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Cases and Materials Relating to Corruption
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(The Lesotho Highlands Water Project Cases)

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THE LESOTHO HIGHLANDS WATER PROJECT CASES

This Issue contains the decisions of the Lesotho Court of Appeal emanating from the Lesotho Highlands Water Project (LHWP). It is perhaps worth emphasising the background to the cases.

The LHWP, one of the largest and most ambitious dam projects in the world, commenced in 1986. The US$8 billion scheme was officially opened in March 2004. Its aim is both to generate hydro-electric power for Lesotho and to deliver water to South Africa through one of the world's largest networks of dams. A statutory body, the Lesotho Highlands Development Authority (LHDA), was established in 1986 to oversee the project. Its first chief executive was Masupha Sole, a Canadian-trained Basuto civil engineer. Concern about the running of the Authority led to an audit in 1994 which uncovered serious financial irregularities on the part of Sole, and this led to his dismissal in 1995. The LHDA then began a civil action against Sole to recover the misappropriated funds. Despite his claims to the contrary, the case eventually revealed that Sole had bank accounts in South Africa and Switzerland.

A criminal investigation was then launched and as part of this, a request for mutual legal assistance was made to the Swiss Federal Authorities requesting the release to Lesotho of details of Sole's Swiss bank account. The Swiss investigation revealed that Sole had several accounts in Switzerland totaling well over US$1 million. Further that whilst the payments had been received via so-called intermediaries, the origin of these payments came from contractors and consultants on the LHWP from several Western countries.

The Court of Appeal in *Sole* clearly sets out the facts (at para 96):

> "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 … 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.

The Lesotho authorities decided to charge both Sole and the bribers in one big trial. However, an application was made for a separation of trials and this was eventually granted. At the same time, a number of preliminary issues were raised by the lawyers representing the various contractors/consultants. This led to a series of ruling by the Lesotho High Court, two of which require particular mention.

It was argued that in order to prove bribery the Crown had to prove "action or inaction" by the alleged bribee. In other words, the Crown had to prove what it was that Sole was supposed to

do in return for the bribe as well as what he in fact did. This the Crown simply did not know. All it knew was that these monies were paid secretly into Swiss accounts to the Chief Executive in circumstances where the only reasonable inference was that they were intended and received as bribes.

In a ruling handed down in March 2001, the presiding judge Cullinan AJ, a previous Chief Justice of Lesotho, ruled that the common law crime of bribery is completed by the briber when s/he makes the corrupt offer and by the bribee when s/he accepts it. The action or inaction sought may actually be in accordance with the bribee's duty. It may even be in the public interest. In fact, it is immaterial whether or not the briber's goal is achieved. Where the Crown does know of the proposed action or inaction, or whether or not the bribee did what s/he was supposed to do, it should detail this. When it does not know, however, it need not do so.

The other ruling of particular importance related to jurisdiction. It was argued on behalf of the contractors/consultants that a court in Lesotho did not have jurisdiction in a case in which the alleged bribes were paid in another country, i.e. Switzerland and where no money changed hands in Lesotho. In another landmark ruling delivered on 18th May 2001 Cullinan AJ, after undertaking a detailed review of the authorities, adopted the "harmful effects" test and came to the conclusion that the only country affected by these bribes was Lesotho. It was a Lesotho state official who was involved in the bribes and the harm that resulted from them related to Lesotho; the reason why these bribes stood to be punished was because they harmed Lesotho. This gave a Lesotho court jurisdiction to try the case (see *R v Sole* in Issue 1 Vol 1). The decision was upheld by the Court of Appeal of Lesotho in the judgment set out below.

In May 2002, Sole was convicted in the Lesotho High Court on thirteen counts of bribery and sentenced to eighteen years imprisonment (see Volume 1, Issue 2).

The prosecution of the companies/consultants commenced with a Canadian firm Acres International. In September 2002, the company was convicted in the Lesotho High Court on two counts of bribery and sentenced to a fine of US$2.25m (see Volume 1, Issue 2).

In a press statement issued after the High Court decision, Acres asserted:

> "Acres had no knowledge or suspicion of these payments, could not have anticipated them, had no motive for them, and received no benefit. The unlawful payments were entirely between the now-deceased representative [of Acres, Mr Bam] and the project director [Mr Sole].

The company added:

> "The trial court surprisingly ignored Acres' entirely legitimate reasons for retaining a local representative in a particularly unstable country at that time, as well as the fact that Acres' agreement with the representative expressly prohibits illegal activities such as the payment of bribes" (available on www.acres.com).

On appeal, the Court of Appeal of Lesotho upheld the first charge, but dismissed the second and reduced the fine imposed upon the company. However the central issues were left largely untouched and the court highlighted the fact that "the record shows that the appellant was given a fair trial and that there is not the slightest indication or suggestion to the contrary" (at para 19).

The appeal court decision is set out below. A comparison between the assertion of Acres in its press statement and the findings of both the High Court and Court of Appeal (and the concession of Acres' counsel in the appeal) make interesting reading.

THE SOLE CASE

Some comments on the main issues raised before the Court of Appeal might be helpful.

1. Jurisdiction

The point was again argued that the crime of bribery is complete once the agreement between the bribee and briber is struck. Thus since there was no evidence that the agreement was made in Lesotho, the trial court had no jurisdiction to convict the appellant of bribery.

In his ruling in the High Court, Cullinan A.J. had undertaken a wide-ranging examination covering different legal systems, different periods of legal history and disparate offences. However the Court of Appeal did not feel it necessary to revisit this discussion. Rather it adopted the approach of the Supreme Court of Zimbabwe in *S v Mharapara* ruling that the court had jurisdiction where the harmful effect of the offence occurs, which was, in this case within Lesotho (see paras 17-19).

2. Who is a state official?

Bribery offences are commonly restricted to acts committed by or in respect of "state" or "public" officials. This is a potentially serious obstacle to anti-corruption strategies given that the wide-ranging privatisation programmes in many countries have ensured that in key areas, public officials have been "transformed" into employees of commercial enterprises and thus out of the reach of the anti-bribery laws. The point is well illustrated by the decision of the Court of Appeal (Criminal Division) in the English case of *R v Natji* (see Vol 1 Issue 4).

The need for states to address corruption in the private sector as well, is reflected in the United Nations Convention Against Corruption, article 12(1) of which states:

> "Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures."

In *Sole*, the matter arose in a somewhat unusual form. Here the issue was whether a member of the public service remained a public officer during the period of his secondment to a statutory body, the LHDA (during which time the alleged bribery offences took place). The matter was subject to detailed examination by the trial judge (see Vol 1 Issue 2 pp.33-43) and the Court of

Appeal was thus content to identify the salient features of the case which supported the finding of the trial judge (see paras 33-35).

3. Proof

The case highlights the problems of proof in corruption cases. The key question was whether the inference of Sole's guilt was properly drawn by the court below. As the court notes in para 8, there was no direct evidence of any agreement between the contractors or the consultants and the appellant or of the manner in which the appellant was to use his powers or opportunities to further their interests. With one possible exception, no money was paid directly to Sole. He did not give evidence and did not call any witnesses (and the intermediary, Bam, had died in 1999). Thus the prosecution was forced to rely on inferences drawn from payments made by the contractors or consultants to the intermediaries who then paid over a certain percentage to Sole. Here the application of the rule in *R v Blom* came into issue (see para 81).

In this respect, the effect of Sole's failure to give evidence was examined. Here the appeal court holds that the trial judge did not give "a correct exposition of the law" and, notes at para 79, that

> "in considering whether the proved facts exclude every reasonable inference, save the one sought to be drawn… regard may be had to the accused's failure to testify. That 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".

The judgment also provides a good illustration of the hearsay rule (para 86): here the statements made by Sole in the earlier civil trial (in which he had denied having any foreign bank accounts) were admissible, not for the purpose of proving the truth of what he had said but "as proof of what had been said".

4. Sentencing

There are two points of interest here. Firstly, the approach of the court concerning the refusal of the trial judge to allow the defence to call a criminologist. Secondly, the need for a deterrent sentence in such cases "to express the public abhorrence of what has transpired" (para 109). However the judgment contains some useful comments regarding the approach to sentencing in cases where there are a multiplicity of counts.

THE ACRES INTERNATIONAL CASE

In September 2002, a Canadian construction company Acres International was convicted in the High Court of Lesotho on two counts of bribery (see *R v Acres International Ltd*, Volume 1 Issue 2). Count 1 alleged that the company had paid into a Swiss bank account of Zalisiwonga Bam almost C$500 000 and that part of this sum was then transferred to Sole. Count 2 alleged that the company had paid almost C$200 000 into a Swiss bank account held by Bam's wife and that part of this money was transferred or supposedly transferred to Sole.

In August 2003, a differently constituted Court of Appeal of Lesotho to that in the *Sole* case but again comprising three senior South African judges, heard the appeal against conviction and sentence case.

At the appeal, counsel for Acres made some crucial concessions, namely:

i) that the payments made by Bam to Sole were funded by payments made by the appellants to Bam and were made unlawfully;
ii) that the Crown evidence, particularly as to the flow of payments, placed an obligation on the appellants to explain the payments to Bam;
iii) that there was an evidential burden on the appellants to explain such payments;
iv) that without an acceptable explanation the inference could properly be drawn that the appellant was guilty of bribery.

It was the Crown case that the only reasonable inference to be drawn from the facts was that the appellant knew it was paying Bam to use its money to bribe Sole and that it used Bam (and his wife) as a conduit to camouflage the fact. The key issue for the court was whether the appellant had discharged the evidential burden it had accepted.

Many of the main facts were uncontested. Acres had made a series of secret payments to Bam and his wife through numbered Swiss bank accounts, amounting to the equivalent of 25% of Acres' profit. Bam had then passed on some 60% of the money received to Sole, the person who was in a position to secure the construction contracts for Acres. The key question was whether the company was buying "political intelligence" from Bam (as it asserted) or whether it had known that Bam was passing on the money to Sole. Bam had died in 1999 and Sole had remained silent throughout the entire criminal and related proceedings.

The case inevitably hinged on circumstantial evidence and, as at the trial, the court turned to *R v Blom* for assistance (see para 13). The court then undertook a helpful review of the permissible use of circumstantial evidence and concluded at para 14:

> "… a court must weigh the cumulative effect of all the proved facts taken together and it is only after that has been done that it must consider whether it is entitled to draw the conclusion which it is asked to make on the basis of inference".

The role of intermediaries and, in particular, the representation agreement made between Acres and Bam merited particular attention. Such agreements are not unusual. In fact an agency agreement or representation agreement in which a local person agrees to act as the agent of a corporation may well be essential to assist a corporation where, for example, it is entering a new field/country and is reliant on local advice and influence. As Scherer puts it,

> "Only a foolish principal would retain an agent *without* influence. Agents may have acquired influence as a result of longstanding professional experience, through the force of their personality, by their standing in society or through their respected expertise." (M Scherer *Circumstantial Evidence in Corruption Cases before International Arbitral Tribunals* [2002] Int ALR 29 at 30) (emphasis in original).

However, the Acres case illustrates that such agreements are a ready mechanism for bribes and also, that the bribes can (and, as in this case, do) emanate from the bribers and not the bribees. The case emphasises that the terms of a contract are not necessarily a trustworthy guide as to the real intent of the parties. In this respect, the use of so-called "red flags" is a useful mechanism in helping to prove corruption. Here the discussion in para 21 onwards provides a series of excellent examples of "red flags".

The court also provides a thorough analysis of the principles of sentencing in such cases (see para 51 onwards).

THE LAHMEYER INTERNATIONAL CASE

Lahmeyer International was the second international construction company to be brought to trial. As the Executive Summary of the case illustrates, the case covered much the same ground (and had a similar result) to that of Acres International. As regards sentence, the court increased the fine to R12 million.

OTHER CONVICTIONS

In September 2003, Michiel du Plooy pleaded guilty to acting as an intermediary in bribery payments to Sole: in this case acting on behalf of an Italian consortium of construction companies. He was given a suspended jail sentence of three years and fined R500 000.

In February 2004, a French-based electrical company, Schneider Electric, pleaded guilty before the Lesotho High Court on sixteen counts of bribery and was fined R10 million.

