

The Lesotho Highlands Water Project: Bribery on a Massive Scale

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(August 8, 2004) In 1986, The Lesotho Highlands Water Project (LHWP) was set up between the governments of Lesotho and South Africa as a multi-billion rand infrastructure project designed to control the flow of the Senqu/Orange river and in doing so provide water for the people of Gauteng province, and electricity and money for the people of Lesotho.

Corruption concerns first surfaced in 1993 when a civil government was elected in Lesotho. The government commissioned an audit of both of the parastatal bodies which shared responsibility for the project. The audit revealed obvious and substantial administrative irregularities within the Lesotho Highlands Development Authority (LHDA). After an audit of its chief executive officer, Masupha Ephraim Sole, Sole was then subjected to a disciplinary enquiry, and subsequently he was dismissed.

The investigations had revealed that Sole was clearly living far beyond his means: his housing, cars, holiday arrangements, and instances of nepotism were the obvious indicators. Civil proceedings were instituted to recoup the funds which had been misappropriated by Sole. Civil proceedings began in 1996 and produced evidence of bank accounts that included accounts with the Union Bank of Switzerland.

In August, 1997, the Lesotho government applied to the Swiss court for disclosure of a number of Swiss bank accounts, including those belonging to Sole. The application was resisted by a number of the contractors/consultants working on the LHWP, but in early 1999, bank records were handed over. Those which belonged to Sole indicated that he had received millions of maloti for which he offered no explanation. Civil proceedings concluded in October, 1999, with judgment given against Sole for the sum of 8.9 million maloti. His appeal, in April, 2001, failed.

The bank records obtained from Switzerland indicated that throughout the lifetime of the project, Sole, using 'middlemen' or intermediaries, had indirectly received vast sums of money from certain companies and consortia who had been awarded contracts in the project. The patterns, size, and timing of the payments gave rise to the notion that bribery had taken place on a massive scale.

The Lesotho government now decided to prosecute Sole as well as many of the corporations and members of consortia who had made secret payments into various Swiss bank accounts, together with the intermediaries who acted as conduits. In December, 1999, 19 defendants were charged with bribery. Sole also faced charges of fraud and perjury. Seven of the defendants failed to attend this initial hearing.

By February, 2001, the landscape had altered substantially. The court had ruled that the defendants should not be tried together, and a long program of trials of individual defendants began with that of Masupha Ephraim Sole, on June 11, 2001. He was charged with 16 counts of bribery and two counts of fraud. During his trial, Sole chose not to give evidence. Evidence which had been gathered for the civil proceedings was now used to show that he had lied repeatedly in denying the existence of any accounts in Zurich. Such accounts existed, and showed a complex pattern of payments which had been made indirectly to him by a very large number of the contractors and consultants at work on the LHWP.

In a comprehensive judgment, finding Sole guilty as charged, Acting Judge Cullinan, a former Chief Justice of Lesotho, observed that the patterns of payments which had emerged during the trial had arisen from transactions which 'inextricably bound together' the defendant consultants/contractors, the intermediaries, and Sole himself. Sole was subsequently imprisoned for 18 years, reduced on appeal to 15 years.

The trial of Acres International, the Canadian engineering company, now followed. Prior to the criminal proceedings, the World Bank had begun debarment proceedings against Acres and Lahmeyer, a German engineering consulting firm, both of which had received funding from the Bank for the contracts. It is worth noting that the evidence of secret payments into numbered Swiss accounts was not deemed to amount to sufficient grounds for the debarment of the companies at that stage. Acres continued to apply for, and receive, funding for projects from the Bank. However, the Bank reserved its position, saying that it would reopen debarment proceedings if new evidence against Acres were to emerge from the criminal proceedings.

It was alleged that Acres had made payments to Sole through the offices of Zaliswonga Bam, one of three intermediaries originally identified. Bam had died of a heart attack in 1999. Although he was, at the relevant time, working for a housing association in Botswana, Bam and his wife had numbered Swiss bank accounts into which money was put by Acres amongst others and a proportion of which was then placed in one of Sole's many accounts.

Acres had to accept that it had made payments to Bam; the company argued that such payments were customary practice, and had been made pursuant to the 'representation agreement' it had made with Bam for services rendered by him to the company in his capacity as its agent or representative. With little evidence to substantiate their case, Acres argued that Bam had performed such services, that payment of such sums of money was commonplace in such circumstances, that nothing adverse should be inferred from the fact that the payments were made in such secrecy, and that in any event, the company had had no idea whatsoever that Bam was making payments to Sole.

