CONFERENCE ON THE PROTECTION AND OPTIMIZATION OF PUBLIC FUNDS – THE CO-OPERATION BETWEEN NATIONAL AND INTERNATIONAL AUTHORITIES

RABAT, 14 – 16 MAY 2007

Paper presented by LL Thetsane and GH Penzhorn SC on 15 May 2007:

Case study: the Lesotho bribery prosecutions

1. In preparing this paper we drew on testimony given by Guido Penzhorn before the EU Parliament in Brussels on 12 June 2003 and before the US Senate Foreign Relations Committee on 21 July 2004. Also on papers he prepared for the Commonwealth Anti-Corruption Conference held at Chatham House, London, on 24/25 April 2006 and the Africa Forum on Fighting Corruption Conference in Johannesburg, South Africa, on 22 November 2006. These are electronically available from Guido Penzhorn at advpenz@law.co.za. In this paper we would like to share with this conference our experiences in prosecuting bribery committed across international borders, the co-operation with international agencies and governments or the lack thereof, and in particular our successful collaboration with OLAF in prosecuting the European companies involved.

2. The Lesotho Highlands Water Project is the result of a treaty between South Africa and Lesotho dating back to 1986 in terms of which water is dammed in the mountains in Lesotho for the purposes of supplying water to the Gauteng province of South Africa as well as hydro-power to Lesotho. Phases 1A and 1B have largely been completed and negotiations are underway in respect of phase 2. This is a multi-billion dollar project and in fact one of the biggest dam projects in the world. An audit by Ernst & Young in the early 1990’s uncovered certain irregularities which in turn led to the dismissal of the Chief Executive of the project authority, Mr Masupha Sole. This was followed by civil litigation against him in the course of which it was discovered that he had bank accounts in Switzerland. An application to the Swiss authorities followed from which it was discovered that he was receiving large sums of money, mostly through intermediaries, from contractors and consultants involved in the water project.
3. Mr Sole was the first to be charged. He was convicted and on appeal\(^1\) sentenced to 15 years imprisonment. Acres International, a firm of consulting engineers from Canada, followed and also on appeal\(^2\) was fined R15 million (the exchange rate between the US dollar and the RSA rand is currently about 7 to 1). Lahmeyer International, the engineering consultancy from Germany, was then prosecuted, convicted and sentenced to a fine of R10.6 million. It appealed against the convictions and on appeal the fine was increased to R12 million. Judgement on appeal was delivered in April 2004\(^3\). In June 2003 one Du Plooy, the intermediary who acted on behalf of Impregilo of Italy, the lead partner of the consortium that built the main dam in the project, pleaded guilty to bribing Mr Sole on behalf of Impregilo. In exchange for co-operation with the prosecution he was fined R500 000, coupled to a lengthy period of imprisonment which was conditionally suspended. In February 2004 Schneider Electric SA (formerly Spie Batignolles), the multi-national French construction company involved in building the transfer tunnels, pleaded guilty to 16 counts of bribing Mr Sole. A fine of R10 million was agreed with the prosecution and was paid. Last year Impregilo pleaded guilty and was fined R15 million.

4. We are currently prosecuting the previous chief delegate of Lesotho on the Highlands Water Commission, a Mr Mochebelele, as well as his deputy. This Commission, on which both the Lesotho and South Africa have three delegates, oversees the water project and Mr Mochebelele’s position in the overall picture of the water project was at the same level as that of Mr Sole. This prosecution has

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

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

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

(All three judgments referred to are electronically available.)
inter alia been the result of Lahmeyer International, the alleged briber, assisting the prosecution, to which we will make further reference below.