OVERVIEW

The importance of the LHWP cases was emphasised by the Court of Appeal in the *Acres International* case:

> "The fact of conviction is in itself perhaps more important than any sentence we could pass. It demonstrates to those who do business in developing countries that they do not have a licence to buy favours from governments by making corrupt payments to persons in authority. If they do, they will be vigorously prosecuted and if found guilty, fairly but severely punished" (at para 66).

Further, they raise the possibility of the convicted firms being placed on the World Bank "blacklist" and thus denied an opportunity to participate in World Bank funded projects.

Indeed, in July 2004 the World Bank announced that it was barring Acres International from receiving any new Bank-financed contracts for the next three years. In a statement, the Bank said:

“The World Bank’s sanctions committee found that Acres engaged in corrupt activities for the purpose of influencing the decision-making of the then chief executive of the Lesotho Highlands Development Authority…”

The cases illustrate some of the layers of protection that participants to a bribery agreement may seek to utilise. In particular, taking advantage of the common practice of entering into representation agreements, thus ensuring there was no direct connection between the payment of the bribes and their receipt by Sole. Further, reliance on the banking secrecy supposedly offered by Switzerland and which was thus regarded as a safe haven for "hot money" (see para 26). This was foiled by two key factors: firstly the determination of the Lesotho authorities to investigate and prosecute both the bribee and the bribers. Here the court in Acres rightly commends the Director of Public Prosecutions and his team "for their dedicated and resolute efforts" (para 67). Secondly, the ability of the investigators to follow the audit trail thanks to effective mutual legal assistance arrangements with the Swiss authorities.

As to the payment of the fine, following the decision of the appellate court the President of Acres International commented:

> "We think the findings are somewhat flawed but we've nevertheless agreed to pay the fine as part of our commitment to being a good corporate citizen. We just want to move on with it. We've paid a heavy price and what we're trying to do is take an industry lead in promoting honest and ethical business practices." (*The Globe and Mail* (Canada) 16 March 2004).

However, it is not clear as to whether the full amount of the fine has yet been paid. It remains to be seen what steps Lesotho might take to seek assistance from Canada in recovering the outstanding amount.

Finally the cost implications for mounting major bribery trials should be noted. As well as the co-operation from Switzerland noted earlier, the Lesotho authorities received considerable assistance from South Africa by way of legal and accounting expertise as well as from the World Bank. Yet such assistance stopped short of financial help and as the Lesotho Attorney-General has pointed out "When you prosecute bribery you are in your own". This despite promises of financial assistance in launching the prosecutions apparently made at a November 1999 meeting called by the World Bank and attended by representatives of various players concerned with the LHWP, including those from South Africa, Britain, the European Union, the European Investment Bank and other European banks.

Criminal Law – bribery – appeal against conviction and sentence
Jurisdiction -- no evidence that agreement made in Lesotho -- whether jurisdiction established where the harmful effect occurred within Lesotho -- evidence required to prove harmful effect
Meaning of "state official" -- whether includes public officer seconded to a statutory body
Indictment -- Criminal Procedure and Evidence (Amendment) Act 2001 -- retrospective operation and constitutionality
Application to re-open defence case -- applicable principles
Right to silence -- evidential value -- whether drawing of an adverse inference from silence of accused unconstitutional
Circumstantial evidence -- rule in R v Blom -- principles of inferential reasoning
Sentence -- refusal of the trial judge to permit accused to call criminologist -- whether constituted a misdirection
Sentence -- use of concurrent and consecutive sentences on different counts -- whether appropriate

EPHRAIM MASUPHA SOLE v THE CROWN

Court of Appeal of Lesotho 2, 3 and 14 April, 2003
Smalberger JA, Gauntlett JA, Melunsky JA

Cases referred to in the judgment
Curtis v Johannesburg Municipality 1906 TS 308
Ex parte Neethling and Others 1951 (4) SA 331 (A)
Hladhla v President Insurance Co. Ltd 1965 (1) SA 614 (A)
Libman v R (1985) 21 DLR (4th) 174; (1986) LRC (Crim) 86)
Mharapara v The State (1986) LRC (Const) 235.
Minister of Public Works v Haffejee NO 1996 (3) SA 745 (A)
National University of Lesotho v Moeketsi (1995) 1995-1996 LLR-LB 100 (CA)
Oosthuizen v Stanley 1938 AD 322
R v Blom 1939 AD 188
R v Erasmus 1945 OPD 50
R v Ismail 1952 (1) SA 204 (A)
R v Whitaker [1914] 3 KB 1283 (CA)
S v De Jager 1965 (2) SA 612 (A)
S v Mharapara 1986 (1) SA 556 (ZSC)
S v Mthetwa 1972 (3) SA 766 (A)
S v Mukwezva 1993 (1) SACR 694 (ZS)
S v Mzizi and Another 1990 (1) SACR 503 (N)
R v Sacks and Another 1943 AD 413
S v Van Der Sandt 1997 (2) SACR 116 (W)

S v Zuma and Others 1995 (1) SACR 568 (CC)

For the appellant: E. H. Phoofolo
For the Crown G H Penzhorn SC and H T T Worker

THE FULL COURT:

Introduction

[1] The appellant was indicted in the High Court on 3 December 1999 together with eighteen other accused on charges of bribery, fraud and perjury. Objections to the indictment resulted in the Crown, on 1 June 2001, preferring a fresh indictment against the appellant only, in which he was charged with 16 counts of bribery and two of fraud. Pursuant thereto he appeared before Cullinan AJ (formerly CJ) on 11 June 2001. He pleaded not guilty to all counts. At the conclusion of a protracted trial, the appellant was convicted on 11 of the bribery counts, involving the receipt of millions of Maloti, and on both fraud counts. He was sentenced to an effective period of 18 years imprisonment. He now appeals against his convictions and sentence.

[2] At the commencement and during the course of his trial the appellant raised a number of legal issues which were the subject of separate rulings and judgments by the learned trial judge. The appellant also appeals against some of those adverse to him. They will be considered and dealt with at an appropriate stage in this judgment.

[3] The criminal trial arose out of the Lesotho Highlands Water Project ("the LHWP" or "the project"), one of the biggest and most ambitious dam projects in the world, which entailed *inter alia* the construction of the Katse Dam in a remote and inaccessible part of the highlands of Lesotho. Initially the project involved the building of the essential infrastructure, such as access roads and accommodation facilities. One of the main aims of the project was the delivery of water to the Republic of South Africa, which necessitated the construction of a delivery tunnel. Another object was the generation of electricity and this entailed the construction of a hydropower complex and a transfer tunnel from Katse to Muela where the complex was to be built. All of this required substantial funding, most of which came from outside agencies such as the World Bank, the European Commission and the African Development Bank.

[4] The implementation, supervision and maintenance of the LHWP was entrusted to the Lesotho Highlands Development Authority ("the LHDA"), a statutory body created by the Lesotho Highlands Development Order 23 of 1986, pursuant to and in terms of a treaty between the governments of Lesotho and the Republic of South Africa. The LHDA was governed by a board of directors but the day to day running of its affairs was in the hands of its chief executive officer. Another body, the Joint Permanent Technical Commission ("the JPTC"),

subsequently known as the Lesotho Highlands Water Commission, which was composed of representatives from both Lesotho and South Africa, acted in an advisory capacity to the LHDA and also monitored the progress of the project.

[5] The appellant is a qualified civil engineer. He was appointed to the public service in August 1972. He had progressed to the position of Senior Engineer, Water Affairs, when, on 1 November 1986, he was seconded to the LHDA as its first chief executive. He served in this capacity until his suspension in October 1994. He was eventually dismissed from this post in November 1995. Subsequently the LHDA instituted civil proceedings against the appellant in the High Court, claiming damages arising from his alleged wrongful conduct while chief executive. Judgment was given in favour of the LHDA in October 1999 and an appeal by the appellant to this court was dismissed in April 2001.

[6] Before considering the evidence, it is appropriate to make some general observations relating to the bribery counts. The alleged bribers were firms, partnerships or joint venturers who were awarded substantial contracts by the LHDA in relation to the project, either as contractors, for the performance of construction work, or as consultants, for the design and/or supervision of the construction. In order to carry out specific aspects of the project some of the firms joined with others to form partnerships or consortia. None of the contractors or consultants gave evidence at the trial although, as appears below, the appellant applied unsuccessfully to reopen his case in order to lead their evidence.

[7] The essential averments in respect of each bribery count were:
1. An offer by a contractor or consultant to the appellant to use his opportunities or powers as chief executive to further the private interests of the contractor or consultant concerned;
2. Acceptance of the offer;
3. Payment of specific amounts by the contractor or consultant to the appellant pursuant to the agreement so reached.

[8] The Crown alleged that it was unable to furnish particularity concerning the agreements on which it relied, nor, save in two or three instances, did it specify what benefits or advantages accrued or were to accrue to the contractor or consultant. Indeed there was no direct evidence of any agreement between the contractors or consultants and the appellant or of the manner in which the appellant was to use his powers or opportunities to further the formers' interests. Furthermore, and apart from one payment by Dumez (Nigeria) Ltd ("Dumez Nigeria") allegedly on behalf of Dumez International ("Dumez"), no money was paid by the contractors or consultants directly to the appellant. The Crown relied on payments made by the contractors or consultants to certain third persons (referred to as "intermediaries" in the court *a quo*) who, in turn, so it is alleged, paid over a percentage of their receipts to the appellant.

[9] From the aforegoing it is apparent that the Crown case was based largely on inferences which it drew from the facts and the essential question that arises in relation to the merits of the appeal is whether the inference of the appellant's guilt was properly drawn. In this regard it is important to note that most of the material facts are not in dispute. The trial judge accepted the material evidence led by the Crown and his factual findings are largely unchallenged on appeal. Moreover the appellant did not give evidence and did not call any witnesses to testify on his behalf.

[10] In the absence of any substantial factual dispute there is no need for us to name the particular witnesses from whom the facts were established. It is sufficient to say that the records from the South African and Lesotho banks, relevant to this enquiry, were produced by representatives of the banking institutions concerned; that the documents relating to Swiss bank accounts were supported by affidavits under the authority of Mrs Cova (an examining magistrate of Zurich); and that Mr. Roux, a director of Price, Waterhouse Coopers, Forensic Services (Pty) Ltd., relying on the banking records, traced the flow of money from contractors and consultants to intermediaries and from intermediaries to the appellant. All of the aforesaid evidence was unchallenged, save that counsel for the appellant disputed the admissibility of certain aspects of Mr. Roux's evidence which were said to amount to opinion evidence. In the result the trial judge, perhaps overcautiously, did not have regard to Mr. Roux's opinions, but took into account his evidence to the extent that the witness placed the facts before him "in manageable form". In addition to the banking and accounting evidence, he also had regard to the testimony of Messrs Putsoane, Mochebelele and Rafoneke and Mrs Mathibeli, Makoko and Callaway, among others.

[11] Before proceeding to consider certain background circumstances relevant to the merits, the various counts on which the appellant was convicted and the inference to be drawn from the established facts, it would be appropriate to deal first with certain other issues which arose at different stages during the trial.

Jurisdiction: bribery

[12] A significant part of the oral argument of the appellant's counsel as regards conviction on the bribery counts related to jurisdiction. A special plea to jurisdiction had been raised before the trial court in terms of section 162(2)(e) of the Criminal Procedure and Evidence Act, 1981 ("the Code"). On 10 May 1991 the trial court held that it had jurisdiction to try the bribery counts, giving its reasons for the ruling in a 124 page judgment handed down a week later.

[13] The trial judge's approach to the issue was this. The objection to jurisdiction related (in the absence of a statement of agreed facts, or any evidence at that stage) to the basis disclosed by the indictment. The latter stated that the location of the place of the commission of the alleged offence of bribery was unknown to the Crown. In the circumstances the matter had to be approached on the basis

that the alleged agreements relating to each of the bribery counts were made outside Lesotho.

[14] Before us the question is less abstract. The objection is not one confined to the indictment; it is that, the trial having now concluded, there is no evidence which establishes that any of the agreements pertaining to the bribery counts were concluded in Lesotho. The appellant's case in summary is that the crime of bribery is complete once the agreement between briber and bribee is struck; it requires nothing more. That being so, since no evidence shows that the corrupt agreements which the Crown contends (for the reasons analysed below, in dealing with the bribery counts) were concluded between the appellant and contractors to the LHDA, were in fact struck in Lesotho, the trial court had no jurisdiction to convict the appellant of bribery.

