separate preliminary applications were made to the court before the first trial began.* These tactics extended the proceedings substantially, extending the pressure on the Lesotho authorities to halt the prosecutions, and increasing the costs to be borne by Lesotho.

In summary, over the course of the following months, separate trials were ordered, in respect of certain companies. One of the consortia, HWV, successfully applied to the court for an order that each member of the consortia was a separate legal entity, and as such, it should be separately.

The defendant companies Acres, Lahmeyer and Spie argued that they had not been correctly cited on the original indictment. They did not proffer alternatives, but one may infer that they would have offered up one of the company employees, which would have given rise to some interesting conflicts of interest. This is a particularly interesting point, since it goes to the heart of the difficult question of criminal corporate liability, a legal concept recognised in common law jurisdictions, but not known in countries where the civil code is the norm.

The court had been asked to rule on a wide range of preliminary issues: from the perspective of the corporate defendants, the question of jurisdiction was critical. Complex defence arguments were prayed in aid of the proposition that the court had no jurisdiction, if it could not be satisfied that the agreement for bribery had been made within the jurisdiction, however, such arguments did not prevail.

Acting Judge Cullinan, a highly experienced former Chief Justice of Lesotho, had presided over most of the preliminary applications, including the jurisdiction question. After an extensive survey of the jurisprudence, based on the assumption that the locations of the offences were unknown, he concluded that the law was that since the impact of the alleged offences were to be felt most keenly in Lesotho, then this was the appropriate jurisdiction for the trials.

At the outset of the proceedings, the Lesotho authorities had taken the view that it was critically important, given the significance of these trials, that the process of litigation should be seen to be highly competent, timely, and procedurally above reproach, all of which Cullinan AJ ensured. The sheer number of defendants, each with different interests, had presented the court with a logistical difficulty, which gave way to an application that the trials should be split.

This was a difficult issue for the court to decide. It would be prejudicial for Sole to be tried in conjunction with all the other defendants. Yet, in the course of his trial, allegations would be made about the conduct of the companies who had bribed him which the respective companies would not be in a position to address or rebut. Further, the time which would elapse as each company was individually brought to book would result in a cloud, hanging over the concerned companies. It was unfair to each defendant, for one reason or another. Cullinan AJ took the view that this was nevertheless the way in which justice would best be served, and the long series of substantive trials finally began, with Sole, in June 2001. His partner in crime, (and friend), Bam, had died of a heart attack earlier, and the prosecution of Mrs Bam was discontinued.

Sole himself decided to remain silent, throughout his trial, although he nevertheless took full advantage of all the procedural points his lawyers were able to take, such as trying to adduce new evidence when the prosecution and defence had both closed their cases. He was convicted of bribery on eleven counts, subsequently appealing unsuccessfully against the verdicts, although achieving a small reduction in his sentence.

3 Acres

Acres, a Canadian company, was the first corporate defendant to be tried.

Acres was accused of the common law offence of bribery. It was alleged that the company had made a number of payments to Mr Bam, in his capacity as the company's representative, and to his wife, over half of which were then passed on to Sole himself, as a bribe, to ensure the awards of certain contracts being made to Acres.

The destination, sequence, size and timing of these payments, together with the nature of the evidence of a representation agreement between the company and Mr Bam, all amounted to the circumstantial evidence from which the court was invited to infer that bribery had occurred. During the proceedings, which were presided over by Judge Lehohla, a number of witnesses gave evidence on behalf of Acres, although noticeably not Mr Witherall, the key defence witness who had previously given evidence to the World Bank during the Banks investigation.

In general, the witnesses for Acres did not impress either the judge or his assessors: they found the witnesses to be evasive, vague, misleading and in some instances, simply mendacious.

When the time came for sentencing, Acres came to court pleading that a fine would be very difficult for them to pay. However, they produced no evidence to substantiate their claim, and were fined the equivalent of [Canadian dollars] \$C3.8 million.

The company appealed.

In the Appeal court, the issue was stark in its simplicity. Was the representation agreement (under which Acres alleged it had correctly made payments to Bam for services rendered by him to the company) a *bona fides* document, being evidence of a genuine agreement between the company and Bam, in which the money that Bam paid on to Sole was unknown to Acres? Or was it a sham, giving rise to the reasonable conclusion that the representation agreement was simply a device deliberately designed to deceive any investigator about the true nature of the relationship between the company and Sole?

