

*Lesotho Case Study*

**At Goliaths Feet: the Lesotho Highlands Water Scheme Corruption & Bribery Trials**

In summary:

The Lesotho Highlands Water Project was first conceived as a solution to the erratic and inadequate water supplies available to residents of Gauteng, and a source of income to their impoverished neighbours over the border in Lesotho. It is a multi-billion dollar project, designed to divert rainwater and runoff from the Senq/Orange River, through a series of dams and tunnels northwards into the urban and industrial suburbs of South Africa. Two dams, (Katse and Mohale) and the connecting infrastructure have been built so far, Phases 1 and 2).

It has been, and remains, a controversial project, with major issues emerging both on the demand side, where those who can afford it have been the main beneficiaries, and in Lesotho itself, where the impacts of its construction have been far-reaching and in many cases, with deeply destructive effects upon the infrastructure of Lesotho society. Compensation for re-located parts of the population has been in many cases inadequate, with small cash payments being provided to those who have lost their land; inappropriate alternative employment, faulty and inadequate housing, and inequitable treatment have been regularly meted out to those who have been involuntarily resettled. In particular, the problem of HIV/Aids, the heritage of a migrant labouring population brought in to Lesotho to construct the project, has now permeated the very heart of Basutho society. Recently, water shortages have, ironically begun to affect food supplies for the population. On the other side of the border, in Gauteng, observers note that increased charges for residential water usage have put it out of the reach of those who need it most. The impact of the project upon the environment has in many cases been disastrous, and in any event has not been accurately assessed.

The World Bank was involved at the inception of the project. It lent \$8 million at the outset, and assisted in setting up a trust fund in Britain through which South Africa could service the loan without overt breach of sanctions. A wide range of international and private commercial banks have been involved in the financing of the project. Concerns about corruption within the LHDA surfaced in the mid 1990's. The Bank was initially unconcerned, even going so far as to impede the investigative process through which Sole, the Chief Executive Officer of the LHDA was drawn. However, the Lesotho authorities were undaunted by the lack of interest shown in their investigations at the early stages, and proceeded to reveal a complex and vast network of corruption, implicating many of the largest construction and consultancy companies in the world. Eventually, in July 1999, the World Bank initiated debarment proceedings against two, Acres (Canadian) and Lahmeyer (German), both of whom had received funding from the Bank. The Bank found insufficient evidence to debar either company, but reserved the right to revisit the matter. It has recently

decided, in the wake of its completed prosecution, to re-open the proceedings in respect of Acres. Lahmeyer's fate is as yet undecided.

The Lesotho prosecutors have since gone on to bring a number of defendants and one of the agents successfully to trial. It is a continuing process: Sole was the first to be convicted of bribery, being sentenced to 18 years, (reduced to 15 on appeal). Acres, a Canadian consultancy company fell next, fined M15,000,000, of which M13,000,000 has yet to be paid. Lahmeyer, a German construction company was next, fined M10,650,000 in the lower court. Its appeal is imminent. Meanwhile, in 2003, Du Plooy (South African), one of the representatives, pleaded guilty, and was sentenced to 8 years imprisonment, (3 of them suspended for 3 years), or a fine of M500,000. He chose the latter, to be paid in three stages over the course of 2003-4. At the end of 2003, Spie Batignolles, (French) under a different name, (Schneider Electric SA), pleaded guilty and was fined M10,000,000, which it has paid. Other companies await their fate.

This paper provides an overview of the trials of Sole and Acres, and addresses some of the wider implications for the international community, and the attitudes which have been adopted towards the prosecutions, which have thus far achieved a 100% strike rate. The trials are unprecedented, and punitively expensive, as each of the defendants has unsurprisingly taken every available point before the Court. This study looks at the implications which they contain for any other impoverished and developing country seeking to tread the same path, to root out corruption.

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### **Introduction**

There is a great deal of international interest in the corruption trials which are taking place in Lesotho at the moment. This is partly because of a growing international awareness of corruption, and the effects which it visits upon society. It is also partly due to the fascination which people have for the sight of a small and impoverished African country taking on corporate giants, and winning, in the face of fierce resistance. In this paper, I shall be looking mainly at the trials of two defendants: Masupha Ephraim Sole, the Chief Executive of the LHDA, and Acres, a Canadian company. When this work is published later in the year, it will contain brief analyses of the fates of others: for example, the Appeal of Lahmeyer, a German company, which begins in Maseru next week.

Against the complex background of the trials themselves, the reader is asked to consider some of the wider implications of the trials: Jurisdiction; costs; the attitudes of the international community; attitudes adopted by parties to the OECD Convention Combatting Bribery; attitudes adopted by defendant companies;

During the course of my research over the last eighteen months, I have been privileged to gain insight into a wide range of responses to the Lesotho prosecutions. Many of them have been somewhat discouraging. Perhaps the most dominant refrain has been along these lines:

'Africa is by its nature corrupt. One only has to look at the way civil society operates to realise that bribery is the way people do business here'. This unfortunate generalisation requires closer consideration of the distinctions to be drawn between the payment of respect in the form of feudal dues, the industry of corporate

hospitality, and the practice of pure bribery to be found in the contractual favoured treatment of a commercial entity.

Another mantra which is regularly chanted by some members of the corporate community, and their lawyers is: 'but it is the way business is done – all round the world – and it isn't going to go away'. Historically, this may well be true. It was Lord Byron who remarked that there is nothing new under the sun. However hesitant I am to disagree with him, I suggest that even if corruption was there, we have now discovered and begun to analyse its effects upon society. It can be argued that this knowledge imposes a duty upon governments, corporations and civil society to address the problems which are attributable to corruption. They are legion, complex, and deep rooted.

Finally, it has been frequently suggested to me that the culture of corporate corruption is so embedded in commerce that it cannot be excised. As one method of corruption is discovered, so another, less easily detectable, will come into use. Whilst educational and cultural initiatives and the fear of reputational risk may address the problem in the long term, the pragmatic view seems to be that where corruption becomes frankly too risky and expensive, it will cease to be valuable as a means of achieving commercial objectives. For that to happen, many governments might consider following the expensive and courageous lead set by the Lesotho government.

Such prevalent attitudes have all been squarely addressed, by the Lesotho prosecuting authorities. Notwithstanding the wide range of challenges which face the government of that country, these prosecutions have continued unflinchingly. They are unique. The due process of the law has operated in Maseru, notwithstanding any suggestions made to the contrary. The trials of Sole and Acres in the court of first instance have been approbated by a highly prestigious Appeal Court bench. This demonstrates the clearest intention of the part of the government that it will not tolerate corruption. The convictions and levels of sentence reflect the Lesotho court's concern that corruption has a terrible impact upon the society where it operates. Finally, the tenacity of purpose on the part of the prosecutors, in obtaining, analysing and marshalling the evidence of corrupt money being siphoned into the pockets of a public official has made corruption in Lesotho a risky and expensive business.