[15] Since this issue goes to jurisdiction, we deal with it at the outset, and in advance of the detailed consideration of the individual counts which follows. We approach it on the premise that these counts are established by the Crown, but without the Crown proving that the corrupt agreements were concluded in Lesotho.

[16] The separate judgment of the court in relation to this issue ranged far and wide: as regards different legal systems, different periods of legal history, and disparate offences. These extend from actions of debt for penalties under old English statutes against usury, to deaths at sea from blows struck on shore, to cheques forged in one country and uttered in another, to bigamy. Before us, however, counsel for both the appellant and the Crown adopted a narrower approach, focusing solely on the crime of bribery. While common jurisdictional principles permeate the field of criminal law, this approach is to be preferred.

[17] The inquiry becomes yet narrower given the acceptance by the appellant's counsel of the correctness of the decision of the Supreme Court of Zimbabwe in *S v Mharapara* 1986 (1) SA 556 (ZSC) (and - *sub nom Mharapara v The State* (1986) LRC (Const) 235). The judgment written for the court by Gubbay JA (as he then was) was indeed extensively quoted by the trial judge. While it deals with a theft offence, this reasoning (at 563-4) appears to us compelling, and of equal application to bribery in Lesotho:

> "With regard to the law of Zimbabwe, I can see no justification for a rigid adherence to the principle that, with the exception of treason, only those common law crimes perpetrated within our borders are punishable. That principle is becoming decreasingly appropriate to the facts of international life. The facility of communication and of movement from country to country is no longer restricted or difficult. Both may be undertaken expeditiously and at short notice. Past is the era when almost invariably the preparation and completion of a crime and the presence of the criminal would coincide in one place, with that place being the one most harmed by

its commission. The inevitable consequence of the development of society along sophisticated lines and the growth of technology have led crimes to become more and more complex and their capacity for harming victims even greater. They are no longer as simple in nature or as limited in their effect as they used to be. Thus a strict interpretation of the principle of territoriality could create injustice where the constituent elements of the crime occur in more than one State or where the *locus commissi* is fortuitous so far as the harm flowing from a crime is concerned. Any reluctance to liberalise the principle and adopt Anglo-American thinking could well result in the *negation of the object of criminal law* in protecting the public and punishing the wrongdoer. A more flexible and realistic approach *based on the place of impact, or of intended impact, of the crime must be favoured*.

Accordingly, I am satisfied that, although all the constituent elements of the theft occurred in Belgium, in particular the obtaining of the money there, the State is nonetheless entitled to proceed upon the present indictment and adduce evidence at the trial, if such is available, to establish the fact that *the harmful effect of the appellant's crime was felt by the Zimbabwe Government within this country*." (Italics added)

As the trial judge observed, the Supreme Court of Canada (in *Libman v R* (1985) 21 DLR (4th) 174; (1986) LRC (Crim) 86) has adopted a similar approach. While it may remain true that "[t]he primary basis of criminal jurisdiction is territorial … as well, along with other types of protective measures, States increasingly exercise jurisdiction over criminal behaviour in other States that has harmful consequences within their own territory or jurisdiction...". (Per La Forest J at 90).

[18] Is this approach incapable of application to bribery in a case like the present because the *actus reus* is complete upon conclusion of the corrupt agreement, so that its implementation, or other consequences, in Lesotho constitute no part of the offence? The analogous problem in *Mharapara* was that a theft was committed in Brussels, but with harmful consequences which ensued within Zimbabwe. Similarly in *Attorney-General v Yeung Sun-Shun and Another* (1987) HKLR 987; (1987) LRC (Crim) 94; (1989) LRC (Crim) 1 (HK CA)) - also considered by the trial judge - the Hong Kong courts had to deal with a conspiracy concluded in Macau relating to illicit imports of ivory from Macau to Hong Kong. The court concluded:

"In our view, the Hong Kong courts have, and should assume jurisdiction to try those who are charged with a conspiracy formed out of the jurisdiction if any act has been committed within the jurisdiction in furtherance of the agreement."

[19] We consider that the trial judge was correct in adopting a similar approach as regards the crime of bribery where acts in furtherance of the offence – already

itself committed when the corrupt agreement between briber and bribee is struck - take place, or harmful effects of the offence occur, within Lesotho.

[20] It is now necessary to consider whether either postulate was established on the evidence.

[21] The Crown argued that the second postulate was sufficiently established by the harmful consequence immediately inflicted upon the integrity of public administration in Lesotho by the conclusion of the corrupt agreements. We agree. The development scheme administered by the LHDA is, as we have already indicated, of great importance to Lesotho, and indeed, to the Southern African Development Community. It involves Lesotho's international relations and is central to its economic future. Its success and integrity matter vitally to this country. Corrupt agreements by its chief executive with its international contractors, if established, would be a cancer at its heart. Since it is not a requirement for the *actus reus* of bribery that loss be suffered, it is not in our view necessary to consider whether, in addition to harm of this kind, specific harmful effects arose in relation to each count for the State of Lesotho.

[22] For these reasons we conclude that the trial judge was correct to conclude that jurisdiction existed to try the appellant in Lesotho on the bribery counts.

Was the appellant a state official at all material times?

[23] The common-law crime of bribery can only be committed by or in respect of state officials. According to the definition in Milton *South African Criminal Law and Procedure Vol.II (Common Law Crimes)* (revised 2nd ed (1982)) (reprint 1992) at 227

> "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."

[24] In terms of section 154 (1) of the Constitution of Lesotho, 1993, "public office" means any office of emolument in the public service, and "public officer" means a person holding or acting in any public office. "Public service" is the service of the King in respect of the government of Lesotho. The term "state official" is not confined to public officers (*R v Sacks and Another* 1943 AD 413 at 423). While all public officers qualify as state officials, the converse is not true. The concept of a state official is of wider import and extends beyond the confines of the public service to someone who derives his authority from the public sector and performs his duties or functions in the public interest (*R v Whitaker* [1914] 3 KB 1283 (CA) at 1286; *S v Mzizi and Another* 1990 (1) SACR 503 (N) at 506/7; *S v Mukwezva* 1993 (1) SACR 694 (ZS) at 697). Whether a person occupying a certain office is a state official in that sense is often difficult to decide and may ultimately depend upon the facts of a particular case.

[25] As previously mentioned, the appellant was a member of the public service before his secondment to the LHDA in November 1986 and returned to the public service after his suspension as chief executive of the LHDA in October 1994. That much is common cause. What is in issue is whether he remained a member of the public service, and hence a public officer, during the period of his secondment when the alleged bribery offences were committed. In this regard the trial judge concluded:

> "he was in fact a public officer holding the post of chief executive of the LHDA. He was, however, first and foremost, a public officer, and so remained until he eventually resigned from public service with effect from 22 December 1998. He was then at all relevant times a state official, for the purposes of the common law offence of bribery."

While it was not strictly necessary for him to do so, the trial judge went on to consider whether the appellant, in his capacity as chief executive of the LHDA, was also a state official for such purposes. He held that he was. Both these findings are challenged on appeal.

[26] Appellant's counsel contended that in terms of the indictment the Crown only set out to prove that the appellant was a state official on the narrow basis that he remained a public officer during the period of his secondment to the LHDA. The trial judge was therefore not entitled to hold that he was a state official by virtue of his capacity as chief executive of the LHDA. We disagree. On a proper reading of the preamble to the indictment the Crown clearly set out to establish not only that the appellant was a state official because he remained a public officer while seconded to the LHDA, but also because considerations governing the establishment of the LHDA, and the exercise of its authority and functions, rendered its chief executive a state official. In any event, the question whether the appellant in his capacity as chief executive of the LHDA was a state official is ultimately a matter of law which the trial judge was not precluded from determining on the indisputable and common cause facts pertaining thereto. It was therefore open to the trial judge to find that the appellant was a state official on either basis or, as he chose to do, on both.

[27] The argument of the appellant's counsel that the appellant ceased to be a public officer on his secondment to the LHDA was premised on such secondment severing his connection to the public service. That is a false premise for it disregards the true meaning and import of secondment as well as the express terms of the appellant's secondment. In this respect *the Concise Oxford Dictionary* (9th ed) defines the verb "second" as "transfer (official) temporarily to other employment or to another position" and in *National University of Lesotho v Moeketsi* (1995) 1995-1996 LLR-LB 100 (CA) at 102/3 it was said (per Kotze JA):

> "The word secondment means transference of a person from one post of employment to another or to render available the services of a person

> from one department to another. Implicit in a contract of secondment is that when it terminates the contract of employment between the seconder and the person seconded resumes."

We agree with the trial judge that the use of the word "resumes" indicates that the court was of the view that during the period of secondment the main contract of employment was in a state of suspension. The terminology used is not compatible with the notion of severance.

[28] This conclusion is reinforced by the terms of the letter addressed by the acting Principal Secretary in the Ministry of the Public Service to the appellant informing him of his secondment, to which we were referred by the Crown's counsel without challenge. It provides, *inter alia:*

> "Your secondment appointment may be terminated by the Government at any time after informing Lesotho Highlands without any reason being assigned and, in the event of such termination, you will revert to your substantive or similarly graded post and enjoy the salary and seniority you would have held had you not been seconded. Please note that your period of secondment, [will] not [constitute] a break in your pensionable service, for purposes of computing your terminal (*sic*) benefits."

[29] Mrs Makoko, the Director of Employee Relations in the Ministry of Public Service, confirmed in her evidence that the appellant's salary rights were preserved during his secondment so that on his return he became entitled to the incremental increases he would have obtained but for his secondment. While she further testified that his pension rights did not accumulate during secondment it is very likely that she was mistaken in that regard as her evidence is not only contrary to the second quoted paragraph in the appellant's letter of secondment but, as pointed out by the trial judge, is also at variance with regulation 15 (1) of the Pensions Regulations, 1964 which reads:

> "Except as otherwise provided in these regulations, only continuous public service shall be taken into account as qualifying service or as pensionable service: Provided that any break in service caused by temporary suspension of employment in the public service not arising from misconduct or voluntary resignation shall be disregarded for the purpose of this paragraph."

Neither the terms of the letter of secondment nor the provisions of regulation 15(1) were drawn to Mrs Makoko's attention when she gave evidence.

[30] Despite misgivings about Mrs Makoko's evidence in this latter respect, the trial judge proceeded on the assumption that her evidence was correct. At the very least, even if they did not accumulate, the appellant's pension rights were preserved during his secondment and resumed on his return to the public service, which is in keeping with suspension rather than severance.

[31] In the result the trial judge's finding that the appellant's "substantive post was that of public officer, (at a grade of no less than Senior Engineer), whilst he temporarily held the post of chief executive of the LHDA," leading to the conclusion-quoted in para [25] above - that he was at all material times a public officer- cannot in our view be faulted.

[32] Although not strictly required we proceed to consider whether the appellant, in his capacity as chief executive, even without ties to the public service, still qualified as a state official. The trial judge, with commendable diligence, did a detailed and thorough analysis of all relevant authorities, legislative and administrative provisions and related considerations bearing on the question. No purpose would be served in traversing the same ground in the same detail. We shall confine ourselves to what we consider to be the more salient features.

[33] The appellant's appointment as chief executive of the LHDA, and his terms and conditions of service, were governed by the Lesotho Highlands Authority Order 23 of 1986 ("the Order"). The enactment of the Order was a direct consequence of the treaty between the governments of Lesotho and South Africa, the purpose of which was to provide for the establishment, implementation, operation and maintenance of the LHWP to the mutual benefit of both countries, but more particularly, Lesotho. The treaty itself made provision for the appointment of a chief executive and the delineation of his functions. The project was ultimately to be controlled by the government of Lesotho through the relevant Minister - the Minister responsible for Water, Energy and Mining. In terms of section 38(1)(a) of the Order the exercise by the LHDA of any of its functions was "deemed to be for public purposes within the meaning of the Land Act, 1979." The Order as a whole clearly indicated that the LHWP was to be for the public benefit. The Minister's authority ranged from the appointment and dismissal of members of the board of the LHDA, having his own Principal Secretary as chairman of the board, to the power to appoint and dismiss the chief executive. Furthermore, the Minister exercised overriding supervisory administrative and financial control over the LHDA. It is also true to say, as found by the trial judge, that the source of the chief executive's emoluments was at least in part public funds.