The company comprehensively failed to convince the judge of the virtue of these arguments. In a colourful and literary judgment, Judge Lehohla concluded that in the light of the established relationship between Acres and the LHDA, Acres' personnel were so embedded in the LHDA that there was simply no need for a 'representative.' Bam's 'representative' status with Acres was not public knowledge, neither was it generally known that Bam was on the payroll of other companies working on the LHWP. The judge could see no evidence to show what services Bam performed, nor why he performed them, particularly in light of the work he was doing at the material time. The judge concluded that the representation agreement was a sham, that Acres had benefited from bribing Sole, to the detriment of its competitors, and that the company was therefore guilty as charged.

Acres was convicted, and sentenced to a fine of CAD3.8M. The company refused to accept the ruling of the court, suggesting that the Judge had not been up to the job, that the trial had been unfair, and that this error would be corrected in the Appeal Court. Acres then lost its appeal. At the time of writing, the company, pleading poverty, has paid a little under half of the fine which was imposed upon it by the

Court of Appeals.

After the appeal hearing, debarment proceedings were recommenced by the World Bank and in August, 2004 the Sanctions Committee debarred Acres from applying to the Bank for financial support for a period of three years. Shortly before the Sanctions Committee gave its ruling, the company was bought by a larger corporation, Hatch. The implications for Hatch's dealings with the World Bank remain unknown.

A trial against Lahmeyer followed the same pattern as the Acres' proceedings, as did the appeal; and it is anticipated that a similar pattern of events will flow in the debarment proceedings with the World Bank, although one cannot predict the view of the Sanctions Committee. Proceedings have now been instituted against Impregilo, an Italian company, with the first hearing timetabled for October, 2004. Evidence is now being gathered against others.

Conclusions

Whilst these trials have earned Lesotho a unique place in legal history, it has been an expensive business. At an international level, many have expressed their admiration for the determination which the Attorney General has shown in proceeding with these difficult cases, and for the tenacity of purpose in the prosecutors, without whose sustained efforts the trials would simply not have been possible. No financial support for these trials has been forthcoming from outside the country. Many institutions and governments promised financial support at the outset of the trials, but none has yet been forthcoming. A conclusion drawn by some in Lesotho is that institutional support for a prosecution may be lacking from a country where the defendant company is registered, and where there may be a corresponding conflict of political interest.

Many of the legal aspects of corruption have now been thoroughly and recently tested in the Lesotho courts. In particular, there is now clear, developed common law jurisprudence on the questions of jurisdiction (where the matters can be tried) and citation (with regards whether a company has a legal personality). In addition, the definition of bribery has been further refined to ensure that equal resonance accrues to the two parts of the offense - netting both the bribee and the briber.

From the perspective of the international community, these trials pose challenges to Parties to the OECD Convention on Combating Bribery about the ways in which corruption is detected and punished in different parts of the world. Canadian lawyers have expressed doubt as to whether Acres would have been prosecuted in Canada. The high moral tone taken throughout by Acres, which has, throughout, been disinclined publicly to express remorse for its actions, might have deterred a decision to prosecute. Lahmeyer could not be prosecuted under the provisions of German criminal law in any event, since corporate offenses are dealt with under administrative law only, punishable by means of fines.

With regards to the international financial institutions, Judge Steyn gave the clearest indication of the Court's view of their role in his ruling in the Lahmeyer appeal: '...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.'

In terms of the Acres debarment, the company has been debarred for three years. The period of debarment is shorter than it might have been, because the Sanctions Committee took into account the fine that had already been imposed by the Lesotho courts, and the fact that those who had been responsible for the bribery no longer worked for the company. The Bank has conducted its own inquiry into corporate corruption in Lesotho: its procedures are not vulnerable to judicial scrutiny. However, the trials in Lesotho have been subject to such scrutiny at every turn; they have effectively provided the World Bank with the materials used in its debarment proceedings. The decision of the World Bank to debar Acres has been heralded as a clear indication from the Bank that it means business, in excising corruption from its lending practices. Responses to the debarment of Acres have yet to emerge from other IFIs. There can be no doubt that mutual debarment could become an ultimate deterrent to a company considering the bribery of a foreign public official.

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