### **The historical context**

1. The context of these trials extends to the very beginning of the Lesotho Highlands Water Project (LHWP). In October 1986, the Treaty on the Lesotho Highlands Water Project was signed, between the governments of the Republic of South Africa and the Kingdom of Lesotho. The purpose of the Treaty was to set in place the infrastructure which would result in the creation of a system for diverting the rainwater and runoff from the Senqu/Orange river, sending it through a series of dams and tunnels constructed within the mountains of Lesotho, providing water for RSA. The scheme would generate some electricity for Lesotho, as well as provide an annual income for the impoverished country.

2. By the terms of the treaty, the two countries shared responsibility for the project along lines determined by their borders. Two parastatal authorities were created: in Lesotho, the Lesotho Highlands Development Authority, (LHDA), and in South Africa, the Trans-Caledon Authority (TCTA). Further, a body named the Joint Permanent Technical Commission(JPTC) was created, which was composed of three

members from each Party to the Treaty. The role of the JPTC was to monitor and advise the LHDA, as well as the right to subject to management audit all those aspects of the management, organisation and accounts of the...Authority relating to the delivery of water to South Africa'.<sup>1</sup> The terms of the Treaty expressly required the LHDA to consult the JPTC, and to obtain its approval for 'all budgets', implementation plans for each phase of the project, the design of project works, tender procedures, documents, appointment of consultants and contractors, and the appointment of all staff, other than the Chief Executive<sup>2</sup>.

3. The position of Chief Executive was one of very considerable power and influence. In November 1986, Masupha Ephraim Sole was appointed to the post. He had previously been employed by the Lesotho Government, for a period of thirteen years, finally reaching the position of Senior Engineer in Water Affairs.

4. By 1993, at which point a civil government had been elected to govern Lesotho, there were serious concerns about financial irregularities appearing within the LHDA. The Minister for Water and Energy decided to conduct an audit of the affairs of the LHDA, for which he commissioned the services of Ernst and Young. The irregularities which were revealed provoked a specific audit into the performances of Sole, and Mochibelele, the Lesotho delegate to the JPTC. For the duration of the audit, the two men were suspended. The audit revealed that the conduct of Mochibelele was satisfactory, and he was re-instated. However, many irregularities emerged from Sole's dealings: he had charged his personal expenses to the LHDA, abused the housing scheme, provided jobs for members of his family, taken his wife overseas at the expense of the LHDA. In fact there was sufficient evidence to justify the Minister's subsequent decision to order a disciplinary enquiry, which took place at the end of 1994.

5. Sole's approach to this enquiry characterised his pugnacious attitude to all subsequent litigation. Using Senior Counsel, he applied to the court to challenge the Minister's powers to hold such an enquiry. The court found against his challenge, and an enquiry began, both the LHDA and Sole now being represented by Senior Counsel. The enquiry continued through 1995, and concluded with the dismissal of Sole from the LHDA in 1996. He challenged his dismissal, unsuccessfully, and subsequently applied for a judicial review of the Ministers decision to dismiss him. This application also failed.

#### **The enquiry into Sole's conduct.**

6. Any investigation into corruption inevitably searches for what is called the 'red flag', the tangible indication of the existence of an irregularity. Classic examples of 'red flags' emerged in Sole's conduct: he was clearly living beyond his means: evidence for this was to be found in his houses, cars and travelling arrangements. Clearly, he had misappropriated funds.

7. The Minister was in particular concerned that the LHDA had suffered financial loss from the irregularities which appeared to characterise some of the

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<sup>1</sup> See Art. 9 of the Treaty

<sup>2</sup> See Art 9(11) of the Treaty

tendering for contracts. In particular, such irregularities were associated with the way in which a consortium known as LHPC, led by Spie Batignolles, a French construction company, had garnered contracts. A subsequent consortium involving substantially the same partners, known as MHPC, had been awarded contracts for the Muela Power Station civil works, (Contract 129A) and the Muela Dam infrastructure and operations building, (Contract 129B).

8. In the award of Contract 129A, the lowest tenderer had been a Swedish company, Skanska. The tender for MHPC contained a modification which had not been revealed when the tenders had been opened, but which resulted in a lower price, and the award of Contract 129A. Subsequently, the African Development Bank (ADB) withdrew its sponsorship of the contract, obliging the LHDA to finance the work with a more expensive loan from a commercial bank.

9. In the negotiations for Contract 129B, MHPC required the escalation clause to be applied before, rather than after the deduction of advance payments, thereby increasing the contract price. When the LHDA refused to agree to this, on the grounds that this would be unfair on other companies who had tendered on the basis that the escalation clause should only be applied after the advance payments had been deducted, the MHPC simply applied directly to Sole, who signed the letter of acceptance. The European Commission, who had sponsored the contract, refused to pay the amount by which the contract had now increased, and the LHDA had to seek funds elsewhere once more.

#### **Civil proceedings.**

10. The LHDA now began to sue Sole for the recovery of their funds. During the course of civil litigation, a process known as 'discovery' occurs. This describes the exchange of documents relevant to the proceedings between both parties. The LHDA requested the production of all Sole's bank accounts. After application had been made by Senior Counsel for the LHDA to the court, Sole produced statements of his accounts in Maseru and his credit card accounts. He thereafter denied the existence of any further accounts. His denial under cross examination was repeated in four sworn affidavits, and only when his bank manager was sub-poena'ed were further bank accounts revealed. In particular, the account he held in Ladybrand now indicated the existence of an account with the Union Bank of Switzerland, in Zurich, as well as another hitherto unrevealed account in Bloemfontain. Sole once more denied holding such an account in Switzerland, in an affidavit sworn in May 1997.

#### **The Swiss application.**

11. The Lesotho government now made an application to the Swiss authorities for the disclosure of Sole's bank accounts. The application was resisted by all the contractors and consultants working in Lesotho who also held Swiss bank accounts. The Swiss magistrate, Mme Cova, made the orders for the disclosure of Sole's accounts, and an appeal against her decision failed, in the Federal Court of Lausanne. In early 1999, the Swiss authorities handed the bank records to the Lesotho Ambassador.

12. This application was crucial to all the subsequent proceedings. Under Swiss law, such an application must indicate the existence of the objective evidence which forms its grounds. The evidence in effectively secret bank accounts was highly complex, but nevertheless showed that vast sums of money were finding their way from the contractors and consultants working in Lesotho, into Sole's accounts, via intermediaries. The LHDA concluded that bribery had been taking place, on a massive scale. Payments to contractors were frozen, and in the civil proceedings, judgment was given against Sole in the sum of M8.9 million. He appealed, unsuccessfully, in April 2001.

### **Criminal proceedings.**

13. In July 1999, Sole was charged with the offence of bribery, (an offence of common law). Subsequently, the contractors, consultants and intermediaries were charged similarly, together with the intermediaries through whose accounts the money had passed.

14. This marked the beginning of an epic legal journey, during which the due process of criminal litigation in Lesotho has been subjected to close scrutiny. A former Chief Justice of Lesotho, Acting Judge Brendan Cullinan was appointed, together with two associates, to conduct the trials. Being expatriate, Cullinan AJA could not be accused of partisan judgment. In appointing a judge of such experience, the Lesotho authorities anticipated his swift and thorough comprehension of the complexities of the matter, if not the exhaustive range of applications made jointly and severally by the defendants.

