

**Corruption – meaning of public officer –  
similar fact evidence – representation  
agreements – Common Law crime of bribery –  
(Lesotho)**

Mr Sole (S), was charged with seventeen counts of bribery and 1 count of fraud against the Lesotho Highlands Development Project (LHWP).

The Lesotho Highlands Water Project ("LHWP") is a major water project in Lesotho, which entailed the building of dams, tunnels and hydro-electric power facilities for the transfer of water to South Africa and for the generation of electricity for consumption in Lesotho and the eastern Free State, a province of South Africa. The Lesotho Highlands Development Authority ("the LHDA") was created by statute to supervise this project and S was appointed as its first Chief Executive, on secondment from the government of Lesotho. As Chief Executive S was closely involved with the evaluation and awarding of contracts in this project and in dealing with variation orders and contractors claims. The governing body of the LHDA was its Board of Directors, but the day to day affairs of the LHDA were the responsibility of its Chief Executive, as such he was in a position to make or influence decisions relating to the LHWP.

The consortium/partnership Highlands Water Venture ("HWV"), Sogreah, Spie Batignolles, the consortium/partnership Lesotho Highlands Project Contractors ("LHPC"), Asea Brown Boveri Schaltanlagen GmbH, Germany, ("ABB, Germany"), Asea Brown Boveri Generation AG, Sweden ("ABB, Sweden"), Lahmeyer International GmbH ("Lahmeyer"), Acres International Limited ("Acres"), Dumez International ("Dumez"), Sir Alexander Gibb & Partners Ltd ("Gibb"), Cegelec and Coyne et Bellier ("Coyne") were contractors and/or consultants who were awarded contracts in respect of the project. Sogreah, Gibb and Coyne were members of the engineering consultancy, Lesotho Highlands Consultants, a consortium/partnership similarly engaged on the LHWP.

At all relevant times, S was a civil servant in the employ of the Lesotho Government and as such a State or public official. While retaining his status as a civil servant he was seconded to the LHDA as Chief Executive Officer.

In a civil suit brought by the Authority against S, certain documents were disclosed that led to a strong suspicion of corruption on his part. Further discoveries from Swiss authorities disclosed a number of accounts maintained by S which led to

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transferred to the account of Mr du Plooy with Nordfinanz Bank, Zurich. The first instalment was paid through a Swiss account belonging to Impreglio, an Italian company, registered in Panama. Impreglio held 22% of HWV. Although Impreglio was not the major shareholder in HWV, it was mainly responsible for the implementation of HWV's contract with Lesotho Highlands Project. Although the court could not conclude that any other partner of HWV was aware of the payments, it found however, that in view of the relevant contents of the Joint Venture Agreement, the actions of Impreglio must be taken to be those of HWV. Further, it found that Mr du Plooy made three payments to the accused which, were linked to the three instalments which he received, from the HWV bank account. In all the circumstances, the latter three payments, in particular, to Mr du Plooy, for the purposes of the trial, were laid at the door of HWV, rather than any partner thereof.

The Court was accordingly satisfied that during the period 1st October, 1991 to 22nd September, 1992 HWV paid Mr du Plooy the total sum of USD 1, 139,404, from which sum Mr du Plooy paid S the total sum of USD 375, 000.00. The payments were all effected through Swiss banks (those of the intermediary and the accused), as were all the other allegedly corrupt payments involved in the trial.

In respect of Count 2, the evidence was that Ceglec, Coyne and Sogreah transferred a total of FFR 1,726,986.06 into an account in Switzerland. Soon thereafter, the sum of FFR 213,011.55 equivalent to £20,986.36 was paid into an account belonging to S, also in Switzerland. The Court made a finding that the payment to S was made from the joint fund of FFR 1 755, 535.54, to which fund all three Consultants/Contractors had made contribution. Bearing in mind their joint association with the LHWP, with Mr Cohen, and with S, the court was satisfied that the payments of all three contributed to the payment to the accused.