5. We initially charged everyone together, that is the contractors and consultants involved, the intermediary to which we have referred, and Mr Sole. The overseas consultants and contractors not being impecunious, this had the result of a battery of lawyers from South Africa, including some high profile ones, descending on the small town of Maseru, armed with what appeared to be every legal point in the book. The lawyers had clearly decided among themselves who would take which legal point and when, which is what then happened. The preliminary issues argued included territorial jurisdiction, the definition and ambit of common law bribery, the manner of bringing a corporate body before Court, the criminal liability of a corporate body as separate from its officers, the doctrine of common purpose, and so on. The presiding judge was Mr Justice Cullinan, a former chief justice of Lesotho, now retired in South Africa, who was brought back to hear this joint trial. He dealt with all these preliminary issues and to the extent that they were challenged in subsequent appeals before the Lesotho Court of Appeal they were all confirmed. One of the rulings made by Judge Cullinan was that the different accused be tried separately. He then presided over the first trial, that of Mr Sole.

6. The rulings and judgements in the various cases run to several thousand pages. In this paper we do not propose giving a synopsis of the legal learning which flows from these. (These rulings are available.) The intention rather is to share with this conference what we have learnt in rather more practical terms about the problems around prosecuting international corruption and what can be done to overcome them. In this regard we are obviously looking at it from the vantage point of the demand side, that is the country hosting the project which the subject matter of the corruption and whose officials are then the ones who are corrupted.

7. The first potential obstacle is the prosecuting authority itself. The resolve necessary to prosecute corruption pre-supposes non corrupt officials who take the decision to prosecute or not. The one way to ensure that you are not prosecuted in the country in which you propose doing business is to compromise the prosecuting authority itself. This may explain why in so many countries, also in Africa, nothing
seems to be done about what from the outside appears to be obvious corruption. In Lesotho we had a taste of this. It was only after an obstructive Director of Public Prosecutions was removed, and replaced by the current DPP Leaba Thetsane, that these prosecutions could actually get under way. Thereafter Guido Penzhorn and his team were also fortunate to have an Attorney-General who gave them his full backing and also an open mandate to do what they considered had to be done.

8. Of equal importance in a country such as Lesotho (or for that matter South Africa) is the necessary political will. In the first world the debate around the positive versus the negative effects of bribery has largely been resolved and it is accepted that the negative effects greatly outweigh any positive spin-offs such as “greasing the wheels”. In the Southern African context things are not that clear cut. Here bribery, being a crime without an obvious victim, is often perceived as colourless and the bribe recipient as not necessarily a villain. Why then spend all this time and money on prosecuting these cases when there is not only a large backlog of ordinary criminal cases to be dealt with, but also where the money spent on expensive foreign lawyers and accountants could instead be spent on fighting Aids or building schools? This was the type of resistance that these prosecutions were initially met with in Lesotho and it came from influential persons, both in parliament and in public life.

9. These attempts to discourage or undermine these prosecutions also go to illustrate the very nature of the crime of bribery in the sense that one does not know where it starts and where it ends. It may well be that such criticism stems from persons who genuinely believe for instance that these prosecutions are cost wise not warranted and that the money could be better spent elsewhere. On the other hand, the motivation for such criticism may lie quite simply in the need to keep a lid on things. One simply does not know.

10. Particularly when dealing with foreign accused, i.e. international contractors, you also need a Court that is respected even beyond its own borders. Even before verdict some of the foreign companies we charged sought to question both the competence and impartiality of the Lesotho Courts, clearly in an attempt to discredit in advance any adverse finding. Fortunately Lesotho is blessed with a Court of
Appeal of international standing, manned as it is by senior judges drawn for instance from the ranks of former members of the South African Supreme Court of Appeal. Once this Court’s judgments were placed before for instance the World Bank this had the effect of dispelling any suggestion that the convictions, which were now the subject matter of debarment proceedings, were the result, as one enterprising first world lawyer put it, of jungle justice. Here we would venture to suggest that a reading of these judgements will show that they are comparable to judgements emanating from the highest Court of any first world country.

11. In most of these cases payments to the bribee were made through an intermediary. This was then also one basis of the defence in these cases, namely that this intermediary was a legitimate agent and the monies paid to him were for actual services rendered by him in connection with his work on behalf of the contractor / consultant in Lesotho. This would then allow the contractor to claim that it did not know about the bribes paid by the agent.