[34] Consequently the trial judge went on to hold that the LHDA "in the constitution of its board, in the overall control of the Minister, was effectively a government body controlled by government. It was also partly funded by government. The accused was appointed by no less than the Minister ..." He concluded:

> "In brief, it is difficult to imagine a post of a greater public character than that of the chief executive. Clearly the accused was, in effect, employed by government and derived his authority from the public sector. On a consideration of all the above authorities I consider that his employment

would meet the test set in any of those cases. I wish to emphasise, that even were it not the case that the accused was also a seconded public officer, I am satisfied that, in any event, for the purposes of the common law offence of bribery, he was a state official at the relevant time."

[35] It has not been shown that in his overall assessment of the relevant authorities and material considerations in relation to this aspect the trial judge misdirected himself in any respect, or that he came to a wrong conclusion in law. In our view he correctly held that the appellant, while chief executive of the LHDA, was a state official and thus capable of being bribed.

Sections 245 to 248 of the Code

[36] The next issue relates to the applicability and constitutionality of sections 245 to 248 of the Code as amended by the Criminal Procedure and Evidence (Amendment) Act 2001 which came into operation on 8 March 2001. On 7 December 1999 the appellant and 18 other accused were arraigned in the High Court on an indictment alleging some 19 counts, including 16 of bribery. In terms of section 119 of the Code, as soon as the indictment in any criminal case has been lodged with the Registrar of the High Court, such case shall be deemed to be pending in that court. At the latest, the case against the appellant was pending as from 7 December 1999. After a number of interlocutory applications the appellant was ultimately left as the sole accused under a fresh indictment charging him, in the main, with the same offences charged under the original indictment. He pleaded to the fresh indictment on 11 June 2001 and his trial proper commenced on that date. It is a moot point whether the proceedings against the appellant only commenced when the fresh indictment was lodged, which probably occurred after the amended sections 245 to 248 came into operation. However, the Crown has consistently adopted the attitude that the proceedings against the appellant commenced when the first indictment was lodged, and were pending when the amended sections became operative. The trial judge approached the matter on that basis, and we shall do likewise.

[37] Two main submissions were advanced on behalf of the appellant. The first was that the amended provisions could not be applied retrospectively to criminal proceedings which had already commenced. The second was that they were unconstitutional to the extent that they denied the appellant a fair hearing in breach of section 12 (1) of the Constitution.

[38] The first submission is without any merit. In law a distinction is drawn between substantive law which defines rights, duties and obligations, and rules of procedure which govern or regulate the general conduct of litigation. As a guiding principle "every alteration in procedure applies to every case subsequently tried, no matter when such case began ..." (*Curtis v Johannesburg Municipality* 1906 TS 308 at 311) provided it does not impact upon existing substantive rights and obligations (*Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A) at 753 B-C).

It was correctly conceded by the appellant's counsel that sections 245 to 248 in their original form were purely procedural in nature. The changes brought about by the amendments to sections 245 to 248 did not affect or alter their intrinsic procedural nature or impact upon any existing substantive rights or obligations. An accused has no vested rights in purely procedural provisions. In keeping with the general principle enunciated above the amended provisions applied to the appellant's trial from the date of their enactment.

[39] With regard to the second submission, the appellant's counsel contended that the amended provisions, as he put it, "had changed the rules of the game" thereby denying the appellant a fair hearing. As pointed out by the trial judge in another of his commendably thorough judgments, the amendments bring the Code, as far as the matters dealt with are concerned, in line with similar legislative provisions in other countries, including South Africa, where they have been in operation for many years. They were clearly designed to better regulate the conduct of criminal proceedings by facilitating proof in relation to matters of a relatively formal, non-contentious nature. We do not propose to embark upon a comparison of sections 245 to 248 in their original and amended forms. This was done by the trial judge. A review of their relative provisions show that the amendments have not imposed new obligations on an accused or interfered with substantive rights. They facilitate the discharge of the burden of proof resting on the Crown but their application does not result in prejudice (in the legal sense) or lead to an unfair trial as the legitimate rights of an accused person to challenge disputed matters are appropriately catered for and protected.

[40] To the extent that the amended provisions incorporate presumptions which favour the Crown by giving entries in the accounting records, and related documentation, of banks both in Lesotho and countries outside the status of prima facie proof, courts recognise "the pressing social need for the effective prosecution of crime, and that in some cases the prosecution may require reasonable presumptions to assist it in its task" *(S v Zuma and Others* 1995 (1) SACR 568 (CC) at 591 para [41]). Here the prima facie proof provisions relate to matters which would generally be considered of a formal, non-contentions nature, proof of which would normally not be considered to operate unfairly against an accused person. Nor can the mere fact that the evidence is tendered in the form of an affidavit render the trial proceedings unfair (cf *S v Van Der Sandt* 1997 (2) SACR 116 (W) at 132). An accused is not denied the right to challenge the evidence constituting prima facie proof. He may request that oral evidence be heard. The fact that it lies within the discretion of the presiding judicial officer whether or not to grant such request does not lead to unfairness; one assumes the proper exercise of such discretion.

[41] In our view the trial judge correctly concluded that the amending provisions did not impinge upon the fairness of the trial, were not unconstitutional, and were applicable to the conduct of the trial.

Application to reopen

[42] Before proceeding to deal with the appeal against the merits, there remains to be considered the appeal against the trial judge's refusal to allow the reopening of the defence case.

[43] The Crown closed its case on 8 November 2001. The appellant's counsel immediately indicated that he was closing the defence case. The trial judge observed that he had not yet ruled on whether there was a case to meet (which strictly speaking he was not required to do in the absence of an application for discharge). He then proceeded to rule that there was a case to answer whereupon the defence case was formally closed. Dates were set for the delivery of the Crown's and the defence's heads of argument, being 16 and 26 November respectively, with argument to be heard on 29 and 30 November. On 16 November the Crown's heads were duly delivered; and on 21 November the application to reopen the defence case was filed on the appellant's behalf.

[44] The appellant annexed to his founding affidavit some 37 letters and communications that had passed between the chief executive of the LHDA and various erstwhile contractor/consultant accused during the latter half of 1999. The correspondence comprised, in general, requests for explanations regarding alleged payments to the appellant and replies of an exculpatory nature from such erstwhile accused. What the appellant sought was an order to subpoena a witness to produce such documents in evidence as well as to subpoena certain consultants/contractors to give evidence before the court or on commission. The application was based on the alleged non-disclosure of the relevant documentation by the Crown and, consequently, the appellants alleged lack of knowledge of exculpatory material indicative of his innocence and relevant to his defence. In a comprehensive judgment which traversed all relevant material the trial judge concluded that the application had not been brought in good faith and accordingly dismissed it.

[45] A court has a general discretion to allow a party who has closed his case to lead evidence at any time up to judgment (Hoffman and Zeffert *The South African Law of Evidence*, (4th ed 1988 at page 476). In exercising such discretion the court will have regard, inter alia, to the reasons advanced for the failure to call such evidence; the materiality thereof; whether due diligence was exercised; and the question of prejudice (cf *Oosthuizen vs Stanley* 1938 AD 322 at 333; *Hladhla v President Insurance Co. Ltd* 1965 (1) SA 614 (A) at 622). A further consideration is the timing of the explanation. In the present instance this occurred some days after the appellant had received the Crown's heads of argument. That raises the spectre of the special danger that "there is always the possibility, such as human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty" (*S v De Jager* 1965 (2) SA 612 (A) at 613) or, far that matter, might seek to avoid or delay its

consequences (see also in this regard the references to Wigmore in *Hladhla's* case at 621).

[46] In response to the appellant's application the Crown called Deputy Commissioner Matsoso as a witness. He testified that, some months prior to the commencement of the trial proper in June 2001, he had furnished the appellant with a bundle of documents, a copy of which he identified in evidence. It transpired that the bundle contained copies of all but four of the copied documents attached to the appellant's founding affidavit. The trial judge accepted Deputy Commissioner Matsoso's evidence after subjecting it to careful scrutiny and evaluation in the light of other relevant documentation. He further concluded that the appellant must have acquired access to the remaining four documents during the course of his trial through his connections with the LHDA. The trial judge therefore rejected any suggestion that the appellant only became aware of the documentation in question after his case had been closed. The appellant's counsel was unable to point to any misdirection by the trial judge in his evaluation of the evidence and the conclusion he reached in that regard.

[47] Arising from such finding it was inevitable that the trial judge would hold, as he did, that on the papers before him the appellant had for same time been aware of the probable general defence of his erstwhile co-accused, implicit in which was a denial of their complicity in, or knowledge of, any alleged bribery of the appellant. Their previous association as co-accused, the interaction of their legal representatives (which included a joint meeting of counsel representing them held on 2 May 2000) and disclosures made by or on behalf of certain of the former co-accused at preliminary court hearings would all have contributed to such awareness. Prospective defence witnesses were notionally available, identifiable and contactable before the appellant's case was closed. In this respect the trial judge observed:

> "From the moment of their notional availability, I cannot but imagine that the accused, duly advised, considered whether or not he should call particular individuals as witnesses, and whether, in view of impending trials, and the privilege against self-incrimination, the individuals might wish to give evidence."

[48] Although the circumstances in which the appellant ultimately came to close his case allowed occasion for reflection, he at no time sought to call any witnesses, not did he seek any opportunity, by way of postponement or otherwise, to do so. No acceptable reason or explanation exists for his failure to do so. The appellant has never suggested that his case was closed contrary to his instructions.

[49] In the circumstances there was every justification for the trial judge exercising his discretion against the appellant and refusing the application to lead further evidence. The exercise of a discretion by a judicial officer in the

performance of his judicial functions can only be interfered with on certain well-known limited grounds (*Ex parte Neethling and Others* 1951 (4) SA 331 (A) at 335 D-F). No ground that would justify interference has been shown to exist. In respect of this ground of appeal, too, the appellant must fail.

The Merits

[50] The process of awarding contracts for the LHDP frequently commenced with what was called the "pre-qualification" procedure - a request to potential contractors or consultants to submit tenders for a particular aspect of the project. Most funding agencies usually insisted on a pre-qualification list and the chief executive also had the right to require it. An evaluation committee, some of whose members were appointed by the chief executive, usually assisted by outside consultants, then considered the tenders and nominated a preferred tenderer to the chief executive. He, if satisfied with the preferred tenderer, recommended the contractor or consultant to the JPTC and thereafter to the LHDA board which made the final decision. In an appropriate case the chief executive apparently had the right to request the evaluation committee to reconsider its nomination. After the LHDA's approval of a tenderer, a negotiating committee (usually consisting of the same persons as the evaluation committee), entered into negotiations with the contractor or consultant in order to resolve any uncertainties or qualifications contained in the tender. If these were disposed of satisfactorily, an agreement, known as a memorandum of understanding ("MOU") was concluded between the LHDA and the tenderer. A letter of acceptance or a contract would signify formal approval.

[51] By October 1986, at the time of the appellant's appointment to the LHDA, the design work on the project was under way. One of the first consultants to become involved in the project was Acres International Limited ("Acres"), a Canadian company. From the beginning of 1987 Acres supplied key personnel to the technical division of the LHDA, initially pursuant to contract 19, and, on the expiry thereof, under contract 65, which was signed in February 1991. The posts occupied by Acres's employees on the LHDA included the technical manager, chief engineers and chief design engineers. They were concerned with running the technical and engineering side of the LHDA, the supervision of the work of other consultants, the provision of assistance in the preparation of tender documents and the evaluation of tenders. The contracts between Acres and the LHDA were clearly lucrative and although no precise figures are available, the LHDA paid Acres at least M15 million and 22 million Canadian dollars ("CAD") between September 1991 and June 1999, according to the trial judge's rough estimate.

[52] When contract 19 came to an end only Acres was invited to submit a proposal for a subsequent contract. It was in this way that contract 65, termed a sole-sourced contract, came into operation. It continued in force until 31 October 1999. During the currency of this contract there was considerable dissatisfaction among Lesotho engineers within the LHDA. This arose out of the following

circumstances. It was due to a shortage of suitably qualified and skilled engineers in Lesotho that Acres obtained the contracts in the first place. It was obliged to train local technicians to enable them to occupy important positions within the LHDA. This, according to the complaints, they failed to do. The appellant conceded as much at a meeting called by the local engineers during February 1994. More importantly the engineers objected to the fact that the appellant had promoted Acres' personnel without justification, while overlooking the claims of local engineers for advancement. These complaints were confirmed by Mr. Putsoane, an engineer, in his evidence, but despite the absence of a denial by the defence, the evidence falls short of establishing beyond reasonable doubt that the appellant had indeed favoured Acres, although it may be noted that the remuneration due to Acres depended, *inter alia,* on the number of their employees engaged by the LHDA.