The Appeal Court judges re-assessed the evidence from the lower court: they looked at the need for Bam's services, the terms of the agreement scheduled thereto, the circumstances surrounding the agreement, the payments made under it – amounts, destinations, timings – and the timing of the agreements against the contracts which Acres won. The ineluctable and unanimous conclusion drawn by the Bench was that Acres had bribed Sole, using Bam as a conduit for that bribery.

The first public response of Acres to the verdict had been to criticise the trial judge, and to suggest that their Appeal would completely exonerate the company. The second public response of Acres, on losing their appeal, was to lobby the Canadian Government, and its representatives in the World Bank, in an effort to avoid debarment. This the company now faces, as the World Bank resumes the process which was stalled by the criminal trials.

The company has still not paid the fines which were imposed upon it in the Court of Appeal. Earlier it had applied to have payment of the fine imposed in the lower court suspended pending hearing of its appeal. Before this application was granted, an undertaking was given to Judge Steyn that, should its appeal fail, Acres would pay the fine forthwith thereafter. It is a particularly unacceptable feature of this company's behaviour that it undertook in court, through its Counsel, to pay the fine, yet it continues to refuse to do so, depriving the Lesotho coffers of the money, whilst it is now hiring the services of very expensive Washington lawyers to assist it in fending off debarment.²

One might argue that if the company was as wedded to the notion of good governance as it professes itself to be, then the fine would have been paid shortly after it had been levied. It may be that the court in Lesotho will be asked to impose further penalties. In

² The conduct of the company may give rise to an application to the court to commit its barrister for contempt of court, or to disbar him completely. At common law, undertakings given by a barrister to the court are personally binding on the barrister, and he or she must comply with the undertaking in the event of his/her client failing to do so.

the meantime, the outcome of the World Bank's debarment procedure is awaited with very great interest.

4 Lahmeyer

Lahmeyer was the next corporate defendant to be tried. The company was found guilty, on a similar set of facts, and subsequently lost its appeal, once again having argued that the representation agreements it had made with Bam were *bona fides*, for the same sorts of reasons Acres had given to the court. The company met with the same lack of success, both at trial and in their subsequent appeal. The company also faces a concluding chapter in the debarment process.

5 Overview

It is too soon to estimate the full impact of these trials upon these corporations. In the short term, for Acres, it seems that the key note of the company's attitude is that it cannot accept the due process of the law in Lesotho, although it has not said why not. The company casts implied aspersions on the laws of Lesotho, but as they largely correspond to the common law jurisdiction of Canada, their arguments cannot be developed with any conviction. The company has expressed 'disappointment' in the rulings of the Lesotho court, rather than contrition. In its public stance, it emphasises that the matter should now be seen in the light of the place which Acres now occupies in the vanguard of anti corruption policies in the Canadian corporate world. The company is understood to be lobbying the Canadian government hard in its attempts to avoid debarment and blacklisting, and it would seem that so far, it has succeeded, at least in slowing down the process.

This landscape may alter, following the completion of the World Bank debarment process. An observation from the legal perspective is that for effective good governance, it must be axiomatic that in circumstances where bribery has occurred, been detected, and a criminal conviction secured, then the defendant must accept that appropriate punishment must follow. This is essential if the process to be a complete, effective and suitable deterrent to others considering the same course of illegal conduct. Such punishment may include fines, debarment and blacklisting, notwithstanding the unfortunate consequences for the company which may flow from such punishments.

The trial of Lahmeyer raises a different point. Lahmeyer faces the same debarment procedure within the World Bank, but the doctrine of criminal corporate liability has no basis in German law, a civil code jurisdiction: indeed, there is no previous instance of the prosecution of a company for an economic crime. This complicates the question of jurisdiction even further. As things in some OECD member countries stand, prosecution of a company is confined to common law jurisdictions. Therefore, even now, under the Convention, and the enabling legislation in Germany, Lahmeyer itself would not have been prosecuted.³

This issue lies at the heart of the question of the effectiveness of the legislation enacted by parties to the OECD Convention Combating Bribery of Foreign Public Officials.

³ This represents a grotesque "hole" in Convention and confers a "corrupt advantage" on corporations based in civil law jurisdictions.