12. Clearly, however, if the agent is given carte blanche to secure the contract and on the basis of a contingency fee, this amounts to an invitation to commit bribery. In this context the presiding judge in the Sole case had the following to say, which it is hoped will preclude contractors / consultants from claiming in the future that they did not know or could not have foreseen what their agent was up to (at pp 203 – 204 of the judgement):

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

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

13. One major hurdle when prosecuting international corruption (or any corruption for that matter) is that one is invariably met with a wall of silence. There is no obvious victim as in an assault or theft case who wants the perpetrator punished and is then willing to tell what happened. Here the victim is society. Also, those who know about the crime are invariably those also involved.

14. Closely related to this wall of silence is the public perception of the crime of bribery, which we have already touched upon. Many do not view it as a crime at all. Nobody was hurt and nobody’s money was stolen. In fact, someone like Mr Sole is regarded by many in Lesotho as some kind of hero because he was able to turn the tables on these (this is the perception) rich and arrogant foreigners. Here we should point out though that our perception from working with French and Italian investigative magistrates is that this attitude to corruption, as not being a real crime, is not that different in these countries. The point is, if you do not find corruption morally reprehensible, why bother reporting it, particularly where it involves your colleague or even your boss? This is the attitude we found when prosecuting Mr Sole. The question we were never able to resolve was whether the resistance and silence we met in Mr Sole’s former colleagues and subordinates was the result of loyalty, complicity or simply a couldn’t care attitude.

15. There is one big difference between prosecuting a natural person and prosecuting a company and that relates to punishment. A company cannot be sent to prison. The
best the Lesotho Courts can do is to impose fines which in most cases the companies can easily pay out of their profits. Or the company simply does not pay the fine, as was the case with Acres, which only paid after strong pressure from the World Bank. Here one also has the problem that criminal sanctions such as fines are normally not enforceable in other countries. What the solution here is we do not know but something must be done to ensure that companies cannot simply walk away.

16. As to the role the international community and donor agencies can play in combating third world corruption, the Lesotho Court of Appeal had the following to say in the Lahmeyer case (at p 55 of the judgement):

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

And at p 56:

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

17. Were international institutions to act firmly against contractors and consultants involved in third world corruption, this would firstly have the effect of deterring corruption of the nature we are dealing with in Lesotho. Equally importantly, this would have the effect of encouraging a country such as Lesotho in its continuing efforts to fight corruption. Lesotho would be told that it is not alone in fighting corruption which, on the available evidence, was largely initiated outside Lesotho and more particularly in the countries where the contractors / consultants came from. Perhaps most importantly what such action would be saying is that corrupting officials in a third world country such as Lesotho is not in any way condoned by the authorities in the countries concerned or by the donor / lending agencies.

18. In a country like Lesotho where international contractors/consultants do business it is from the vantage point of the recipient of the bribe that one is able to view matters. This brings about problems when having to deal with the payers of the bribes, such as bringing them before Court and obtaining evidence from the countries where they are based. The obvious solution is for these countries themselves to prosecute the bribe payers, assuming that the country in question has in place legislation criminalising the bribing of foreign public officials. It would then not be necessary for a country such as Lesotho to also seek to prosecute the alleged payers, which in these cases it felt it had to, particularly where, as pointed out, the evidence at our disposal suggested that the initiative came from the briber and not the recipient of the bribe.

19. Apart from the stigma attached to a conviction, which may or may not count for much, the only real punishment, as we see it, is being sanctioned by the international donor / lending agencies. Only the taking away of the contractor / consultant’s means of livelihood would serve as a deterrent that could roughly be compared to the taking away of a natural person’s liberty.

20. The World Bank as a major sponsor of the water project took an interest in these prosecutions from early on, to the extent that there was World Bank funding involved,
which was the case with among others Acres, Lahmeyer and Spie Batignolles. The interests of the World Bank and those of Lesotho largely coincided and this resulted in close co-operation between the Bank’s investigation and ours. The World Bank lawyers visited Lesotho on a number of occasions to share our information and we did likewise when visiting Washington. The resulting benefits were considerable. On the one hand the World Bank lawyers had access to our documentation and witnesses which they could use in proceedings against the contractors/consultants involved, and we had similar access to World Bank documentation as well as any responses by the contractors/consultants in answer to the charges leveled against them by the Bank.