[53] In 1988 certain contractors were invited to tender for the construction of the northern access road to Katse Dam (contract 104). Sixteen tenderers prequalified. Dumez was not one of them but the appellant, on the advice of Acres, recommended the inclusion of Dumez. The recommendation was accepted and Dumez was included. After the receipt of tenders, Dumez was recommended and appointed as the preferred tenderer for the contract at a contract price of M54 million. The MOU was signed and work commenced early in 1989. Dumez made substantial claims for extra payments as the work progressed and a dispute arose concerning the amount to which it was entitled. In June 1991 the appellant, a Mr. Schutte (the consulting engineer) and Dumez's representatives met in Paris. (The fact that the appellant was in Paris at all, while in Europe for the ostensible purpose of attending a conference in Vienna, was the subject of one of the fraud counts). Dumez alleged that the appellant had settled its claims at the Paris meeting. This was denied by the LHDA. The dispute proceeded to arbitration. Dumez again raised the issue of the Paris agreement. Eventually, and during 1994, the arbitration was settled by a payment of M90 million to Dumez. On behalf of the respondent it was submitted that these facts established that the appellant had benefited Dumez by agreeing to a substantial settlement of Dumez's disputed claims when he had no authority from the LHDA to do so. This, it was argued, was further proof of the appellant's involvement in a corrupt scheme with Dumez. The short answer to this submission is that there was no evidence of an agreement between Dumez and the appellant at the Paris meeting. It is true that the appellant gave no explanation for his unauthorised visit to Paris. But Dumez did not give evidence about the alleged settlement and the appellant made no admission in that regard. It follows that there is no merit in the Crown's submissions on this aspect. It also follows that the trial judge erred in holding that the appellant had acted in an unauthorised manner in relation to contract 104.

[54] A French firm known as Spie Batignolles ("Spie") was also involved in the LHWP. It was awarded the contract for the construction of the Katse village in August 1989. It was also the successful tenderer for carrying out civil works and

the erection of buildings for power supplies, sub-stations and border crossing facilities. All of these contracts were commenced during March 1990. Spie, moreover, was the leading partner (or a substantial participant) in two partnerships or joint ventures, known as LHPC and MHPC respectively. Both partnerships consisted of the same firms, save that a firm known as LTA, while not a member of LHPC, was a participant in MHPC. In 1990 LHPC was designated as the preferred tenderer for building the transfer tunnel from Katse to Muela (at a contract price of M822 million) and delivery tunnel from Muela to South Africa (at a contract price of M422 million). MHPC was awarded very substantial contracts for the Muela Power Station civil works, steel lining and gates (contract 129 A) in December 1994 and for the Muela Dam infrastructure and operations building (contract 129 B) earlier during that year.

[55] Questions concerning alleged irregularities in respect of contracts 129 A and 129 B were raised in the court *a quo* and in this court. These contracts, relating to hydropower aspects, did not involve the JPTC at that time. When the tenders were read out for contract 129 A, the lowest tenderer was a firm known as Skanska. MHPC's tender contained a modification which was not read out when tenders were opened. The effect of the modification was to reduce the tender price of MHPC. The upshot was that while the contract was eventually awarded to MHPC, the funding agency, the African Development Bank, withdrew its sponsorship for the contract and the LHDA was obliged to resort to commercial loans to finance it. With regard to contract 129 B, although MHPC was designated as the preferred tenderer, a serious dispute was encountered when the negotiating committee met with the firm in accordance with the normal practice. MHPC required the escalation clause to be applied before, instead of after, the deduction of advance payments, the effect of which would be to increase the contract price. The negotiating committee refused to accede to this. One of the significant reasons for the committee's decision was that, if agreed to, it would unfairly prejudice the unsuccessful tenderers who had tendered on the basis that escalation would be applied only after the advance payments were deducted. MHPC indicated that it would "bypass" the negotiating committee. This is precisely what happened. The MOU was signed by a Mr. Ramollo and the letter of acceptance by the appellant. Both contained the requirement of the tenderer. The appellant clearly knew of the disputed issue and obviously had decided to benefit the tenderer. As a result of his decision, the funding agency, the European Commission, refused to provide sponsorship to the extent to which the contract price had been increased and the LHDA (or the Government) was obliged to find funding elsewhere.

[56] The largest contract, for the construction of the Katse Dam, was awarded to a consortium known as the Highlands Water Venture ("HWV"). The tender documents were issued in October 1989, HWV was identified as the preferred tenderer during 1990 and the contract was signed in 1991 at a contract price of over M1245 million. The dam was completed during 1998 at a cost substantially in excess of the contract price.

[57] Sogreah, Cegelec and Coyne et Bellier ("Coyne") were three other overseas firms involved in the project. Sogreah's involvement commenced as early as 1986. It was concerned, together with Sir Alexander Gibb and Partners ("Gibb") in the hydropower design, with Gibb and Coyne in the water transfer design and, together with Coyne, it was in charge of the supervision of the construction of the Katse Dam and the transfer tunnel. The construction of a power supply system and what was called the "Maseru Ring" was an integral part of the LHWP. This contract was awarded to Cegelec which executed the work from December 1989 to September 1991.

[58] Lahmeyer International GmbH ("Lahmeyer") was also concerned in the LHWP at an early stage in connection with a feasibility study for certain aspects of the project. Subsequently and in partnership with Mott MacDonald - the Lahmeyer MacDonald consortium ("LMC") - it entered into a joint venture with other participants. The joint venture was known as the Lesotho Highlands Tunnel Partnership ("LHTP"). As a partner in LHTP Lahmeyer had a substantial interest in the supervision of two contracts, *viz.* the construction of the delivery tunnel in Lesotho (contract 46) and the construction of the Muela hydropower project (contract 51). Tenders for these contracts were submitted in May 1990 and May 1991 respectively and the contracts were signed in February 1991 (contract 46) and February 1992 (contract 51). Both contracts ran for a number of years. Lahmeyer, as a partner in LHTP, was also involved in a later phase of the project which related to the construction of the Mohale tunnel. Tenders for two consultancy contracts relating to the tunnel were called for in 1994. The contracts were awarded to LHTP in 1995 and 1997.

[59] We have already observed that Gibb was concerned in a number of joint ventures in the project. Indeed, Gibb's interest commenced as early as October 1986 when it pre-qualified as a consultant for the hydropower design. All in all it was involved in fourteen consultancy contracts over a period of eleven years.

[60] So much for the contractors and consultants. We turn now to consider two other aspects - the appellant's banking accounts and the significance of the intermediaries. On 1 March 1988 the appellant opened a bank account at the Union Bank of Switzerland ("UBS") Zurich. The account consisted of US Dollar ("USD") and British Sterling ("GBP") sub-accounts into which a Mr. Max Cohen paid the opening deposits of USD 2500 and GBP 2500 respectively. Cohen was a director of two Panamanian registered companies, Universal Development Corporation (Panama) ("UDC") and Electro Power Corporation (Panama) ("EPC") both of which played pivotal roles as intermediaries. Cohen was residing in the Lesotho Sun Hotel Maseru as early as October 1984 and he remained there on a semi-permanent basis for a few years. Neither UDC nor EPC had any direct interest in the LHDP but, as will be shown when we deal with the individual counts, they conducted banking accounts in Switzerland into which they received money from contractors or consultants and from which they paid the appellant.

[61] Apart from his accounts at UBS, the appellant held an account at Banque Multi Commerciale ("BMC") in Geneva in a French Franc ("FFR") currency, which he opened on 11 October 1989. He also operated an account at Union Bancaire Privee ("UBP"), Geneva, with two sub-accounts in FFR and South African Rands ("R") and further accounts (or possibly sub-accounts) at UBS. In addition, and during the period relevant to the charges, he held cheque and 32 day notice accounts at the Standard Bank, Ladybrand and a 32 day notice account at the Standard Bank, Bloemfontein, apart from various accounts in Maseru. These accounts were funded from his Swiss accounts.

[62] Besides Cohen and the two companies, UDC and EPC, other intermediaries who feature in the charges are a Mr. JM du Plooy of Ficksburg, Free State, who held an account at Nordfinanz Bank, Zurich, Mr Z M Bam, a consulting engineer, and his wife, Mrs MM Bam, who operated various accounts in Swiss Banks. Bam, who was the Managing Director of a consultancy firm known as LESCON, died in 1999.

[63] There was no evidence that Du Plooy had any involvement in the LHWP. A "consultancy agreement" between a contracting consortium, HWV, and Du Plooy was produced in the court *a quo*. The trial court held, in effect, that the agreement was not *bona fide.* It will be observed that Du Plooy acted as an intermediary in respect of the payments to the appellant in Count 1. All that needs to be noted at this stage is that the appellant's counsel did not suggest that the trial judge's assessment of the agreement was incorrect. Indeed, and in the absence of any evidence from the appellant, Du Plooy or HWV, it is difficult to imagine what skill or expertise Du Plooy could have provided and, more importantly, why he made payments to the appellant.

[64] LESCON was involved in the project by providing assistance in the supervision of certain contracts. In this capacity it earned considerable sums of money which were paid into its accounts in Maseru. What was not explained was why certain contractors and consultants paid Bam in foreign currencies in Switzerland or why Bam, in turn, paid the appellant. Nor is there any explanation for similar payments by consultants or contractors to Mrs Bam.

[65] This is an appropriate stage to consider the counts on which the appellant was convicted. These will be dealt with in the same order as the trial court did. It will, however, suffice to do so in outline as the trial judge covered each count comprehensively and his factual findings were, save to the extent set out hereunder, largely unchallenged.

[66] Count 1:
On this count the appellant was charged with and convicted of receiving bribes totalling USD 370 000 from HWV, a partnership consisting of seven partners. HWV's involvement in the LHWP appears in para [56] above. During the

currency of its contract HWV paid Du Plooy the following amounts by transferring the money to Du Plooy's account with Nordfinanz Bank, Zurich:
- USD 250 000 on 9 October 1991
- USD 233 404 on 28 February 1992
- USD 250 000 on 10 September 1992

Significantly enough Du Plooy made three payments of USD 125 000 each to the appellant within ten days of receiving each transfer from HWV. The payments made to the appellant were credited to his account at UBS on 9 October 1991, 10 March 1992 and 18 September 1992. There were two other payments made by, or on behalf of, HWV to Du Plooy but there was no evidence of any other payment by Du Plooy to the appellant. The trial judge held, with reference to the payments received by the appellant that

> "during the period 1 October 1991 to 22 September 1992 HWV paid Mr. Du Plooy the total sum of USD 1 139 404 from which sum Mr Du Plooy paid the accused the total sum of USD 375 000".

Nothing turns on the fact that during the relevant period the payments to Du Plooy amounted to USD 733 404 and not USD 1 139 404. What also may be observed is that although HWV operated bank accounts in Lesotho and South Africa and furnished the LHDA with details of six European banks for receipt of payment (none of which were Swiss banks) the payments to Du Plooy came from Swiss bank accounts.

[67] Count 2:
On this count the appellant was alleged to have received FFR 808 270.37 as a bribe from Sogreah, alternatively Coyne, alternatively Cegelec, alternatively one or more of them. The trial court's conviction was on the basis that Sogreah, Cegelec and Coyne had in fact paid him GBP 20 986.36. The participation of the three firms in the project is evident from para [57]. The facts show that FFR1.726 million was transferred by Cegelec, Coyne and Sogreah into UDC's account at the Zurich branch of the UBS during April 1991. During the same month GBP 20 986.36 was transferred from UDC's account into the appellant's account at the same bank. The trial judge was satisfied that the payment to the appellant was made from a joint fund into which Sogreah, Coyne and Cegelec had contributed and added:

> "Bearing in mind their joint association with the LHWP, with Mr. Cohen, and with the accused, I am then satisfied the payments of all three contributed to the payments to the accused."

[68] Count 15:
In the indictment the Crown alleged that Cegelec or Sogreah or Coyne or some or all of them paid the appellant over FFR 6.5 million during February 1990 to May 1995. The Court *a quo* held that out of a payment of FFR 935, 000 made by Cegelec to EPC, the said intermediary (represented by Cohen) transferred FFR 211 828, converted into USD 35 842.30 (the equivalent at the time of R100 000)

into the appellant's UBS account at Zurich. It was on that basis that the appellant was convicted.