#### **Counts 3 and 4: Spie Batignolles**

On 24th May, 1988 Spie Batignolles paid the sum of FFR 140,251.90 into the account of UDC, No. 647.525.60 Y with UBS Zurich. On 27th May 1988 UDC transferred the said amount, converted to SFR 34,151.35, to its account No 647.525.01 W with the same bank and branch. In any event, S's two accounts were respectively credited on 27th May 1988

with the sums of USD 5,617.11 and GBP 3, 020.81.

#### **Count 15: Cegelec**

This company paid into an account belonging to EPC the sum of FFR 935,000 out of which S was paid US 35,842.30. Cegelec was awarded contract number 117.

#### **Count 16 Coyne**

Four payments were made to UDC between 22nd April 1988 and 21st September 1994 totalling FFR 341,387.04, not connected to the accused. S was acquitted on this charge.

#### **Count 12: Dumez, Dumez (Nigeria) Ltd**

It was found that a total of thirteen payments, were made mostly by Dumez (Nigeria) Ltd, three directly to S and the rest to Mr Bam and one payment to Mrs Bam. The court found that the payments indicated an agreement between Dumez or Dumez (Nigeria) Ltd, ( on behalf of Dumez), Mr Bam and S, whereby the latter would receive an amount equivalent to a fixed proportion of that paid to Mr Bam.

Dumez was interested in LHDA Contract 104. The prosecution's evidence was that initially Dumez did not qualify as a tenderer. On the advice of Acres, however, whose officers held appointments within the structure of LHDA, S as Chief Executive recommended that Dumez be included on the list of tenderers. Dumez was so included. The Tender Evaluation Committee was appointed by the Chief Executive. The said Committee recommended Dumez as the preferred tenderer. The Negotiating Committee, consisting of the Tender Evaluation Committee plus another officer from LHDA (from Acres) was appointed by S. The MOU was signed in January 1989, the commencement date being 9th February 1989. The contract price was approximately M54 million. Ultimately, Dumez was paid a total of M90 million for Contract 104 following arbitration.

In the result the question that arose was whether or not Dumez Nigeria Limited was in fact the transferor of the payments to S. In all the circumstances the court found it safer to assume that it was. However, the court held that in the circumstances, the transfers were effected for and on behalf of Dumez International.

#### **Count 14 Gibb**

On 28 December 1990, Gibb transferred GBP 22, 420.65 into the account of UDC in Zurich,

Switzerland. On 22nd January, 1991 the sum of GBP 20,000 was transferred from the UDC account to S's account also held with a bank in Zurich and later invested in a six-month deposit account. The only intervening item on the UDC account in January was a debit of GBP 4.13 for bank charges. Prior to the transfer by Gibb there were insufficient funds on the UDC account to sustain the transfer to S. The court was satisfied that the transfer to S of GBP 20,000.00 was funded by the transfer of GBP 22,420.65 by Gibb to UDC. Gibb was involved with LHWP at a very early stage in at least fourteen consultancy contracts. The payment by Gibb to UDC and from UDC to S took place during the implementation of Contracts 26, 28 and 45. Contract 45 was a much sought-after contract, the contract price being M 287 million the cost of which had escalated to M 408.7 million by 9th September 1999.

#### Counts 9 and 10: Acres

On 4th June 1991 Acres International credited the account of Mr Bam, with the sum of CAD 31,255.71. The next day, the sum of FFR 34,329.50 (less charges) was transferred from Mr Bam's account to S's account with a bank in Geneva, Switzerland. There followed a further twenty-three transfers from Acres to Mr Bam and twenty corresponding transfers by Mr Bam to S's FFR account in Geneva. The payments followed a pattern and had much in common. The transfers by Acres were effected in CAD; those by Mr Bam being converted to FFR. The payments by Acres for the most part were in the region of CAD 23,478.27. Whatever the sum, Mr Bam transferred 60% thereof to S, earlier on the same day, or within a matter of days. The court found that 60% was clearly the percentage agreed upon. It was satisfied that during the period 4th June, 1991 to 7th May, 1997 Acres paid Mr Bam the total sum of CAD 493,061.60, from which sum Mr Bam paid the accused the total sum of FFR 1,306,920.22.