Bribery is by its nature a secret offence. In the light of the Lesotho cases, it is clear that the two convicted companies bribed Sole over a period of years to an extent and in a manner which the courts found to have been clearly sanctioned by the companies themselves, and by implication therefore by the respective Boards of Directors.

If a conviction had been sought solely on the basis of the conduct of an employee, acting without the knowledge of the company concerned, it is difficult to see how it would have succeeded. The evidence against all of the companies concerned in this massive complex circuitry of corruption was not of a personal nature, showing the conduct of certain isolated and criminal employees of two or three companies, but against a wide spectrum of powerful and ambitious transnational corporations, who took steps of various sorts to insure themselves against the dangers of prosecution.

6 World Bank implications

Both of these companies had benefited from financial support from the World Bank. When the allegations of corruption first surfaced, the World Bank began its own investigations. The investigations led to debarment proceedings being instituted against both companies. The evidence which formed the basis of the prosecutions in Lesotho, in particular the information which emerged from the Swiss bank accounts, was all available to the World Bank, at the outset of the debarment procedure.

However, the Bank decided that it did not have sufficient evidence, *at that time*, to debar either company. It retained its interest in the matters, however, indicating that if 'further new evidence' emerged in the course of the criminal trials, then it would revisit the debarment proceedings.

New evidence obviously did emerge during the course of the trials, and the Bank has now re-opened the proceedings against Acres, with a hearing due to take place in Washington in June 2004. What the Bank considers to amount to 'new evidence' will emerge during the course of the re-opened debarment procedure, but to the outside observer, that 'new evidence' can only be the evidence which emerged during the course of the trial, under cross examination, together with the conclusions which were drawn by the Bench.

7 Questions for the World Bank

The first question must be this: what is lacking in the investigative procedures of the Bank, that in the end they have had to rely upon the Lesotho prosecutors and court proceedings, to provide the evidence of what took place (proved to the criminal standard of "beyond reasonable doubt"), and that they, themselves, could not ascertain (even to meet the lower, non-criminal standard of proof, "on the balance of probabilities")?

The Bank currently occupies interesting, hybrid ground in law – it has immunity from prosecution itself, which gives it a certain autonomy whence it is accountable only to its government shareholders... yet it does not appear to have sufficient powers to conduct a forensic examination where bribery/fraud/corruption has taken place in projects that it finances.

In particular, the allegedly adversarial nature of its debarment process does not extend to permitting cross examination during a debarment hearing. One might suppose that it

was during the cross examination of the witnesses in the Acres trials that 'new evidence' arose. Accordingly therefore one might argue that anything less than forensic powers, given to an arms length task force, for the purpose of investigating corporate corruption will stand little chance of success in the detection of serious instances of corruption.

The second question is this: what is the relationship between the Bank's debarment process and the due process of a criminal prosecution within a national jurisdiction?

At present, there seems to be an informal relationship, in which information has been exchanged between the Bank and the Lesotho authorities. This group of prosecutions, dovetailing with the debarment procedures, is unprecedented, and certainly the Bank deserves credit for the cooperation it has extended to the victim country by making its own evidence available to the prosecutors. However, the Bank's debarment procedure embraced the possibility that Acres might not, in the end, have been debarred at all, despite its criminal convictions.

Had Acres not been debarred, this would at least have implied contempt on the part of the Bank for the due process of law in the Lesotho courts. It would have been available for use by Acres to launch further attacks on the Lesotho courts and criminal justice system as being, at best, unreliable and at worst, corrupt. It certainly would not have augured well for other countries considering embarking on similar, devastatingly effective courses of action to root out corruption in their own jurisdictions.

It was alleged that behind the scenes in the Bank, some Canadian officials had been lobbying on behalf of Acres. One is obliged to conclude from this and all the other surrounding evidence that the Canadian prosecuting authorities would not have been encouraged to mount a prosecution of Acres themselves in the prevailing political climate. This conflict of interest is, on one view, a fatal flaw in the OECD Convention Combating Bribery of Foreign Public Officials. A clear cut decision to prosecute becomes far more difficult to achieve where there are competing 'public interests', where difficulties of evidence-gathering can be exaggerated, and where a pragmatic view is the one most likely to prevail. The rationale of decisions to prosecute, or more frequently *not* to do so, is, at the best of times, shrouded in mystery, with the expression 'the public interest' in frequent usage as a cover all.