15. Naturally, the costs of prosecuting the trials was of great concern to the Lesotho government. A large meeting in Johannesburg was hosted by the World Bank, in November 1999; it was called to discuss the way forward it was attended by a comprehensive range of interests, including the international financial institutions, the merchant banks, representatives of a number of governments, and the EU. The Lesotho government was left under the impression that they would receive substantial assistance along the path of the prosecutions, *including* financial support for the legal costs which would be incurred. However, no financial support has been forthcoming from any of the parties who attended that meeting.

16. By December 1999, 19 defendants had been charged with the common law offence of bribery.<sup>3</sup> The law in Lesotho largely follows the law of the Republic of South Africa, which is to say that it is a hybrid system, originally based upon the Roman Dutch principles which were brought to RSA by the Dutch. With British colonisation, English case-law now overlaid these principles. In 1961, with the formation of the Republic of South Africa, the final Court of Appeal now rested in South Africa. In general, the two systems harmonise. However, where there is no express statute, and the law requires construction, the Court will examine the Roman Dutch principles, and construe them in the light of subsequent case law. In the course of the next months, the numerous applications made to the court required his Lordship to conduct a comprehensive review of the law from first principles, through an ocean of case law.

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<sup>3</sup> See Appendix 1.

17. Whilst trials for corporate corruption occur, the trial of a foreign corporation in the country where bribery is alleged to have taken place is unprecedented, as far as the writer is aware. The companies concerned made a number of preliminary applications as they sought to avoid prosecution. Seven of the defendants did not appear in court in December 1999, namely UDC (Panama), EPC (Panama), Max Cohen, (an intermediary), Asea Brown Boveri Schaltanlagen GmbH Germany, Asea Brown Boveri Generation AG (Sweden), Dumez International and Cegelec.

18. On the application of the Crown, separate trials were ordered in respect of Sogreah, Spie, LHPC, Sir Alexander Gibb and partners, and Coyne et Bellier.

**Preliminary applications:**

19. Numerous preliminary applications were made by the defendants. Four of these were critical to the continued progress of the prosecutions:

- (i) citation – that is, whose name should appear on the indictment.
- (ii) joinder – that is, who can be jointly tried with other defendants.
- (iii) bribery – that is, what are the constituent elements of the offence
- (iv) jurisdiction – that is, where should the matter be tried

His Lordship's rulings on these applications will have particular significance for common law jurisdictions, where similar applications are likely to be made before the commencement of a trial for bribery.

20. The question of jurisdiction will continue to be challenged by a defendant. The ruling will offer clarification of this issue to those parties to the OECD Convention Combating Bribery of Foreign Public Officials who are considering prosecutions, pursuant to their obligations under the Convention. For further discussion on the role and obligations of parties to the Convention, see below.

**Citation (i).**

Whose name should appear on the indictment?

21. The consortium HWV made an application to the court seeking an order that it had been wrongly cited, on the grounds that since it was a consortium of partners, the consortium did not have legal personality, and therefore could not stand trial. This application succeeded.

22. Bam, an intermediary, died in 1999. Although the name of his company remained on the indictment, where it related to charges of bribery brought against other defendants, the Crown withdrew proceedings against his company.

23. When the matter came before the court in February 2001, the landscape had altered. Cullinan AJ now examined the 19 counts which remained on the indictment placed before the court, which related to five of the original defendants, namely Sole, du Plooy, Margaret Bam, Lahmeyer International GmbH, and Acres International. Out of the numerous preliminary applications made by certain defendants, the following were particularly important:

## Citation (ii).

24. Acres and Lahmeyer argued that the employee, not the company itself, should be cited on the indictment. This argument concerned the nature and extent of corporate liability, which Cullinan AJ then reviewed, extensively. In his judgment, at p60, he said:

‘...it seems to me that a practice has grown up in the last 40 – 50 years which I have little doubt that I should now follow. The learned author Johann Kriegler has this to say of s332 (2) in *Hiemstra: Suid Afrikaanse Strafproses*, 5 ED p 875....

According to the literal wording of sub-section (2) the corporate body should not be summoned in its own name but rather a director or servant thereof in his capacity as representative of that corporate body.....It is however doubtful that this was indeed the intention of the legislature. In practice this seldom if ever happens and there are no known judgments to this effect since the coming into operation of Act 51 of 1977. This practice has furthermore the advantages (a) that the name of the case remains constant irrespective of the identity of the representative; and (b), what is even more important, that a clear distinction is drawn between the citation of the natural person in terms of sub-section (2) qua representative, and his personal citation by reason of sub-section (5). The risk of imperfect citations, as in *S v Freeman*<sup>4</sup> or irregular substitutions, as in *R v Erasmus*<sup>5</sup> is thereby diminished.’.

Accordingly, the corporations, (Acres, Lahmeyer and Spie) retained their corporate identities on the indictment.

25. It is interesting to note that the argument on behalf of Spie (1) in this preliminary application included the proposition with which they returned to court four years later, in November 2003, that Spie (1) had in 1995 ceased to be the lead partner in MHPC. Spie (1) averred that Spie (2) had taken over that lead, and accordingly the company had been wrongly indicted, and its employee therefore wrongly served with a summons. The proposition failed to convince the Court on either occasion. The Crown argued, in November 2003, that Spie (1) which was the defendant in the criminal proceedings had committed the crime of bribery before 1995, in connection with its partners, in the LHPC and MHPC, concerning contracts 124/5/6 and 129A/B. The alleged substitution was not reflected in the dissolution of the partnerships, the registration numbers of which had remained unchanged in Lesotho. A major flaw in the arguments raised by Spie was that the contracts contained a provision that a contractor may not assign its rights or obligations under the mentioned contracts without the consent of the LHDA. It was conceded by Spie that such consent had neither requested nor forthcoming, and that therefore the assignment of the obligations and liabilities could not have occurred, which proposition was supported by the absence of any evidence of such consent, nor any evidence of the dissolutions of the two partnerships to which Spie (1) belonged, such as affidavits from other members of the partnership, or any indication that the LHDA

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<sup>4</sup> 1970(3) SA 700 (N)

<sup>5</sup> 1970 (4) SA 378 (R)

was aware of, and consented to the corporate step change. The judge agreed with the Crown's arguments.

26. Spie, more recently known as Schneider Electric SA, pleaded guilty to 16 counts of bribery [date], and was sentenced to a fine of M10,000,000, (which it has paid).

**Joinder:**

(who appears on the indictment, to be jointly tried with other defendants?)

27. Argument was made on Sole's behalf that he should not be jointly tried with the other defendants. The heart of such argument concerns the prejudice which might be caused to a defendant, by his association with others similarly charged. Du Plooy also objected to being jointly tried. The basis of their applications was that there was a distinction between being tried for 'the same offence' and 'the same species of offence'. Complex legal argument followed, and a review of the arguments is contained below.<sup>6</sup> Cullinan AJ concluded that a separation of trials was the just way to proceed. This may not have been the ideal result for the companies concerned, as His Lordship was aware. Were Sole to be tried alone, as he subsequently was, there was a risk that allegations against other defendants would remain. The companies which were implicated would then have to wait for trial, with the attendant stigma which would thereby attach to their names.