21. As to actual financial assistance, we make mention of a meeting held in Pretoria at the commencement of these prosecutions in November 1999. This meeting was called by the World Bank in order to discuss the pending prosecutions in Lesotho and ways in which Lesotho could be assisted by the international community. It was attended by representatives from South Africa, Britain, the European Union, the European Investment Bank, individual banks in Europe, as well as others. Various promises of assistance were made by those attending. The official minutes of the meeting also record such promises, such as the representative of the EU undertaking to “contribute to the cost of the process” and the British High Commissioner in Lesotho saying “that DFID could possibly offer direct assistance, even though a part of the EU”. The World Bank representative that chaired this meeting, assured the Lesotho Attorney-General in the context of assistance that “the World Bank has deep pockets”. Unfortunately none of this help has been forthcoming.

22. The EU did send out a team (not OLAF) a few years ago to investigate the involvement of European companies. We placed all our information and resources at its disposal. The team could find virtually nothing untoward and largely gave the European companies a clean bill of health.

23. Apart from Switzerland, through their mutual legal assistance in these prosecutions, and to some extent France which also helped with an application for mutual legal assistance, no formal assistance was received from any other overseas country. (We did receive, through OLAF, assistance from the prosecuting authorities in Milan. We
deal with this below.) This despite the fact that these prosecutions have received considerable publicity overseas and interest groups such as NGO's have taken up the question of funding with various governments. When addressing the EU Committee on Development and Co-operation in June 2003 Guido Penzhorn also raised the question of assistance in the form of funding. Nothing has come of any of this.

24. Faced with its own economic and social problems, such as a frightening Aids pandemic, Lesotho cannot really afford the costs incurred in these prosecutions. But it did what it had to do and this involved the allocation of funds which could well have been used for such other purposes. This clearly illustrates Lesotho’s measure of commitment to fighting corruption. From our vantage point we do not see any such commitment on the part of other countries, i.e. those whose companies were and still are involved in the water project.

25. This brings us to the enormous help we received from OLAF.

26. Schneider Electric had formally been Spie Batignolles, the company that actually paid the bribes. The restructuring resulting in Schneider taking over the corporate identity of Spie posed considerable logistical and legal hurdles for us which, working with the limited resources we have in Lesotho and on top of that dealing with a foreign legal system, at one stage appeared to be insurmountable. We encountered similar problems in the prosecution of Impregilo, an Italian company within the Fiat group of companies. Also here we were faced with various corporate restructurings, which coincidentally occurred, as in the case of Spie, after the bribes had been paid and, we believe, were the result of the company wishing to cover its tracks. Once again we were faced with Italian law, Italian company records in different centers such as Milan and, on top of all that, a company bent on placing every hurdle in our way.

27. Fortunately for us both these companies were involved in contracts involving EU funding. This in turn brought in OLAF.

28. Spie Batignolles was a French construction company which was awarded one of the contracts on the water project. It is then this company that also paid the bribes. When however we charged Spie Batignolles in 1999 we were confidently met by the
defence that the company we were charging was not the company involved in the bribes and that the company that was involved in the bribes no longer existed. That is where the matter would have ended but for the assistance of Johan Vlogaert and his team.

29. What they established was that the parent company Schneider Electric had taken over Spie’s assets and obligations, including the Lesotho contract, resulting in Spie being no more than an empty shell. Schneider then swallowed Spie. This is where the picture presented by the defence ended. The investigations however showed that instead of Spie being absorbed into the corporate entity of Schneider the opposite happened in that Schneider assumed for company registration purposes the corporate identity of the former Spie. In other words, the Spie which operated in Lesotho was in fact still extant and, ironically, this major French corporate entity Schneider in law now formed part of it. From Schneider’s company records the reason for this bit of corporate maneuvering would appear to have been taxation, but clearly the lawyer who worked out this particular tax maneuver overlooked the problem in Lesotho. He is presumably no longer employed by Schneider.