The prosecution lead evidence that Acres' officers occupied such senior positions within the Technical Division of LHDA, that Acres "ran the Technical Division", being "involved in the day to day running of the LHDA". Acres' staff supervised the consultants' work, and the consultants' payment in respect thereof; they checked all designs submitted to LHDA, assisted in the preparation of tender documents and were involved in the evaluation of tenders.

Two of their officers were appointed Assistant Chief Executive under two separate contracts. In fact at the end of one of the contracts, only Acres were invited to submit a proposal in respect of the latter contract, it being then termed a "sole-sourced contract". Upon award of the contract, some of its officers were promoted by S, as the Chief.

#### 4. SUMMARY OF PAYMENTS UNDER BRIBERY COUNTS

The accounts maintained by S in Switzerland could not be described as normal business, current or cheque accounts, where one expects to see a frequency of transactions. Those accounts were sustained solely by payments by the intermediaries and served as a conduit pipe for such: frequently only a small balance was maintained on such accounts and monies received from the intermediaries were often transferred elsewhere within a matter of days, or on the day of receipt, or even beforehand in anticipation of such receipt.

S also had accounts with Ladybrand bank in South Africa through which he filtered the monies paid into his Swiss bank accounts. The Swiss and Ladybrand bank records disclosed that over the period 18th October 1991 to 24th April, 1997 S made 24 transfers from four Swiss accounts. Not being resident in South Africa, S was not obliged to complete a standard foreign exchange form, disclosing the source of the foreign monies lodged to the account. But S would inform Ladybrand bank officials that the payments represented "salary", a reason which did not meet the queries raised by the importation from overseas, by one employed in Lesotho, of more than R5 million in the space of five and a half years.

S also frequently invested large amounts on short term, fiduciary deposits, with the particular Swiss bank which received these specific funds. The deposits were made locally with the bank, or otherwise with a foreign branch of that bank, or elsewhere, through the agency of the Swiss bank.

The court found that by 31st December 1996, S had transferred the sum of SAR 5,052,241.57 to his Ladybrand account. His assets in Europe, amounted to SAR 1,012,966.00. He however continued to receive further payments from intermediaries in 1997. A figure in excess of R6 million was representative of the value of the payments to S.

The court was satisfied that S transferred no less than M430,000.00 to the Maseru account from

the Ladybrand account, and further, that the origin of such funds was the payments which he received over the years from the intermediaries.

## 5. SIMILAR-FACT EVIDENCE

The fact that there were so many counts on the indictment and the fact that the first sixteen counts were similar, raised the issue of similar-fact evidence. In criminal cases the formulation of the "rule" in the matter is as stated in the dicta of Lord Herschell LC in *Makin v Attorney General for New South Wales*, decided in 1894, at p65:

"In their Lordships' opinion, the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered in the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it is relevant to an issue before the jury; and it may be so relevant if it bears upon the question of whether the acts alleged to constitute the crime charged in the indictment were *designed or accidental*, or to *rebut a defence* which would otherwise be open to the accused." (Italics added)

In the present case, while each count must be considered separately, nonetheless they were similar in nature, and reflected a system over an extended period whereby eleven Consultants/Contractors paid large sums of money to three intermediaries, Mr Cohen, Mr du Plooy and Mr Bam, who in turn virtually forthwith paid the accused in most cases a regular percentage thereof, depending upon the intermediary, ranging from 60% by Mr Bam, and 50% by Mr du Plooy, to a relatively small fraction by Mr Cohen. Many of the transactions involved were relatively contemporaneous, so that at times funds became intermingled; so much so that on occasion it was difficult to identify the source of a particular payment to S. Indeed, the transactions involved were inextricably bound together and the facts of the case were such that the court had to look at the global picture.

The purpose of numerous payments of large amounts of money by three intermediaries to S over a period of some nine years, could only have had and could only have been understood by S to have one purpose, that is, a corrupt one. So also was the purpose for which the three direct payments to S by Dumez Nigeria Ltd. S must then have known of the *source* (the identity of the Consultant/Contractor) as well as the purpose of each payment, and in particular what was expected of him in return for such payment; alternatively a payment might well have been made in respect of consideration already granted by S.