28. The lengthy wait for the companies concerned, which was envisaged by His Lordship, then transpired, with trials of Acres and Lahmeyer taking place respectively two and three years after the trial of Sole himself. The degree of stigma which has attached itself to the names of these companies is less easily quantifiable.

29. The ramifications of a guilty verdict brought in Maseru, in the cases of Acres International and subsequently Lahmeyer International, are reflected in a far greater potential impact upon those companies when the World Bank concludes its debarment process; the Bank has recently announced its intention to re-open debarment proceedings in the case of Acres, and will consider the same process at the end of Lahmeyer's trial. The whole process has undoubtedly been lengthy and deeply damaging to the companies concerned.

30. At the time of writing, the World Bank is facing an unprecedented challenge to its governance procedures. Both Acres and Lahmeyer, which had been provided by the World Bank with financial support for their contracts, were found guilty of bribery in the court of first instance. Yet this was in the wake of earlier pre-trial investigations into both companies' dealings, conducted by the Bank itself: the Bank had concluded that there was insufficient evidence to debar either company.

31. Although the Bank reserved and has subsequently exercised its right to re-examine any fresh evidence emerging from the criminal trials and appeals, it is arguable that it now faces a real crisis of credibility in its dealings with the corrupt practices of those companies whose work it has supported and continues to support.

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<sup>6</sup> See Appendix 2

In order to assert its capacity for good governance in several areas the Bank may consider the following questions :

- 1) After the Bank has re-examined the evidence against a company found guilty of bribery through due process, but decides not debar the company concerned, what impact will that decision have upon future decisions to prosecute, both in Lesotho and generally?  
This is a particularly important aspect of the Bank's work within developing countries, where infrastructure projects attract the construction and consultancy companies which have historically been more prone to corruption than most other branches of industry. At the least, the Bank's decision not to debar would provide a serious disincentive to a small, poor country considering taking similar action against companies allegedly practising bribery. Technically, a convicted company which has not been debarred can return to Lesotho, and continue to do business there.
- 2) Alternatively, if the Bank decides to debar a company which it had hitherto exonerated by implication, either in part or entirely, (but which was subsequently found to have committed the common law offence of bribery), the question is this: will the Bank, an institution largely immune to legal procedural challenge, whose powers are not generally subject to any sort of review or appeals procedure, now re-examine and intensify the methods by which it conducts its original investigations?  
This question is particularly pertinent in circumstances where allegations of corruption increase at a rate which has obliged the Anti Fraud Unit in the Bank to undergo substantial expansion in recent years.
- 3) Currently, the Bank's investigations are conducted in an inquisitorial way, when it seeks to discover the existence of bribery. Parties to an investigation give evidence on their own terms, with the Bank possessing no powers to test the evidence, such as through cross examination. The investigative procedure is completed upon the basis of submissions made by the party in question and its lawyers.  
  
In the case of Acres, the Bank announced after its original investigation that it had not discovered sufficient evidence of corruption to justify debarring. Without the tenacity of purpose shown by the Lesotho government, it is reasonable to suppose that this corruption might have gone undiscovered. In returning to review the evidence given in the court of first instance, the Bank can be seen acting in parallel to the Lesotho Court of Appeal, which has already arrived at its decision.
- 4) Will the Bank now consider amending its Articles of Agreement, to sharpen the teeth of its investigative processes, so that they can become, and importantly *are perceived to be* part of a process which will rejuvenate public confidence in the Bank's expressed hostility towards bribery and corruption?
- 5) Corruption is notoriously difficult both to discover, and to prosecute. Investigation at a forensic level, conducted by an organ which is at arms

length from the Bank itself, is arguably the most effective way in which it can be revealed. An assessment of the political agenda of the Bank lies outwith the ambit of this paper, but a pragmatist might question the conflicts of interest inherent on the Executive Board of the Bank, where the decision to debar, or not is taken privately, after the work of the Anti-Fraud Unit has been done. The decision will be taken by the Sanctions Committee, which consists of members of the Executive Board of Directors, whose interests otherwise lie in tending the relationship between the Board and the government they represent, and lobbying for financial support for the very companies later found to have indulged in corrupt practices.

Reasons for the Bank's decision to debar are not normally forthcoming, and in a global climate of hostility to corruption, the writer respectfully suggests that in this may be a good moment for the Bank to review its procedures, and consider introducing a little more transparency into its governance.

**Bribery:**

(the constituent elements of the offence which must be proved.)

34. Defence counsel argued that the particulars of the offences as they had been set out by the prosecution were inadequate to form the basis of a conviction. This argument was comprehensively reviewed by Cullinan AJ of the common law offence of bribery: in his ruling on this application, he began by setting out the nature of the offence as defined in Hunt and Milton, South African Criminal Law and Procedure (Common Law Crimes), Vol II, Revised 2 Ed, at pp 219, 227:

‘Bribery (as a briber) consists in unlawfully and intentionally offering to, or agreeing with a state official to give any consideration in return for action or inaction by him in an official capacity’....

‘Bribery (as a bribee) is committed by a state official who unlawfully and intentionally agrees to take any consideration in return for action or inaction by him in an official capacity’.

His Lordship went on to set out the elements of the offence, identifying the roles played by briber and bribee as similar in all respects. The elements of the offence which had to be proved, and found to be common to both briber and bribee were as follows:

- (a) unlawfully
- (b) intentionally
- (c) a state official
- (d) offering or agreeing to give or take any consideration
- (e) in return for action or inaction by the bribee in an official capacity.

35. His Lordship's view of the offence was unambiguous: the briber and bribee committed substantially the same offence, the former offering, and the latter agreeing to give. Critically, it was not necessary for the prosecution to prove that bribe money was paid and accepted.

*The offence is committed at the time when an agreement between briber and bribee is reached.*<sup>7</sup>

**Jurisdiction:**

(in which country should the matter be tried?)

36. Defence counsel argued that matters lay outwith the jurisdiction of the Lesotho High Court, because the prosecution could not establish where agreement had been reached, since the payments forming part of the evidence against the defendants had been made after the offence had been committed. Additionally, the payments themselves had been made outside the jurisdiction. Prosecuting counsel argued that the principle of strict territoriality should give way to a more flexible approach.

37. Once more, Cullinan AJ surveyed the law comprehensively, noting the flexible approach inherent within Roman Dutch law, the English case law (where the offence had been committed in part in different jurisdictions), and the principles contained within the emerging body of international law<sup>8</sup>. Synthesising all three, he concluded that it was correct for the Lesotho court to accept jurisdiction. At the core of his ruling lay the proposition that the harmful consequences of the offences were principally felt in Lesotho. The fact that the elements of the offence were not to be *seen* within the jurisdiction did not mean that the matter could not be tried there.

**The Trial of Masupha Ephraim Sole.**

38. This began, finally, on 11<sup>th</sup> June 2001. Sole was charged with 16 counts of bribery, and 2 of fraud. He remained silent, throughout his trial.

39. In line with His Lordship's earlier ruling, the prosecution now sought to prove the elements of the offence of bribery. The alleged bribee, Sole, was a civil servant, in the employ of the Lesotho government, and therefore a public official, retaining that status when he was seconded to the LHDA as its Chief Executive Officer. HWV, Sogreah, Spie Batignolles, LHPC, ABB Germany, ABB Sweden, Lahmeyer, Acres, Dumez, Gibb, Cegelec and Coyne were all contractually involved in the project.