[69] Count 3:
The appellant was charged with receiving FFR 941 882.12 from Spie during or about 27 May 1988 to 8 January 1991. The trial court's conviction was based on the following facts which it found were established: on 27 May 1988 Spie paid UDC FFR 140 251.90 out of which UDC paid the appellant USD 5617.11 and GBP 3020.81 on the same day. The amounts were paid into the appellant's account with UBS Zurich, each amount being the equivalent of 8187.50 Swiss Francs or R12 500. We have referred to Spie's involvement in the project, both singly and as part of LHPC and MHPC in paras [54] and [55] above.

[70] Count 4:
It was alleged that during March 1991 to August 1994 LHPC or one or more of its constituent members paid the appellant FFR 4 638 594.62, GBP 139 102.95 and 1 221 016.58 German marks ("DM"). Cullinan AJ held that during 17 November 1992 to 31 March 1994 LHPC (whose involvement in the project is detailed in para [54] above) paid UDC a total of GBP 123 310.95 from which UDC paid the appellant FFR 58 654.90, GBP 15 200 and USD 17 180.49 by transferring the said sums into his account at UBS, Zurich. It may be noted that although the construction work performed by Spie in the LHWP had ceased before the payments to the appellant were made, the involvement of LHPC and MHPC had not. Spie, as the lead partner in both these partnerships, retained a significant interest in the project until 1998.

[71] Count 6
On this count, according to the indictment, ABB Sweden, alternatively Spartak Trading Limited ("Spartak") on behalf of ABB Sweden, alternatively on behalf of an unknown contractor or consultant involved in the LHWP, paid the appellant USD 181 760 during June to July 1994. The evidence disclosed that two amounts - USD 122 542 and USD 59 218 - were paid into Bam's account at UBP Geneva on 21 June and 25 July 1994 respectively. The money was paid from an account holder at UBS Zurich but the identity of the transferor was not established. Within a month of receipt of each payment, Bam transferred approximately half of his receipts into the appellant's account at UBS Zurich - USD 62 000 on 21 July and USD 29 609 on 19 August 1994.

On behalf of the Crown it was submitted that the payments to Bam were made by Spartak on behalf of ABB Sweden or on behalf of an unknown contractor or consultant concerned in the LHWP. Cullinan AJ held that these averments had not been proved. However he went on to say:

> "Considering the percentage (50%) of that received being paid forthwith to the accused and considering the system and pattern of all the other

payments by Mr. Bam and others to the accused, I am satisfied that the present payments are but evidence of a corrupt agreement."

He consequently convicted the appellant on Count 6 for accepting bribes totalling USD 91 609 from a consultant or contractor "involved in the LHWP to the Crown unknown."

[72] Count 7
According to the indictment, Lahmeyer and/or LMC bribed the appellant to the extent of DM 261 747.64 and R184 774.20 during the period April 1992 to April 1997. The trial judge held that the appellant received substantially less as bribe money from Lahmeyer, *viz*. FFR108 599.10 and USD 85,053.41. He held, moreover, that LMC (in which, as we have mentioned, Lahmeyer was a partner) paid a bribe of R50 000 to the appellant. Those payments formed the basis of the conviction on Count 7. The evidence established that in all instances Bam acted as the intermediary, that payments were transferred to him by Lahmeyer and, in one instance, by LMC, out of accounts held at German banks into Bam's account at UBP Geneva. The evidence also disclosed that Bam, in turn, transferred money (amounting in all to FFR 108 599.10, USD 85 053.41 and R50 000) into the appellant's account at UBS, Zurich.

There are some interesting matters arising out of these transactions. Firstly, a transfer of R100 000 to Bam on 30 April 1992 was followed on 20 May 1992 by a payment of R50 000 from Bam to the appellant. Secondly, of the payments made by Lahmeyer to Bam during the period 20 January 1995 to 10 April 1997 (totalling DM 261 747.64), one payment of DM 61 870 was transferred to Bam on 11 May 1995. The identical amount was transferred to the appellant on the same day, was received by him on 15 May, and was immediately transferred (converted into USD 42 730.17) from his UBS account to his Ladybrand account. Moreover, precisely half of the amounts received by Bam in four out of the ten receipts, were paid over to the appellant. Finally it is to be observed that the trial judge concluded as he did in respect of the other counts, that the payments by Bam were funded by Lahmeyer or LMC, in other words, had it not been for the contractors' payments, Bam would not have been able to pay the appellant as he did.

[73] Count 8
This count relates to a payment of FFR 135 760 allegedly made to the appellant as a bribe by Lahmeyer, alternatively Dumez, alternatively Dumez Nigeria for and on behalf of Dumez, alternatively one or more of them. The appellant's conviction on this count was based on the finding of the trial court that the payment was made by Lahmeyer in the following circumstances:

1. Various payments by Dumez to Bam resulted in his account at BMC having a credit of FFR 1 020 000.
2. On 20 October 1990 Bam closed the account and transferred the proceeds into an account opened by his wife at the same bank.

3. Mrs Bam placed the money in an investment account. This and other payments resulted in her current account having a debit balance.
4. On 8 February 1991 Lahmeyer transferred FFR 135 760 to Mrs Bam's current account. Although this account went into debit again, partly because of a transfer of over FFR 118 000 to her investment account, she still had substantial investments, exceeding FFR 1.2 million, with the bank.
5. As a result she was able to transfer FFR 458 600 to the appellant's account with BMC Geneva on 4 March 1991.

Consequently Cullinan AJ said that the

> "Payment of FFR 135 760 by Lahmeyer on 8th February 1991 contributed to the payment of FFR 458 600 to the accused. I am thus satisfied, under Count 8, that the payment of at least FFR 135 760 to the accused was funded by the payment of Lahmeyer."

[74] Count 12
This count related to a payment of FFR 509 905.62 to the appellant during the period 11 October 1989 to 21 June 1990. The trial judge held that the money was indeed paid to the appellant by Dumez Nigeria on behalf of Dumez and that the payment amounted to a bribe. He duly convicted the appellant.

According to the evidence, Dumez Nigeria paid the appellant FFR 232 761 on 11 October 1989, the same amount "less charges" - FFR 232 644.62 - on 15 June 1990 and FFR 44 500 on 22 June 1990 by transferring these amounts into the appellant's account at BMC Geneva. It is significant that on the same day of each of the first two payments the identical amounts were transferred to Bam's account with BMC Geneva, the transferor again being Dumez Nigeria. Now although Dumez Nigeria was not a contractor or consultant concerned in the LHWP, it was part of the Dumez group. This appears clearly from the Group's consolidated financial statements as at 31 December 1989. Dumez's own involvement in the LHWP appears in para [53] above. It may also be noted that the evidence disclosed that most of the plant used by Dumez in carrying out contract 104 was brought into Lesotho from Nigeria, presumably from Dumez Nigeria.

[75] Count 14
The indictment charged the appellant with receiving GBP 51 478.01 as a bribe from Gibb during the period December 1990 to September 1994. The trial court found that Gibb had paid the appellant GBP20 000 on 22 January 1991. According to the evidence Gibb transferred GBP 22 420 to UDC's account with UBS on 28 December 1990. On 22 January 1991 GBP 20 000 was transferred from UDC's account to the appellant's account with the same bank on Cohen's instructions. The trial judge held that he was satisfied that the aforesaid transfer to the appellant's account was "funded by the transfer of GBP 22 420.65 by Gibb to UDC on 28 December 1990."

[76] Count 9
This count concerned payments made by Acres to the appellant through Bam as the intermediary. The trial judge held that during the period 4 June 1991 to 26 January 1998 Acres paid Bam CAD 493 061.60 from which Bam paid the appellant CAD 320 697.50, converted into FFR 1 306 920.22. He convicted the appellant on this basis. Even before the commencement of the payments to Bam, Acres had paid Mrs Bam CAD 180 000 on 5 February 1991 and CAD 8255.48 on 3 April 1991 by transferring these amounts to her account at BMC Geneva. By April 1991 interest on the payments had increased the balance in the account to CAD 192 356.90 and this sum was transferred to Bam's account with UBP Geneva. Within about six weeks thereafter Acres began to make payments, totalling CAD 493 061.60 to Bam. The pattern of these payments (more than twenty in all) is revealing. It shows that, apart from the first payment of CAD 188 255 received by Mrs Bam and transferred to her husband, Bam paid the appellant 60% of the money that he received from Acres and that such payments were generally made on the day of receipt. What is more, once Bam's payment to the appellant ceased (his final payment was made on 7 May 1997), Acres's subsequent payments to Bam (of which there were three) were reduced by roughly 55%, from approximately CAD 23 478 each to CAD 10 500 each. It is only necessary to add that the transfers by Acres were deposited into Bam's CAD account with UBP Geneva and that Bam's payments to the appellant were transferred into the latter's FFR account with the same bank, and that the payments by Acres were made from three branches of the Royal Bank of Canada apart from the same bank in Geneva.

[77] We have mentioned that the convictions on the bribery counts were based on inferences drawn by the trial judge. On the appellant's behalf it was submitted that the facts did not justify the conclusions reached by the court *a quo*. The main submissions may conveniently be summarised as follows:

6. On each bribery count the Crown failed to prove the existence of an agreement between the contractor or consultant and the appellant whereunder the former undertook to pay the appellant in return for a benefit in relation to the LHWP.
7. There was no or inadequate evidence to establish that the contractors or consultants had received any benefit from the appellant either before or during the currency of the LHWP.
8. It was not proved beyond reasonable doubt that the contractors and consultants concerned knew that the intermediaries intended to pay, or did pay, the appellant out of the money received by them. Thus there was no evidence that they intended to bribe the appellant.
9. The payments by the intermediaries to the appellant were independent of and unconnected with the amounts received by the former. Consequently it was not proved that the intermediaries were mere conduits for the alleged bribers or that the appellant intended to receive payments from the contractors and consultants in question.

10. The fact that the appellant received money from the intermediaries was reasonably consistent with an innocent explanation.

[78] There is some overlapping between the first two grounds and the last three, but before dealing with the appellant's argument it is desirable to state the legal principles which govern the enquiry. There was no dispute before us concerning the principles in question and there is no need to deal with these at any length. One matter that requires consideration, however, concerns the legal effect of the appellant's failure to give evidence. The trial judge said, in this regard, that

> "No adverse inference should be drawn from the accused's silence in the sense that it is an evidential item bolstering the Crown case, and it certainly cannot cure defects in the Crown case. Such silence is simply not evidence in the case."

This does not appear to us, with respect, to be a correct exposition of the law. HC Nicholas (formerly a Judge of Appeal of the then South African Appellate Division) dealt with the subject in his contribution to *Fiat Justitia (Essays in Memory of Oliver Schreiner)*. In his essay entitled "The Two Cardinal Rules of Logic in *Rex v Blom*", he wrote at page 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."

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 page 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).

[79] 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.

[80] It is convenient at this stage to refer to another submission put forward on the appellant's behalf - that the appellant had the constitutional right to remain silent. We understood the implication to be that, as a matter of law, no adverse inference should be drawn from the appellant's failure to testify as he was merely exercising his constitutional right to remain silent. There is no merit in this submission. The appellant undoubtedly had a right to remain silent. But he was also entitled to testify. His failure to do so cannot be ignored as a matter of course. It is a factor to be taken into account and its significance depends on all the circumstances of the case. This is a matter that will be dealt with later in the judgment.