As to knowledge and intent by the Consultant/Contractor, the court found *inter alia*, the following factors of significance:

- (i) that Mr Cohen set the wheels of corruption in motion by his payments to S and by being instrumental in opening his UBS account, followed by the other French companies, and through them Gibb and LHPC, with whom Mr Cohen was in association.
- (ii) that one of the three consultants, Mr Bam, served three Consultants/Contractors, namely, Acres, Dumez and Lahmeyer, who, were not associated in any way, and whose interests were necessarily diverse.
- (iii) that the three consultants engaged by eleven Consultants/Contractors all resorted to corrupt payments.
- (iv) that it was extremely unlikely that all eleven Consultants/Contractors were being individually or collectively deceived by their respective consultants.
- (v) All Consultants/Contractors were generally successful, being awarded one or more contracts. The consultants supplied something more than mere information, therefore, sufficient to cause enquiry as to their methods.
- (vi) Although the personal services of Mr Bam had been directly or indirectly (as representative of ACPM) engaged as a consultant, nonetheless three Consultants/Contractors each made a payment to Mrs Bam. The fact that Mr Bam and Mr du Plooy each paid the accused a constant percentage of money received from the Consultant/Contractor, indicated an agreement with either the accused or the Consultant/Contractor, or both. S could only ensure that he was receiving the correct amount, by establishing the amount received by the intermediary from

the the Consultant/Contractor himself. In the case of Mr Cohen, the fluctuating amount and percentage of payment meant that S had to liaise with the particular Consultant/Contractor in the matter.

- (vii) Clearly the most significant factor was that all payments were effected by the Consultants/Contractors to their respective consultants, and also Mrs Bam, through the medium of Swiss bank accounts, all operated with "Banque Restante" facilities. Indeed, HWV itself availed of the use of a Swiss bank account. The consultants rendered their services locally. All of the Consultants/Contractors operated local bank accounts and operated local bank accounts at the relevant time. None of them were based in or operated out of Switzerland. None of the bank account details supplied by them to LHDA for the purposes of payment of the various contractual currency components, included Swiss Bank accounts. If the various representation agreements were conducted *bona fide*, in the highly sensitised and tense atmosphere prevailing in the world of multi-million and even billion Maloti construction tenders, the *stigma* of covert banking facilities would never have been contemplated.

#### 6. ADMISSIBILITY OF STATEMENTS BY AND CONDUCT OF ACCUSED IN CIVIL RECORDS

The court had earlier held in preliminary rulings (March 18, 2002) that some 51 extracts of the civil records were generally admissible as evidence of their making, and that informal admissions against interest and the confessions of a party are admissible in evidence *against* him, as evidence of the *truth* of their contents, as an exception to the hearsay rule.

In *R v Carson*, 1926, the Appellate Division held that the examination of an insolvent, under section 55 of the Insolvency Act No 32 of 1916, under which he was obliged to answer incriminating questions, was admissible *against* him, as evidence of its contents, in criminal proceedings. This was so despite the subsequent provisions of section 273 of the Criminal Procedure and Evidence Act.

#### 7. THE ACCUSED'S FAILURE TO PRODUCE FOREIGN BANK RECORDS

The various bank records produced by the prosecution held evidence that convinced the court that the accounts were held by S. However, S did not produce, nor did he

acknowledge that he held such accounts. The Crown, adduced evidence of 51 extracts from the civil record. Counsel for S had submitted that the contents of the civil record were simply irrelevant in the criminal trial. In *R v Mpanza* (50) Innes CJ observed at pp352/353 that:

"... facts relevant to the issue may always be proved, and any facts are so relevant if from their existence inferences may properly be drawn as to the existence of the fact in issue."

What S said as to the Swiss bank accounts in the civil trial was entirely relevant. The contents thereof were evidence of the making thereof. But when it comes to statements by the accused, they take on an evidential value, if they are inculpatory, in which case they are admitted *against* the accused. Although an accused's statement can thus be admitted *against* him as evidence of the *truth* of its contents, as an exception to the hearsay rule, in the present case S's statements were not admitted for that purpose. They were being admitted as evidence simply that he *made* such statements, in which case they did not, in any event, constitute hearsay. The statements by S were all exculpatory in form: he denied having any South African or Swiss bank accounts. But the Court found that he manifestly did hold such accounts and accordingly found that, he lied, and lied under oath on a number of times, in the High Court. His statements therefore, while exculpatory in form, had an inculpatory effect: they inevitably indicated that he wished at all costs to conceal those accounts, raising the inference that the accounts were not held and operated for a valid purpose, and indeed, in all the circumstances, supporting the inference of corrupt transactions.