40. The counts of bribery arose from

- (i) payments made by the contractors and consultants to Sole, into his Swiss bank accounts, either directly or through intermediaries, which finally found their way to him in Lesotho.
- (ii) contracts negotiated to the advantage of the contractor/consultant
- (iii) variation orders and contractors claims arising from such contracts
- (iv) payments made or to be made by the LHDA to the contractors/consultants under the terms of the contracts, such payments being made, initiated or authorised in Lesotho

41. It was alleged that on a series of occasions, within certain periods, but on unknown dates, the contractors/consultants offered payments to Sole, which payments

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<sup>7</sup> For a closer analysis of Sole's application, see Appendix 3

<sup>8</sup> For a more detailed account of this ruling, see Appendix 4

Sole accepted, in return for which he exercised his influence and power, in his official capacity, to further their private interests.

42. The prosecution had to prove that Sole was indeed acting as a State official, that he behaved unlawfully, intentionally and corruptly, that he had agreed to take consideration, (money in this case), in return for doing or not doing something in his official capacity.

43. Cullinan AJ heard argument on the question of Sole's status,<sup>9</sup> and satisfied himself that Sole was indeed a State official at the relevant time.

44. The prosecution then adduced the evidence of Sole's bank accounts in Switzerland. Jean Roux, of PriceWaterhouseCoopers, Forensic Services (Pty) had conducted a comprehensive investigation of the extracted Swiss accounts which Sole had repeatedly denied possessing. He now produced a Final Report, which set out what payments had been made, when, by whom, and to whom. Argument was heard as to Mr Roux's status with the court, but Cullinan AJ took the view that the report simply provided evidence to the court in manageable form, and was entirely admissible for that purpose. The process reflected in Mr Roux's report is colloquially referred to as 'following the money', and it forms the basis of any successful prosecution for bribery.<sup>10</sup>

45. The challenge for the prosecution was to trace a connection between the payments which was sufficiently clear that an inference of bribery could be drawn. The accounts had revealed movements of considerable commercial complexity, as companies joined and then reformed in different consortia. In summary, over a period of nine years, Sole had received almost entirely via intermediaries, M8,058.877.00. He had gone on to invest the money in short-term fiduciary deposits, amongst 26 banks. His Lordship later calculated that at 31<sup>st</sup> December 1996, Sole's European assets amounted to over 6 million SAR.

#### **The defendant's silence.**

46. Much speculation has surrounded Sole's refusal to give evidence on his own behalf during his trial. The legal consequences of such a refusal were considered further when Sole's appeal came before the Court of Appeal, where their Lordships quoted the words of HC Nicholas (formerly a Judge of Appeal of the then South African Appellate Division), who dealt with the subject in his contribution to **Fiat Justitia (Essays in Memory of Oliver Deneys Schreiner)**.

'In his essay entitled "**The Two Cardinal Rules of Logic in Rex v Blom**", he wrote at 326:

**"Where the facts are such as to call for an explanation by the accused and he does not give one, the trier of fact may conclude that any hypothesis consistent with his innocence should be discarded as not reasonably possible."**

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<sup>9</sup> For further analysis, see Appendix 5

<sup>10</sup> For Cullinan AJ's analysis of the payments, see his judgment, appended to this paper.

The learned author was concerned with the process of reasoning which is to be applied when considering the circumstances in which an inference of guilt may be drawn from circumstantial facts. He concludes his essay with the following sentence (at 328):

**“In investigating other reasonable inferences [i.e. inferences consistent with the accused’s innocence], the field of enquiry may be limited by the fact that the accused has given an explanation, or by the fact that he has failed to give an explanation where one was called for in the circumstances.”**

This view accords, in our judgment, with sound legal principle and with authority (see, for example **S v Mthetwa** 1972 (3) SA 766 (A) at 769 B - C). We hold, therefore, that in considering whether the proved facts exclude every reasonable inference, save the one sought to be drawn, (see **Rex v Blom** 1939 AD 188 at 202 - 3), regard may be had to the accused’s failure to testify. This is not to say that such failure gives rise to an inference of guilt in itself: it is merely one of the circumstances to be taken into account in establishing whether the accused’s guilt has been proved beyond reasonable doubt.’

47. Sole’s failure to produce the bank records which contained evidence of his venality was the subject of an application by his counsel, produced in the previous civil proceedings, and contained no relevance to the criminal proceedings. Cullinan AJ took the view that no unfairness or prejudice was attached to the inclusion of such evidence in the trial, and therefore admitted it.

#### **Circumstantial evidence.**

48. The use of such evidence has been central to each of these prosecutions. The law governing the use of such evidence is found in the case of **R v Blom**<sup>11</sup>, a landmark South African case, set out by Watermeyer J. Two rules apply:

- 1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- 2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

49. In Sole’s trial, the circumstantial evidence adduced by the prosecution fell into two categories: the first concerned Sole’s use of three intermediaries, (Cohen, Du Plooy and Bam)<sup>12</sup>, through whose offices he received the payments. The second was the representation agreements, which reflected, or rather failed to reflect, the existence

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<sup>11</sup> 1939 AD 288

<sup>12</sup> For further details, see Appendix 6

of a bona fide relationship between the contractor/company and the intermediary concerned<sup>13</sup>.

### **Representation agreements.**

50. This genre of agreement may serve a variety of uses in the commercial arena. Traditionally, such an agreement will be made between a company and a person with a certain local expertise, for the benefit of the company in a country where it seeks to establish itself. The terms of such an agreement may vary widely, and will depend upon the nature of the services to be performed by the representative.

51. Remuneration under the agreement may be a one off payment, expressed as a percentage of the contract price, or it may be a retainer, provided by the company for continuing services to be performed by the representative during the lifetime of the contract. It is a convention that the representative may be paid in any currency, into any account, in any country.

52. A representative may not be paid at all, until the company whose interests he represents has been awarded the contract. Such agreements can often be drawn up in a way which is clearly conducive to, if not indicative of bribery.

53. The prosecution called a number of witnesses to support its contention that the representatives were simply conduits through which money could pass from the companies and consultants to Sole.

54. It is common to each of these trials that there was little dispute over the facts themselves. The defendants did not seek to deny the existence of the Swiss bank accounts, or the identities of those holding such accounts. They sought to justify the terms of various representation agreements, where they were shown to have existed.

55. The arguments have centred throughout upon what construction the court should place upon those facts, and whether or not the inference of bribery could therefore be drawn.

56. Sole called no witnesses in his defence. He retained his silence throughout the course of his trial. Apart from his silence on the nature of his relationships with the companies and contractors whose money he was found to have taken, this left unaddressed such matters as his previous and repeated denials of the existence of his Swiss bank accounts. His counsel made a late application to re-open his defence, which did not succeed, either before Cullinan AJ or subsequently before the Appeal Court.