30. Also in the case of Impregilo we were met with a confident defence that the company involved in the water project no longer existed. With the help of OLAF, particularly Roberto Buccheri and through him the prosecuting authorities in Milan, we were able to establish, through documentation which we could present in a Lesotho Court, that the original Spie was taken over by and incorporated into its major shareholder, a subsidiary of Fiat, which then changed his name once again to Spie Batignolles. What we were able to establish through these investigations was that this new Impregilo, when it was the major shareholder of the old Impregilo, through its shareholding in the old Impregilo, through members it was able to place on its board and profits it derived from inter alia the project in Lesotho, all this with the knowledge of what was going on in Lesotho, made itself an accessory to the payment of the bribes. Once the defence found it could find no loophole in this, this resulted in a plea of guilty and the payment of a fine of R15 million.

31. In the case of Acres International the prosecution in Lesotho ran in parallel with debarment hearings brought against Acres by the World Bank. Because the World
Bank was one of the major sponsors of the contracts in which Acres was involved, this brought into play the World Bank’s regulations relating to the bribery of foreign officials. This co-operation was beneficial to both sides, that is the prosecuting authority in Lesotho and the World Bank, in that we were able to share information, on the one hand from our investigations and on the other from the World Bank’s ability to require from Acres the production of documentary evidence which we could not ourselves have obtained.

32. A similar situation arose when we decided to prosecute Lahmeyer again in the beginning of 2006. Not only were they facing a second conviction in Lesotho, but they were now also facing an enquiry by OLAF with its considerable investigative powers. We have no doubt that this latter factor strongly contributed to Lahmeyer’s decision to “come clean” and offer us its testimony in the current prosecution against Mr Mochebelele and Mr Molapo.

33. These prosecutions are also largely based on bank records received in terms of the Swiss mutual assistance legislation. The Lesotho government approached the Swiss federal authorities in Berne for assistance which in turn referred the application to Zurich where it was dealt with. The prompt and efficient manner in which the Swiss authorities dealt with what eventually became a complex and multi-layered application contributed immeasurably to the successful outcome of these prosecutions.

34. This assistance by the Swiss authorities would have taken much longer and would have been far less productive had it not been for face to face meetings on a regular basis between ourselves and the examining magistrates in Switzerland dealing with our request. It was when a relationship of mutual trust was established that things really got going.

35. Much the same applies to our co-operation with the World Bank. We and the World Bank investigators got to know each other through various meetings and the co-operation which then resulted was also on the basis of mutual trust.
36. This was even more so the case with regard to our working relationship with OLAF. The result of this close co-operation and consequent mutual understanding in our view had as a direct result the conviction of two major international construction companies, one from France and the other from Italy, which would not otherwise have come about.

37. Perhaps our experience with OLAF can serve as a basis or example for co-operation between prosecuting and investigating agencies in a European / African context. Here we will gladly share our experiences and also legal work done with such prosecuting / investigating bodies. Perhaps a starting point would be regular meetings between prosecuting and investigating authorities dealing with cross border corruption. Specific requests would then proceed on an already established basis of mutual understanding and respect.

38. One of the things that makes the crime of corruption unique is that it is so difficult to detect. You never know how far the rot has spread. There is also no obvious victim and no reason for the obvious witness, the co-participant, to come forward. The problem here is that the failure to co-operate, certainly on the part of individuals, would normally itself have a corrupt basis. This unfortunately could very well also apply to the investigating and prosecuting authority themselves.

39. This is then also what makes the crime of corruption so insidious. Everything is steeped in suspicion and distrust.

40. It is only when the actual persons dealing with investigating and prosecuting international corruption get together and get to know each other that this kind of mistrust can be overcome and a relationship of mutually beneficial co-operation be achieved.

GH Penzhorn SC
LL Thetsane
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