[81] Concluding the resume of the principles of inferential reasoning, it is hardly necessary to re-state the second rule formulated in *Rex v Blom* and applied in this court on more than one occasion. It is only necessary to emphasise that, on a consideration of all of the circumstances of the case, the question is not whether the inference sought to be drawn is a reasonable one: it is whether the facts are such that all other reasonable inferences are excluded. As H.C. Nicholas pointed out in his erudite essay:

> "The second rule of logic in *Blom* is a salutary rule, whose field of application is limited by its nature. It is a tool for detecting and avoiding fallacy, for testing the logical validity of a conclusion. It is no more than that. It is not a legal precept. It is not another way of stating the criminal standard of proof. It does not in itself provide an automatic answer to the question whether guilt has been proved beyond a reasonable doubt. Even if the rule is satisfied, it does not follow that the trier of fact *must* convict the accused. It does not license speculation as to facts not proved by the evidence, nor does it mean that the State is obliged to close every avenue of escape which might otherwise be open to an accused. "

[82] We now have to apply the above-stated principles to the facts of this case. We commence by considering the position of the appellant. Clearly he occupied a key position on the LHDA. Quite apart from the fact that he could nominate members to the evaluation committee, he acted as a link between the committee and the LHDA's board. Indeed, according to the witness Rafoneke, he had to approve of the committee's recommendation before passing it on "for further clearance" by the LHDA and, where applicable, the JPTC and the funding authorities. The chief executive, moreover, was intimately involved in the negotiating proceedings before the signature of the MOU. And as the work progressed the LHDA had no direct communication with the contractor. It depended for information and advice on the engineer who supervised the work and on the chief executive's knowledge, for the chief executive himself maintained close contact with the engineer at all material times. It is clear that the chief executive had to assist in resolving disputes during the currency of the contract, including claims by a contractor or consultant for additional

remuneration. Although he had to report to the board and obtain its authority in respect of all-important decisions, his views nevertheless had significant weight and his influence was considerable.

[83] In addition the appellant, in his capacity as chief executive, had access to confidential information, that is information known only by the officials and the board of the LHDA. One example suffices. The engineer's estimate of the value of a particular contract was known to only a few before the issue of the tender documents. One of these was the chief executive. There was no evidence that the appellant passed on any confidential information to benefit a prospective tenderer, nor, indeed, has it been clearly proved that he unlawfully granted favours to any consultant or contractor involved in the counts on which he was convicted. As we have mentioned in para [52], the evidence relating to the promotion of Acres's personnel to the detriment of local engineers was not compelling enough to warrant a finding. The evidence relating to the implementation of the escalation clause in contract 129 B was certainly indicative of improper, if not unlawful, conduct by the appellant. The contractor concerned in that contract was MHPC. Although at least one of MHPC's partners, Spie, was implicated as a briber, MHPC as such was not, and for this reason we prefer to leave that evidence out of the reckoning as well.

[84] The absence of clear evidence that the appellant unlawfully advanced the position of contractors or consultants is not decisive. The fact remains that the appellant occupied a position of importance and influence in the LHDA and the evidence shows conclusively that contractors and consultants paid him considerable sums of money at least in the expectation that he might use his position to benefit them. It is undisputed that the appellant opened and operated bank accounts in Switzerland at a time when contractors and consultants were attempting to obtain contracts in connection with the LHWP or, having obtained such contracts, were actually engaged in the project. The opening deposits into the first account were made by Cohen and all subsequent deposits into the accounts (save in respect of count 12) were effected by transfers from intermediaries. The accounts were used for no other purpose; they were receptacles for the receipt of money from intermediaries and Dumez Nigeria.

[85] All of the contractors and consultants operated bank accounts in Lesotho or South Africa or in both countries. Some of the payments made to them by the LHDA were in local currency to enable them to meet local expenses. But payments to intermediaries and transfers from intermediaries to the appellant were carried out through overseas banks. There was no obvious legitimate reason why all payments to intermediaries came from overseas accounts, nor was it explained why transfers were made into the Swiss bank account of the intermediaries and the appellant. The only plausible reason appears to be secrecy - an attempt to conceal the transactions from the LHDA or other authorities.

[86] This conclusion is substantiated by the appellant's false and disingenuous evidence in the civil proceedings instituted against him by the LHDA. There is no need to set out his evidence in any detail. What he said *viva voce* and on affidavit is reflected in full in the extensive judgment of the court *a quo*. Nor did counsel for the appellant challenge the accuracy of what his client had said: he objected to its admissibility. The original grounds for objection, contained in the heads of argument, were not persisted in, and rightly so. In this court it was submitted that the appellant's statements in the earlier proceedings were inadmissible for the purpose of proving the truth of what he had said. As a general rule this is correct. However, the evidence was not tendered for that purpose: it was adduced by the Crown only as proof of what had been said. There is no doubt that it is admissible for that purpose and this was eventually conceded by the appellant's counsel.

[87] In the civil proceedings the appellant initially denied in oral evidence that he held any bank accounts overseas or in South Africa. Subsequently he denied on affidavit that he had ever had or conducted a banking account with the Union Bank of Switzerland. In a later affidavit he admitted that money from the UBS had been paid into his account with the Ladybrand branch of the Standard Bank but claimed that the payments had been made to accommodate an acquaintance who held the overseas account. These statements are clearly relevant and show not only that he was deliberately untruthful under oath but that his false denials were made for the purpose of concealing his involvement with the intermediaries and, through them, with the contractors and consultants.

[88] We have referred to the intermediaries in paras [60] to [64] above. Before dealing with their significance in the overall picture, we comment on the trial judge's findings on the part they played - or lack of it in most cases - in the LHWP. He pointed out that Cohen and his companies - UDC and EDC - were not in any way involved in the project and that there was no need for Du Plooy to enter into a contractual agreement in a foreign country and conduct financial transactions there if he was involved in the project in Lesotho. We agree with these findings. Moreover two of the senior local engineers closely connected with the LHWP - Rafoneke and Putsoane - testified that they did not know Du Plooy. It is inconceivable that they would not have know him had he been actively concerned in the project as a consultant.

[89] Something further needs to be said about Bam. We have already referred in para [64] to the fact that money was paid into his personal account in Switzerland in addition to bona fide payments to LESCON in Maseru by Lahmeyer and others. Moreover Lahmeyer paid Mrs Bam FFR 135 760 for no apparent reason in February 1991.

[90] Dumez Nigeria (on behalf of Dumez) made two payments to Bam on the same days in which this company paid identical sums to the appellant. The amounts were substantial - over FFR 464 000 to each payee. These payments

cannot be explained on the basis of work performed by LESCON, nor was there any attempt to do so.

[91] Next we consider the trial judge's findings in relation to the payments made by Acres to Bam and Mrs Bam. The payments were effected through the company's Canadian bankers from three different branches. At least one payment was processed by the bank's Swiss counterpart. The first payment to Mrs Bam, in a significantly large amount of CAD 180 000, was made on 5 February 1991, some sixteen days before the award of the sole-sourced contract (contract 65) to Acres. The trial judge pointed out, quite correctly in our view, that the "payment was suggestive of a strong incentive for the award of a contract."

[92] The subsequent payments were to Bam and were in smaller amounts at fairly regular intervals. We have referred to these payments in para [76] above and they require no further comment. We agree with the trial judge, for the reasons given by him, that there was no need for Bam to render any services or assistance to Acres at the times when the payments were made. In our view, therefore, the payments to Bam and his wife were not made in return for services rendered to Acres for the legitimate purposes of the project. It only remains to add that Putsoane, despite his senior position and long association with Bam, and, for that matter with Lahmeyer and Acres, was unaware of any agency agreement between the consultants and the intermediary.

[93] The only counts that require further consideration are counts 6 and 12, the former because the identity of the payer to the intermediary was not established and the latter because the appellant did not receive payment from an intermediary. The pattern of payments and the system adopted on count 6 were similar, if not identical to, other counts where an intermediary was used. What is more the intermediary was Bam. Two payments were transferred in US dollars from UBS Zurich into Bam's account at UBP Geneva. Within a month of each transfer Bam paid roughly 50% of his receipts in the same currency into the appellant's account at UBS Zurich. In the absence of any other explanation and having regard to the dates of payment, the only reasonable inference to drawn is that the original transferor of the money was a contractor or consultant involved in the LHWP. The submissions of appellant's counsel to the contrary must therefore fail.

[94] While no intermediary transferred money to the appellant on count 12, the transferor was an associated company of Dumez. Here, too, the money was paid in foreign currency (French francs) into a Swiss bank account held by the appellant. What is equally incriminating for the appellant is that identical payments were made to Bam by the same payer, Dumez Nigeria. Count 12, therefore, presents no difficulty.

[95] The Crown presented a strong case against the appellant. It called for an answer. The trial judge advised the appellant's counsel that this was so and

invited him to reconsider his decision to close the defence case. The invitation was not accepted. Not only was no explanation given for the appellant's extraordinary dealing, the appellant when faced with the need to testify in the civil proceedings gave false and contradictory explanations on oath. We refer in this regard to the comments made by H C Nicholas in paras [78] to [81] above.

[96] 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.

[97] 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.

[98] 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.*

[99] 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.

[100] In the result the appellant was correctly convicted on the bribery counts.

[101] Although the appeal was apparently intended to cover the two fraud counts (counts 17 and 18), no argument was advanced to us in court on the appellant's behalf in respect of these counts. The matter was left expressly in the hands of this court. We have had regard to the evidence, to the reasons of the trial judge for convicting the appellant on these counts and to the submissions made in the heads of argument on both sides. In view of the attitude adopted by counsel for the appellant, there is no need for us to add to the trial judge's reasons. It suffices to say that we are satisfied that the appellant was properly convicted.

[102] In the result the appeal against the convictions fails and falls to be dismissed.

Sentence

[103] We turn finally to the question of sentence. Before considering the matter it is necessary to refer to something that transpired at the close of argument before us. Our attention was drawn to the fact that on 29 May 2002 the trial judge had refused an application by the defence to call a criminologist to testify on behalf of the defence and for the postponement of the matter to 7 June 2002 for that purpose. The trial judge had previously intimated that he was not prepared to delay the sentencing proceedings unduly. The refusal of the application was never the subject of appeal - it featured in neither the original nor the amended notice of appeal. Nor was the matter adverted to by the appellant's counsel either in his original or his supplementary heads of argument, nor in argument before us until his reply, when it surfaced almost as an afterthought. It was then for the first time raised and argued that the trial judge had acted irregularly in refusing the application.

[104] We do not propose to canvass the relevant facts in detail. Suffice it to say that the decision to consult a criminologist was left to the last moment. No adequate explanation for the delay was advanced. The suggested criminologist had not consulted with the appellant; the arrangements that had been made were generally very tenuous; there was no indication of the probable nature of any report that it was hoped to receive nor of what assistance, if any, such report might be in the sentencing process. Quite clearly the nature and extent of the offences committed by the appellant permitted only of a custodial sentence. All

relevant considerations in that regard were either already before the court or subsequently placed before it when the appellant and two witnesses testified in mitigation. In all the circumstances we are of the view that the trial judge did not act irregularly when, in the exercise of his discretion, he refused the application. Nor did such refusal operate unfairly towards the appellant. The fact that it was never sought to raise the point until the dying throes of the appeal is indicative of the appellant's lack of conviction that there was substance in it.

[105] The further point was raised in argument that the appellant had been refused the opportunity to engage another counsel at the sentencing stage. There is no substance in such complaint. The appellant did not have an absolute right to counsel of his choice, particularly not where he was receiving the benefit of Legal Aid. His counsel, who had appeared for him on that basis during a long and arduous trial, was available to represent him at the final stages. There was no reason why he could not have continued to do so. The fact that the appellant chose to continue unrepresented while giving evidence in mitigation, calling witnesses and addressing the court, in the circumstances, did not render the proceedings unfair and he accordingly suffered no prejudice.

[106] Sentence is a matter pre-eminently in the discretion of the trial judge. Interference with such sentence is only permitted on well-known, circumscribed grounds. One such ground is if there has been a material misdirection by the trial judge in his assessment of an appropriate sentence.

[107] The trial judge sentenced the appellant to separate periods of imprisonment on each count, but then ordered the sentences on 11 counts (all those save counts 3 and 12) to run concurrently, resulting in an effective sentence of 12 years on those counts. To that he added the sentences on counts 3 (one year) and 12 (five years) to run consecutively, hence a total sentence of 18 years. In order to determine the amount involved in each count in local currency the trial judge converted all bribery payments received by the appellant in foreign currency into Maloti as at 1996. He acknowledged that this was not an accurate reflection of value at all relevant times and went on to say:

> "In any event, the purpose of the exercise is not necessarily to establish the exact value of each payment as and when received, but to establish the relative gravity of the offence under each count in the scale of the thirteen offences involved."

The reason advanced by him why he made all the counts save 3 and 12 run concurrently was that the offences relating to them "were committed somewhat contemporaneously" (starting in January 1991) whereas in respect of counts 3 and 12 they were committed in 1988 and 1989/90.