57. In coming to his judgment, His Lordship examined the nature of the representative relationships which had emerged during the trial. He questioned the need for them, the size of payments made under the terms scheduled to such agreements, the destination and denomination of such payments, their duration, and, in the case of Mr Bam and his company ACPM, the identities of those parties who

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<sup>13</sup> For further details see Appendix 7

signed them. He concluded that such agreements were not bona fide, that the Swiss bank accounts were in fact covert, and amounted to vehicles for the channelling of bribes to Sole, who he judged to have held a position of 'pervasive powerful influence', whose recommendations 'would carry much weight'. He set out his findings thus:

'I am satisfied beyond reasonable doubt, as the only reasonable inference, that in the eleven counts of bribery involved, the accused and the relevant Consultant/Contractor in each count, unlawfully, intentionally and corruptly entered into a corrupt agreement, whereby the accused agreed to further the private interests of that Consultant/Contractor in its involvement with the LHWP, pursuant to which agreement the Consultant/Contractor paid the accused the particular sum of money which I have previously specified under each count.'

58. At the Appeal Court hearing, Their Lordships concurred with Cullinan AJ's analysis. They concluded thus:

'The case presents no great difficulty. There were payments in foreign currency by contractors and consultants to intermediaries who took part of the proceeds and passed on the rest to the appellant. The payments to the appellant were, in almost all cases, funded by (to use the trial judge's expression) the money received from the contractor or consultant. The payments were not disclosed to the LHDA by any of the participants, including the appellant. He, the appellant, occupied a pivotal role within the LHDA, he was capable of influencing decisions of that body and he was in a position to benefit and favour contractors and consultants, even if the evidence may fall short of proving that he actually did so. The intermediaries, where they were used, were interposed between the consultants and contractor on the one hand and the appellant on the other, in an inept attempt to distance themselves from the intended recipient. And the intermediaries, too took their share. When regard is had to the facts and to the system employed, it would be idle to suggest that the original transferors - the contractors and consultants - were ignorant of the intended destination of the payments. In drawing inferences the trier of fact is entitled, in fact obliged, to use logic blended with common or human experience (see **R v Erasmus** 1945 OPD 50 at 71-2 and cf the remarks of **Centlivres CJ** in **R v Ismail** 1952 (1) SA 204 (A) at 210 B-C). Once this is accepted it is obvious that there must have been agreements between the contractors and consultants concerned, the intermediaries and the appellant whereunder the former would pay money to the appellant in return for favours or benefits in relation to their prospective or actual agreements with the LHDA. It also follows, of course, that the appellant knew precisely that he was accepting money as bribes in all the counts now under discussion.

Counsel for the appellant suggested that there was at least one other reasonable inference to be drawn from the payments to his client - that the money was paid to him for work performed outside the scope of his duties with the LHDA. In terms of his employment with the LHDA the appellant was not entitled to undertake outside work and, according to the argument, he

might have accepted payments, not for corrupt purposes, but for the rendering of genuine services. This argument cannot prevail. The inference which counsel asks us to draw is far from reasonable, having regard, *inter alia*, to the scale of the operation, the foreign currency and the obvious involvement of other parties. Moreover, and if this were the appellant's explanation, he should have given it in evidence. At the time of the criminal trial, he had already been dismissed by the LHDA and had left the civil service and the civil claims against him had been determined in favour of the LHDA. He had nothing to lose by giving the explanation before the court *a quo*.

It remains only to note that some payments to the appellant were made by consultants after his dismissal from the LHDA. This does not detract from our conclusions. The evidence clearly showed that the appellant remained influential in the LHDA long after he left. There may also have been other reasons for these later payments but it is not necessary to speculate on these.'

59. Sole was imprisoned for 18 years, which was reduced, on appeal, to 15. The judgments of Cullinan AJ and the Court of Appeal are available

## **The Trial of Acres**

### **Background**

60. This trial took place against the background of a longstanding relationship between Acres and the government of Lesotho, originally established in 1981 when Acres became involved in the construction of Moshoeshoe Airport. In the wake of that project, the LHDA had been established, and Acres then successfully competed for Contract 19, under the terms of which it was required to provide technical assistance to the LHDA. Effectively, this amounted to the provision of qualified professional staff to the LHDA, in particular to the technical division which mainly concerned the construction works. Mr Jonker of Acres acted as Sole's assistant. He was succeeded in that position by Mr Witherall.

61. In 1989, Sole advised Acres that the LHDA would 'sole-source' Contract 65 from Acres. The terms and ambit of the contract were similar to Contract 19, insofar as Acres was responsible for the provision of technical assistance to the LHDA. Contract 65 was finally signed in February 1991, in Maseru. The sequence of events which led up to the signature of Contract 65 became one of the key aspects of the trial.

62. Acres' trial began in February 2002, presided over by Lehohla J, and his two associates. Acres was charged with two counts of bribery. The prosecution produced evidence that between June 1991 and January 1998, Acres had paid 493,061.60 Canadian dollars into a Swiss bank account belonging to Bam, who transferred proportions of that sum to Sole's account. During the same period, 180,825.48 Canadian dollars was transferred by Acres into the Swiss bank account of Mrs Bam, who then transferred the money to Sole's account. It was the prosecution's case that both of those payments amounted to bribes.

63. The representation agreement itself was alleged to be a sham, which amounted to insurance against the day when the payments were discovered to have been made to ACPM, an organisation of doubtful constitution which had been set up by Bam and his wife.

64. Acres' defence was that through his organisation, Bam had been properly employed by them to act as Acres' representative in Lesotho. The company averred that it had paid Bam in good faith, under the terms of the representation agreement, and it had not known that any part of that money would be passed on to Sole. The company certainly had not made payments with any intention for that to happen.

65. Thus the battle lines now drawn in Acres trial were similar to those upon which Cullinan AJ had been required to rule, in Sole.

66. Acres once more argued at the outset of the trial that it had been wrongly cited. In his ruling, Lehohla J affirmed the doctrine of corporate liability, as set out in 'South African Criminal Law and Procedure' Vol 1 Burchell and Hunt. He ruled that ' a corporate body can be convicted of virtually any crime requiring mens rea'...the fact that what the servant does was expressly forbidden by the company makes no difference provided that in doing so, he sought to further the interests of the company'.

#### **Agreed evidence.**

67. Many aspects of the evidence were agreed between prosecution and defence. There was no question that Acres had paid Bam the sums of money which were evidenced by bank account records, none of which were disputed; neither was it in dispute that LHDA money had been used to make such payments.

68. What was the subject of protracted argument was the nature of the inferences which could be drawn from the body of evidence. The second rule in **R v Blom** was thoroughly re-visited, with Senior Counsel for Acres arguing that the inferences which the prosecution sought to draw were based on conjecture and speculation, not upon the facts as they had been presented to the Court.

69. The prosecution now called oral evidence, in support of its contention that Sole could and did exert a huge influence over such awards<sup>14</sup>. Mr Putsoane, Deputy Chief Executive of the LHDA, testified that Sole had failed to follow the correct procedures for the award of a contract, exceeding his powers as Chief Executive of the LHDA by failing to consult the JPTC during the decision making process in respect of Contract 65, as he was obliged to do, by the terms of the Treaty. Mr Molapo, a member of the JPTC at the relevant time, confirmed this failure to consult.