Therefore the evidence of what transpired in the civil proceedings was admissible in these proceedings.

#### 8. REPRESENTATION AGREEMENTS

The Consultants/Contractors position was that they had representation agreements with the companies that were doing business with LHDA. Under such agreements, the consultant may agree to provide certain information about local conditions, labour, wages, materials, plant, transport, climatic conditions etc. If he supplies perfectly innocent information, then the agreement is *bona fide*. If, however, the consultant supplies patently confidential information, then the inference of bribery arises and the principal should be put on enquiry. If he raises no query, then his conduct is not *bona fide*

and he becomes party, in whatever form, to such bribery. And 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. In that case, the results produced by the consultant speak for themselves. The principal cannot be unaware of the consultant's activities, particularly where they are extended over a period.

Under the consultancy agreement between HWV and Mr du Plooy, the latter undertook to supply not only the necessary information, but also undertook in effect to secure the award of the contract to the extent that his fee would only become payable with the award of the contract. A consultant cannot give such an undertaking *bona fide*. The consideration offered and executed by a consultant is the services which he renders and not the results thereof. In the construction industry 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.

The payments to Mr Bam continued long after the accused had left LHDA, pointing to the lack of *bona fides* of any representation agreement. What assistance or service could Mr Bam render in the matter? His services might have been relevant in 1986, before the start of TAC1 on 3rd January 1987. On 21st February, 1991, Acres had by then rendered four years of service in LHDA as an integral part thereof, with a number of officers of Acres holding very senior appointments therein, as high as Assistant Chief Executive, within the Technical Division, so that, Acres "ran the Technical Division". Acres had completed TAC1 successfully, so successfully indeed that TAC2 was a "sole-sourced" contract. After four years of no doubt hard work and hard-gained experience of local conditions, in effect being responsible for the administration of a complex and vast water project, constituting little short of an engineering miracle, there was no longer any need by Acres for consultancy services from a

small sub-contracting consultancy firm. As TAC2 was a "sole-sourced" contract, no other concern was invited to tender. Quite clearly therefore the recommendation of the Chief Executive in the matter was a matter of concern to Acres. The only inference that could be drawn from such continued relationship was that Mr Bam facilitated the bribery of S by Acres.

#### 9. THE ACCUSED'S SILENCE

S did not adduce any evidence in answer to the Crown's case, and elected to remain silent. He was not obliged to give any evidence. That right is enshrined in s. 12(7) of the Constitution.

However, no adverse inference should be drawn from S's silence in the sense that it was an *evidential item* bolstering the Crown case, and could not cure defects in the Crown case. Such silence was simply not evidence in the case.

#### Count 17

The Court found that on 11th June, 1991 S intended to utilize the attendance at ICOLD in Vienna as an opportunity to attend to his own business in Paris, Zurich and London, and if not his own business then at least a holiday in Moscow and Leningrad, at a time when he should have been attending the conference in Vienna. On the totality of the evidence, including the accused's concealment of the visit to Paris, the purchase of the ticket if not tickets by Dumez, the meeting with the President (Chairman) of Dumez in Vienna, the delivery of the ticket to Vienna, the court was satisfied that the main purpose of S's visit to Europe was not to attend the Conference, but to attend the meeting in Paris.

Accordingly, it found S unlawfully and with intent to defraud made the representation charged causing actual proprietary prejudice to the LHDA in the amount of M16,289.85.

#### CONCLUSION

S was convicted of 13 counts and acquitted of 5 counts. The court repeated its earlier ruling that it was not possible for the Crown to prove by direct evidence, whether particular payments were made as a reward for past favours or as an inducement for future favours.

*R.v Sole* [Unreported] case No. CRI/T/111/99