In the course of the Acres trial, many Canadian lawyers expressed their disapproval of the prosecution of a Canadian company in a foreign land, offering the rationale that Acres had learnt its lesson, and it had become such a pristine, corruption free organisation – a regular paragon of virtue - that it would be unfair for the company to have to revisit events in its history in this way.

This is an interesting construction of the notion of criminal corporate liability, that in some way corporate liability should be circumscribed by an arbitrary period of limitation – and that repentance after the event, and when facing punitive sanctions, is sufficient to remove any need for punishment.⁴ Arguably, this approach within the Canadian legal

⁴ The proposition is, of course, bizarre. The company should not be prosecuted because it has been caught out and has reformed its practices to avoid disbarments etc. Clearly, without the prospect of punishment the company would in all likelihood have continued with its practices. This is not to say that corporate reforms ought not to be taken into account when assessing appropriate sentences. They frequently are taken into account, or made a condition, when sentences are fixed.

community fortified Acres disinclination to pay the fine which was imposed as a sentence (it is now being paid in instalments!). This would appear to be an inappropriate response on the part of a certain sector of the legal community to the due process of law which has unfolded over the last two years in Lesotho.

If the trials have been conducted with complete rectitude, the fines are due and payable. Indeed, Acres gave its solemn and formal undertaking to pay them to the Judges of the Appeal Court in Lesotho.⁵ It is a matter of conjecture, whether Acres, and the section of the Canadian legal community that has been supporting the company, take the view that the trial and appeal were in some way flawed, and that Acres is morally not obliged to pay the fine.

8 Spie Batignolles

Faced with prosecution for bribery, a third corporation, Spie Batignolles has produced a new line of defence.

Spie Batignolles Ltd was registered in Lesotho in 1987. A series of bribes were made by the company, prior to 1995. Contracts 124/5/6, and Contracts 129A/B were awarded to the Joint Ventures, LHPC and MHPC, in which Spie Batignolles was the lead partner. LHPC had been registered as a partnership on 29 January 1991, MHPC similarly on 24 March 1994. Both partnerships registered Spie Batignolles with its Lesotho company number.

The company has now gone through a series of manoeuvres, which led to its contention that the company in Lesotho, 'Spie 1', had been substituted by another, 'Spie 2'. Accordingly, the representative who had originally been served with the indictment had been wrongly served, and therefore the trial amounted to an abuse of process.

Specifically, on 19 May, 1995, the company had entered into a 'contribution and divestment agreement', with a French company called Gesilec. By the terms of the agreement, Spie Batignolles divested itself of all its assets and liabilities, into 'Gesilec', which renamed itself Spie Batignolles, on 27 June 1995. On the same date, the original Spie Batignolles, 'Spie 1', now merged with another company, namely Schneider SA, the new company assuming the name Schneider Electric SA. Crucially, before making any of these moves, it made no attempt to dissociate itself from any partnership agreements in Lesotho. The consequence was that the arguments which it ran to try and evade prosecution were all doomed to failure.

In his judgment on 11 December 2003⁶, Nomngcongong J said (at p6):

'What this means is that when the original Spie Batignolles decided to dissolve itself apparently without the sanction of any court either here or in France what ever the law is in that distant land, it left its name in Lesotho and whatever else was associated with itself, including most of its employees... It never even bothered to change its registration number as an external company in Lesotho. It

⁵ Indeed, were the company within the jurisdiction of the Lesotho court, its officials could well have been imprisoned for their continuing contempt of the court. The failure to pay the fine is the more serious as the World Bank was among those who refused to assist Lesotho in the financing of the proceedings on the grounds that the country would recoup its costs on gaining convictions.

retained its face in this country intact. On the other hand it left in France the number on the basis of which it was registered in Lesotho as external company in the hands of a completely different entity. I have no doubt in my mind that this was calculated to deceive and to send the authorities of this country on a wild goose chase...[His Lordship went on to cite the statutory provisions with which the company had failed to comply] ...What all this leads me to is that whatever happened in France this was meant to mislead and calculated to deceive us in Lesotho. The present applicant was no doubt a party to such machinations as were done in France. It is hardly a coincidence that all the so called mergers deposed to by Salazar were done by resolutions of special shareholders meetings on the same date. All of these were done for no demonstrable reason around the time when the net was closing around one Mr Masupha Sole, who it is alleged received bribes from Spie Batignolles.....'