70. Critically, Acres had already mobilised before the contract was signed, as a result of which the JPTC was presented with a fait accompli, in relation to Contract 65. The Crown invited the Court to consider why Acres would have embarked upon

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<sup>14</sup> for further details of the oral evidence given at trial, see Appendix 9.

Contract 65 if it had not concluded the contract. By the 23<sup>rd</sup> of November, 1990, the date on which the Agreement between ACPM and Acres was signed, Acres had already begun work under Contract 65. Lehohla J observed that Mr Hare, for Acres, agreed that Acres had started work under Contract 65, but was not as yet getting paid for doing it, neither was there a contract in place. The consequences of this state of affairs for Acres could have been dire. By 25<sup>th</sup> September 1990, the Acres mark up, a crucial term of the contract, had still not been agreed. By now, the company badly needed an advance payment, and a signed contract. By 23<sup>rd</sup> November, all but two minor terms of Contract 65 had been agreed. On the 28<sup>th</sup> November, Acres own employee, Mr Witherell, authorised advance payments to Acres on the part of Sole, which were made on the 29<sup>th</sup>. This corresponded with the period during which the company appeared to have been negotiating with Bam to make payments.

71. Lehohla J examined the role ACPM was supposed to play in getting Contract 65.

‘In terms of this agreement ACPM was to assist Acres in getting contract 65 and also perform certain services during the life time of the contract. For this Z M Bam would receive 3.6% of the net value of the contract with Acres. Bearing in mind Acres’ mark up of 14. 7% this meant that he would get approximately 25% of Acres profit. The question that immediately arises is why pay him 25% occasioned by the mark up in circumstances where contract 65 is in the bag’.

### **The role of the representative.**

72. Turning to Acres’ need for a representative, the Crown surveyed the history of the company’s operations in Lesotho. Mr Putsoane testified that Acres had embedded itself in the LHDA with Contract 19, over the period from 1987-1990. Mr Jonker, Executive Vice President of Acres had been Sole’s assistant from 1987, and evidence was adduced to show that Acres was regularly present at LHDA management meetings. It was clear that over time, Acres had become involved in the LHDA from the highest level.<sup>15</sup>

73. The Crown argued that in the light of the existing relationship between Acres and the LHDA, any need for a representative was otiose. Further, it alleged that the alleged work for which Bam was paid was neither required nor performed by him. In addition, between 1988 and Feb 1991 Bam was working in Botswana, at the Botswana Housing Corporation. Negotiations between Bam and Acres had concluded in November 1990, with the signing of an agreement between Acres and ‘ACPM’, an entity for which no legal evidence was adduced. Payments under the agreement were to be made into bank accounts held by the Bams in Switzerland.

### **The Representation Agreement.**

74. In addition to the inherent weaknesses in such an agreement, where it is based on an incentive, there are many other aspects of such an agreements which constitute ‘red flags’, as referred to above in the investigation of Sole’s conduct. Many of them appear in the body of case law in the Arbitration Tribunal of the International

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<sup>15</sup> For further details please see Appendix 10

Chamber of Commerce (ICC).<sup>16</sup> In arbitration proceedings, direct evidence of corruption is rarely forthcoming. That tribunal, in reaching its decision, will look at what it sees to be the real intent of the parties, as evinced by their conduct which indicates the true nature of the contract between the company and the representative. Lehohla J adopted a similar method. In summary, he asked himself

- (i) **What need had Acres for the services of Bam ?**<sup>17</sup> He concluded that in the light of the company's history in Lesotho, and the level and degree of its involvement with LHDA, Acres had not demonstrated that it had such a need.
- (ii) **Where was the evidence that he had performed any of the services scheduled to the Representation Agreement?** Such evidence was not before the court. There had been no invoices produced, or any other evidence to indicate the authenticity of the agreement.
- (iii) **What justification was there for the payment of such substantial sums under the agreement?** His Lordship took the view that

'it defied common sense that Acres should pay so much money as it did consistently over a period spanning the duration of this practice, without knowing that its money was being used through their agent to pay the Chief Executive of an organisation in which they had a direct interest' ....

A vital part of his reasoning was the inadequacy of the explanation which Acres gave for the reduction, by 60%, of its last three payments to Bam. This reduction coincided precisely in the calendar with the conclusion of Sole's relationship with the LHDA, as he lost his application for judicial review of the decision to dismiss him from the post of Chief Executive.

- (iv) **Why was there such a need for secrecy in the manner of the payments?** His Lordship could see no other rationale for this secrecy than that the payments were a vehicle for bribery.
- (v) **What was the justification for using ACPM as a party to the agreement?** His Lordship took the view that Acres intended their agreement to be with ACPM, notwithstanding that there was no evidence adduced to indicate the functions performed by ACPM, neither was there any material link between ACPM and the money paid by Acres, other than a Swiss address given for ACPM. Consequently, this was further evidence that the agreement concealed bribery.

75. Senior Counsel for Acres called evidence from a number of Acres' personnel<sup>18</sup>. The most apposite of these would have been Mr Witherell. However, he was indisposed. Mr Hare was called, but in giving evidence, in His Lordship's view he failed to meet the case which Acres was attempting to make, and indeed was

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<sup>16</sup> For a list of 'red flags', see App 11.

<sup>17</sup> For the Schedule of services appended to this representation agreement, see App 12

<sup>18</sup> For further comment upon defence witnesses, see Appendix 13

thought to have been untruthful in giving his evidence. Apart from a wealth of procedural inconsistencies, and the validity or otherwise of the Representation Agreement, there were two other points of particular interest –

- (i) Acres had obtained its bank guarantees from the Royal Bank of Canada long before the conditions within the letter of intent for Contract 65 had been met, or the contract signed.
- (ii) Acres had failed to appreciate the range of obvious conflicts of interest which arose from Bam's various roles in Lesotho. He had a consultant engineering company, Lescon, as well as the ownership of ACPM, as well as a pre-existing representation agreement with Lahmeyer, another of the defendant companies. (Note that both Acres' and Lahmeyer's agreements with Bam contained exclusion clauses).

76. Mr Brown was called, in his capacity as Senior Representative for Acres with the LHWP. His Lordship thought no more highly of his truthfulness, and found him to be an evasive witness altogether. He was not assisted by the remaining witnesses called by the defendant company, largely to provide the court with their opinions. Each appeared to his Lordship to be evasive on the points which were put to them.

77. In reaching his decision, Lehohla J reviewed the law governing the circumstantial evidence which formed the basis of the case for the Crown, starting with **R v Blom**. In summary, for the defendant to be found guilty, the totality of the evidence adduced by the Crown had to give rise to an inference of bribery which was beyond reasonable doubt.

78. His Lordship found that the Representation Agreement was a sham, that the sequence of events leading to the signing of Contract 65 rendered the Representation Agreement redundant in any event, and that Bam, ACPM and the accounts in Switzerland were clear indications of deceitful behaviour. Accordingly, he found that Acres had been awarded Contract 65 unfairly, and the company was found guilty of the offences with which it had been charged.

79. The company's immediate response in the wake of its trial was to criticise the judicial process in the Lesotho court, suggesting that Lehohla J had failed to comprehend the commercial complexities of the matter. This may have been a little injudicious, as the company then came before Lehohla J for sentence. He imposed a fine on the company of M22,058,091, for a crime which he viewed as having been carefully planned, executed and concealed. The company had, he said, failed to show remorse. It simply regretted that it had been caught. Although Acres pleaded potential hardship, in mitigation at sentence, it provided no evidence to support such a claim.

#### **Acres' appeal.**

80. At the appeal, the company succeeded in overturning the verdict on Count 2, which concerned the payment made to Mrs Bam. That payment did not share the pattern of payments which characterised those which were the subject of Count 1, and their Lordships were not certain that the only reasonable inference which could be

drawn was one of bribery on the part of the company. Otherwise, its appeal against conviction failed. Sentence was reduced to M15,000,000. At the time of writing, M13,000,000 of the fine remains unpaid.

81. The World Bank has yet to announce the result of its appraisal of Acres' trial and subsequent appeal. As far as the writer is aware, the situation in which the Bank finds itself is unprecedented. There is global interest in its findings, and the possible debarment of Acres.

### **Implications for the international community**

82. These trials pose a range of questions for different quarters of the international community in the light of such new instruments as the OECD Convention Combating Bribery of Foreign Public Officials in International Business Transactions (which came into force in 1999)<sup>19</sup>. Whilst the Convention is a clear example of the collective international will to eradicate bribery, its successful implementation depends upon the wills of individual states.

### **Jurisdiction: the decision to prosecute.**

81. Following legislation introduced by state parties pursuant to their obligations under the OECD Anti Bribery Convention, corporate corruption should be easier to prosecute in the country where the company concerned is registered. However, the decision to prosecute remains a complex issue. It has been suggested privately to the writer that Acres would not have been prosecuted in Canada, had the appropriate legislation concerning the bribery of a foreign public official been in place. Further, that if it had been prosecuted, the company would not have been found guilty. Whilst this is mere conjecture, it is beyond question that there is a division of opinion about the Acres prosecution within the Canadian legal community.

82. In a common law jurisdiction, Canadian case law concerning bribery and corruption may correspond in principle with the laws of Lesotho: hypothetically, had the same arguments in respect of jurisdiction been advanced before a Canadian judge, the central point, justifying the trial of bribery where its effects had been most keenly felt, could not have been argued successfully.

83. The decision to prosecute inevitably contains political and evidential challenges: consider the position where a company receives public money in the form of export credit insurance, as a result of its intensive lobbying, and intimate relationship with the government of the day. That same government may be tempted to take a pragmatic view, in the light of the consequences which would flow from a successful prosecution. It may find itself unwilling to prosecute, disguising its lack of will with a range of alternative suggestions. There is a paramount need for OECD member countries to introduce transparency into the procedure governing the decision to prosecute.

### **Jurisdiction: evidential issues**

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<sup>19</sup> See Appendix 14

84. In the case of Acres, doing its business in a small, impoverished African country, how successfully could the evidence against the company have been gathered? Evidence of corruption is inevitably circumstantial by nature. In practical terms, there could be queries over the admissibility of evidence gathered in one country for use in a prosecution in another. In those circumstance, how could a prosecuting authority ensure compliance with the evidential rules by which it is bound, in its own jurisdiction?

85. Further in this hypothesis, in what position might the Lesotho government have been placed, if the Canadian authorities had gathered evidence against Acres, but then decided not to proceed against the company? One might conjecture that the Lesotho authorities might have attracted a degree of criticism, if they had gone to prosecute Acres anyway. The mechanism by which such decisions can be calibrated between nation states has yet to be established, although there is an arguable need for it.

### **Liability:**

86. Corporate liability is a doctrine generally found in common law jurisdictions. Requiring a company to accept liability for the acts of its employers is one of the means by which a company knows that it may subsequently be held accountable for its nefarious activities. In common law jurisdictions, this doctrine may be used as a means of ensuring corporate responsibility, since in certain circumstances, the company will be obliged to take the consequences of its actions. There have been a number of different methods used by defendants in these trials to avoid responsibility, not the least of which are the attempts which have been made by certain companies to altering their identities. (See above, on Spie Batignolles).

### **Costs:**

87. The silence from the international community, in particular the international financial institutions, has been deafening, as they have watched the expenses of these trials mount. The World Bank is a development bank, with no budget for litigation, and it has not assisted with funding for the trials, for fear of creating a precedent by which it would regard itself as being bound in future. Other financial institutions would doubtless raise the same argument. The European Investment Bank has remained aloof from the proceedings in Lesotho, having conducted its own audit and concluded that since there appeared to be no '*direct or specific*' misuse of EIB funds. It was content to conclude that indirect misuse of EIB funds could not be proved, and it took no further obvious interest in the trials.

88. Questions were asked in the European Parliament, by MEP di Pietro, about the use of European Development Fund moneys by companies named as defendants, and about the commitment by the Commission to provide financial assistance for the prosecution of the trials, but these met with a similar response<sup>20</sup>. An independent audit of EDF had been conducted, yielding no direct evidence of misuse of funds, and even if there had been, it was not a large sum! The Commission firmly back-pedalled

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<sup>20</sup> See Appendix 15

from any commitment understood to have been made at the Johannesburg meeting in November 1999

89. There can be little doubt that funding for the trials has been desperately needed by the government of Lesotho, as it faces huge financial challenges from other quarters: HIV/Aids, the needs of the communities resettled in the wake of the dams, a shrinking economic base, and lately a food crisis, arising, ironically from the lack of water available to the farming communities. Sole himself was awarded legal aid, obliging the government to pay for both his prosecution and defence. Only one company has paid the total fines imposed by the Court.

90. The OECD has been equally conspicuous by the distance it has kept from the trials. Of all the institutions, this organisation is arguably best able to render financial assistance. It is not constitutionally prevented from doing so, and it is now presented with an opportunity to produce genuine support for a government taking the most proactive role in eradicating the corruption which is the subject of one of its own conventions. In this unique set of circumstances, the organisation is arguably under a duty to assist, since almost all the bribers are registered within OECD jurisdictions.

#### **Mutual legal assistance.**

91. Timely and efficient mutual legal assistance was provided to the Lesotho government by the Swiss authorities. Such support has not been readily forthcoming from other authorities, concerning individuals and companies registered in their jurisdiction. Reasons for this remain speculative, as the trials are far from finished. Whatever reasons might emerge, in the wake of the trials, it is a matter of regret that the Lesotho prosecutors have elicited such poor responses, which have done much to diminish the perception that governments of the north are truly determined to join forces in eradicating corruption.

#### **Conclusion**

There are a large number of lessons yet to be learnt from these trials by the international community. The lack of financial support for the Lesotho government, the negative briefings of which some hearings have been the subject, and the distance observed by the international financial community have constituted a clear message to countries in the developing world about the kind of responses they will elicit, if they make similar moves to root out corruption in their own domains. The World Bank's attitude has been ambiguous. Generally such a message can only discourage such moves. It is respectfully suggested that the international community should now consider initiatives to co-ordinate, and provide expert and financial support to those authorities brave enough to strike a blow for good governance.