'This is a classic case where 'fraudulent use is made of the fiction of legal personality for purposes of improper conduct'.

Subsequently the prosecutors in Lesotho proceeded with the case, tracing the clear corporate relationships, and their work resulted in a guilty plea from Schneider/Spie, who now accepted liability for bribing Sole, and pleaded guilty in February 2004. The company was fined \$US1.4 milion.

It is clear from the negotiations leading to the plea that Schneider Electric SA had taken a pragmatic decision, fearing a damages claim from Spie 2, which had been sold to Amec, in February 2003 on the apparent basis that Spie 2 was free of any liability in Lesotho – an uncertain assertion for the Board to make, in circumstances where, until the ruling of Judge Nomngongo in December 2003, the issue of liability between the two companies had not been resolved. In a recent Amec AGM, the board was able to assert, with some relief, that the matter was now resolved, with all liability accruing to Schneider/Spie, none to Amec/Spie.

This defence had been particularly artful, depending for its success upon the failure of the prosecutors to address the requirements of company law in Lesotho. In simple terms, where a company re-invents itself, it presents the prosecutors with the challenge of identifying and prosecuting a defendant company which has taken a series of steps amounting to a sophisticated attempt to redistribute its identity, and therefore its liabilities. In current French jurisprudence, this would appear to be both legal and effective.

It is interesting to note that both companies using versions of this particular line of defence would trace the corporate manoeuvres giving rise to their defence back to the period in which Sole had fallen into disrepute with the LHDA. One might conjecture that the companies concerned had anticipated the possibility that the bribery would be discovered, and begun to take the steps which would distance them from its commission.

9 *Impregilo*

The board of a fourth corporation, the latest incarnation of Impregilo, faces prosecution later this year and is said to be making similar arguments in defence of the company.

Summarised briefly, the company argues that the company now charged is not the company which should be charged, which is no longer in existence, and therefore no liability for the bribery which is alleged can be tested in court, it would appear to have been dissolved.

Corporate gymnastics, splitting, buying and selling, renaming, and the like, clearly provide a series of attractive means of obfuscating the case against an original company. Whilst ultimately, company law within most jurisprudence provides for the transfer of obligations and liabilities, such acts of obfuscation can lengthen and increase the expenses of a case against that original company.

10 Conclusions

Players on the corporate landscape in the LHWP have hopped, skipped and jumped through many different incarnations since Sole's corrupt conduct with their representatives was first exposed. In AJ Cullinan's landmark judgment of Sole, he made it clear that the evidence of the bank accounts indicated that an army of companies had been implicated in bribing their way into the LHWP.

There has been a continuous flow of obstacles placed in the way of prosecution, and to the outside observer, it is testament to the tenacity of purpose, tactical skills, and abiding patience of the Lesotho prosecuting team that there has been such an unbroken series of successes.

The rigour of the legal process has been such that it has proved difficult for prosecutions to be brought against defendants whose financial dealings have been sufficiently Byzantine - where movements of money have been too frequent and too complex for prosecutors to be able to discern any demonstrable patterns, the evidential burden against a defendant may be impossible to discharge and some of the outstanding charges may have to be abandoned.

In the absence of direct evidence of corruption, as in many other corruption investigations prosecutors have had to rely on circumstantial evidence. However, the rules which govern circumstantial evidence in a common law jurisdiction are sufficiently stringent to render convictions for bribery difficult to achieve.

A real issue here is the absence of cooperation or assistance from the international community for the Lesotho government in terms of evidence gathering, or staff support, or finances, etc. The only thing which is left is that the IFIs, led by the World Bank, should make an example of the companies which have been convicted, by debarring them, not just from World bank-financed contracts but from *all* developmental work financed by the IFIs and the donor community. The opportunity must be taken for governments and official organisations to make it plain to the private sector that the corruption game is one they will not tolerate. Otherwise, the Lesotho process will have gone, if not for nothing, then for far less than it should have done.

The major lesson in all of this is that debarment is the real fear for the companies, and it is the single most powerful tool, even more so.