[108] It is difficult to appreciate why the trial judge singled out counts 3 and 12 because they were not that far removed in time from the other counts and in

reality no less contemporaneous in the rather wide sense in which that word was used. Nor did he apparently consider making part of the sentences on those counts (totalling six years) run concurrently with the sentences on the other counts. The logic of his computations is also not evident. An analysis of his figures shows that in respect of 44 transactions relating to 11 counts (including two of fraud), involving something in the order of M 4 1/2 million, he sentenced the appellant to an effective 12 years.

By contrast, in respect of four transactions relating to counts 3 and 12 involving approximately M 1/2 million the appellant was sentenced to six years imprisonment. The apparent imbalance is unexplained. When these considerations are viewed cumulatively it appears that the trial judge arrived at the ultimate sentence by means of a flawed process, amounting to a misdirection. In the result we are entitled to consider the question of sentence afresh.

[109] In the course of his judgment the trial judge observed:

> "[T]he sentence imposed by the court must express the public abhorrence of what has transpired and in particular emphasise that Lesotho simply will not tolerate corruption in its midst. In this respect the sentence imposed must be such as to act as a deterrence to others in the future".

We echo those sentiments. Corruption is inimical to sound public administration, itself essential to the strength of constitutional democracy; it also threatens investor confidence, development projects and employment, including in Lesotho. Nonetheless we are of the view that an appropriate sentence for the appellant's crimes, on a conspectus of all relevant considerations relating to sentence, would be an effective fifteen years imprisonment. As the bribery offences were part of a system which extended over a period of time, we deem it appropriate to take all the bribery counts together for the purposes of sentence.

[110] In the result the appeal against sentence succeeds. The sentence imposed by the trial court falls to be set aside and to be substituted by the sentence set out in the order:

ORDER

The following order is made:

- The appeal against the convictions is dismissed.
- The appeal against the sentence succeeds to the extent that the sentence imposed is set aside and there is substituted in its stead the following sentence:

"Counts 1,2,3,4,6,7,8,9,12,14 and 15 taken together: Fifteen (15) years' imprisonment.

Counts 17 and 18: One (1) year imprisonment on each.

The sentences on counts 17 and 18 are ordered to run concurrently with the sentence of fifteen (15) years imprisonment in 1 above."

Criminal Law -- bribery -- appeal against conviction and sentence
Representation agreement -- factors to be considered when determining genuineness of agreement
Evidence -- admissibility -- evidence of payments by other contractors to intermediary -- whether evidence against the appellant
Sentence -- appropriate procedure for determining sentence for corporation
Sentence -- need for deterrent sentence -- need to take into account both aggravating and mitigating features

ACRES INTERNATIONAL LIMITED v THE CROWN

Court of Appeal of Lesotho 6 - 15 August 2003
Steyn, P, Ramodibedi, J.A., Plewman, J.A.

Cases referred to in the judgment
Molapo v. Rex 1999-2000 L.L.R. and L.B. 316
Moshephi and Others v R
R v. Blom 1939 AD 188.
R v De Villiers 1944 AD. 493
R. v Patel 1944 A.D. 511
R v Sole (unreported)
S. v. Hadebe and Others 1998 (1) SA C.R. 422 (A)
S. v Kelly 1980 (3) SA 301 (A) at 313.
S. v. Narker 1975 (1) SA 583 (A)
S. v. Rabie 1975 (4) SA 855 (A)
S. v. Scheepers 1977 (2) S.A. 156 (A)
S. v. Zinn, 1969 (2) S.A. 537 (A.D.)

For Appellant: Mr. S. Alkema SC and Mr. K.J. Kemp SC
For Respondent: Mr. G.H. Penzhorn SC and Mr. H.T.T. Woker

STEYN, P gave the judgment of the court

[1] This is an appeal from a judgment by Lehohla C.J. convicting the appellant on two counts of bribery. The appellant, Acres International Limited ("the appellant") was tried in summary proceedings in the High Court. Initially the appellant was indicted with others. After a separation of trials was decreed, a new indictment was framed. In this indictment the Crown alleged in count 1 that the appellant, over the period June 1991 to January 1998, paid CAD 493,168.28 into a Swiss Bank account held by one Z.M. Bam (now deceased and hereinafter referred to as "Bam") who thereafter transferred the said sum, or part thereof, to Mr. Sole ("Sole") who was the Chief Executive Officer of the Lesotho Highlands

Development Authority (LHDA) and a civil servant in the employ of the Lesotho Government at all material times in question. The respective roles of Bam and Sole will be explained below.

Count 2 alleged payment by the appellant, over the period 31 January 1991 to 3 April 1991, of CAD 188,255.48 into a Swiss Bank account held by the wife of the aforesaid Bam namely one Margaret Bam ("Mrs. Bam") who thereafter transferred "or was supposed to pay/transfer the said sum" or part thereof to Sole.

The Court *a quo* sentenced the appellant to a fine of M22,058,091. It has appealed against both convictions and sentence.

[2] The events which gave rise to the trial in the High Court arise out of the Lesotho Highlands Water Project, ("the L.H.W.P." or "the project"). The governments of Lesotho and South Africa concluded a Treaty to govern all the activities associated with it. It was described by this Court in its judgment in the matter of *Sole v The Crown* (C of A (CRI) 5/2002) delivered on the 14th of April 2003 as being :

> "[O]ne of the biggest and most ambitious dam projects in the world, which entailed *inter alia* the construction of the Katse Dam in a remote and inaccessible part of the highlands of Lesotho". The Court goes on to say: "Initially the project involved the building of the essential infrastructure, such as access roads and accommodation facilities. One of the main aims of the project was the delivery of water to the Republic of South Africa. The delivery of water to South Africa necessitated the construction of a delivery tunnel. Another object was the generation of electricity and this entailed the construction of a hydropower complex and a transfer tunnel from Katse to Muela where the complex was to be built. All of this required substantial funding, most of which came from outside agencies such as the World Bank, the European Commission and the African Development Bank".

The Court proceeds to describe the management and supervisory structures of the project as follows:

> "The implementation, supervision and maintenance of the LHWP was entrusted to the Lesotho Highlands Development Authority ("the LHDA"), a statutory body created by the Lesotho Highlands Development Order 23 of 1986, pursuant to and in terms of a Treaty between the governments of Lesotho and the Republic of South Africa. The LHDA was governed by a board of directors but the day to day running of its affairs was in the hands of its chief executive officer. Another body, the Joint Permanent Technical Commission ("the JPTC"), subsequently known as the Lesotho Highlands Water Commission, which was composed of representatives from both

Lesotho and South Africa, acted in an advisory capacity to the LHDA and also monitored the progress of the project".

It need only be added that the project gave rise to a large number of civil engineering contracts, said at one point to number as many as 500. A number of large international firms of civil engineers were from time to time engaged in work for the project.

[3] Sole is a qualified civil engineer who on the 1st of November 1986 was appointed as the first chief executive of the L.H.D.A. He served in this capacity until he was suspended in October 1994 and after a departmental inquiry was dismissed from this post in October 1995. He sought to review this decision through the courts, but these proceedings were dismissed in October 1996 with reasons given in January 1997. The other principal actor on the scene was Bam. He had practised as a civil engineer in Lesotho during the eighties. As will be seen below he was the founder of "Lescon" a company registered in Lesotho with which Sole had also been involved as a subscriber to its memorandum of association. The case for the Crown rested on the premise that the appellant funded the payments in question with the intention of bribing Sole and that for that purpose it paid him through intermediaries namely Bam and Mrs. Bam. There was evidence that as Bam was paid by appellant he (in turn) and over a significant period - some six years - paid over to Sole in the region of 60% of what was paid to him by the appellant.

[4] Although both the Crown and the defence called several witnesses, the material facts of this case are either common cause or only peripherally in dispute. In so far as the facts that are common cause are concerned we record the important concessions quite properly made by Counsel for Acres. It was conceded that the payments made by Bam to Sole were funded by payments made by appellants to Bam and were made unlawfully. Nor was it in dispute that the Crown evidence, particularly the evidence concerning the flow of payments, placed an obligation on the appellants to explain the payments to Bam. There was therefore an evidential burden on the appellant to explain such payments. Counsel also conceded that without an acceptable explanation the inference could properly be drawn that appellant was guilty of bribery.

[5] The facts outlined in summary below which were relied on by the Crown are the following:
5.1 From 1980 to 1986 the appellant was engaged as a subconsultant on the Lesotho Airport contract - a contract not connected with the project. Lescon (Pty) Ltd - of whom more later - was also engaged as a sub-contractor on the same project.
5.2 In March 1987 and under Contract designated in the project works as Contract 19, the appellant provided key technical personnel to line positions within the LHDA, the statutory body which was charged with the implementation, supervision and maintenance of the LHWP. In so doing the appellant's staff

members employed in Lesotho effectively became part and parcel of the LHDA, supervising the contracts on behalf of that body. More importantly, it is common cause that at the commencement of the construction phase of the Katse Dam, a major part of the contract, three of the five senior executive positions within the LHDA were occupied by appellant's personnel.

5.3 After securing Contract 19 the appellant engaged the services of Lescon as its agent. Bam held the controlling interest in this company. At the end of 1988 Bam left Lesotho to take up full time employment with the Botswana Housing Corporation in Botswana. He remained there until February 1991.

5.4 By letter dated 28 April 1989 the appellant was notified by Sole that it would be invited, on a sole-sourced basis - a concept to be explained below - to put up a proposal for the continuation of its services under a new contract to be designated Contract 65. Indeed it had as early as March 1988 identified the securing of this contract as an objective to be pursued. The appellant was the only entity invited to submit such a proposal.

5.5 In February 1990 the appellant was formally invited to submit its proposal which it did. Contract 65 then became the subject of negotiation. Prior to its final conclusion a memorandum of understanding (MOU), a preparatory step to the conclusion of a final contract was, prepared.

5.6 On 28 July 1990 the appellant was issued a conditional letter of intent by Sole. Thereafter the appellant mobilised its resources to enable it to implement its obligations in terms of the proposed contract. Sole himself authorised such mobilisation and gave the undertaking to pay the appellant. This was in terms of a letter dated 14 August 1990. The Treaty had provided for the establishment of a supervisory body known by the acronym J.P.T.C. (Joint Permanent Technical Commission). It was a joint monitoring and approvals body that had to ensure compliance with the Treaty obligations. The powers of this body and its volatile relationship with the L.H.D.A. will be commented on below. However it should be noted that at the time of the issue of the M.O.U. and the letter of intent these actions as well as the authorisation of appellant's mobilisation had not received J.P.T.C. approval. Indeed the events recorded above occurred despite the fact that Contract 65 had not been formally concluded. Even the appellant's fees had not yet been agreed.

5.7 Whilst negotiations concerning Contract 65 were proceeding the appellant was also discussing the conclusion of a representative agreement (abbreviated hereinafter to RA) with Bam. The initial proposal (made early in 1989) was a contract between Lescon and the appellant. However in the final analysis and on the 23rd of November 1990 an agreement was concluded between the appellant and an "entity" called Associated Consultants and Project Managers (A.C.P.M.). The terms, the status and the legality of this agreement are crucial to the determination of this appeal.

5.8 Shortly after the conclusion of this agreement and on the 29th November 1990, an advance part-payment of the fees in respect of services rendered under the - as yet unsigned contract 65 - was paid to the appellant on the authority of Sole and without J.P.T.C.'s sanction. The Maloti portion paid as above was

M250,000. This was followed by the payment in Canadian dollars (C.A.D.)1,160,000 on the 4th of January 1991.
5.9 On 31 January1991 the appellant made a payment into a Swiss Bank account in Geneva nominated by Bam in the representative agreement and belonging to Mrs. Bam in an amount of C.A.D. 180,000. This payment is the subject matter of count 2 referred to above.
5.10 It was only on 21 February 1991 that Contract 65 was formally concluded. Sole signed it on behalf of the LHDA. It was however only approved by the J.P.T.C. on the 14th of March 1991.
5.11 One Roux, a forensic accountant in the employ of Price Waterhouse, Coopers, gave evidence confirming the flow of funds from the appellant to Bam and from Bam to Sole and prepared a flow chart Exhibit K4, demonstrating graphically how these funds moved from the appellant to the accounts held by Bam and his wife, and from there to a Swiss bank account held by Sole in a regular or defined pattern. All these payments were effected in Switzerland using Bam's Swiss accounts in Geneva. Bam shared these payments with Sole on an approximately 60/40 basis, 60% being allocated to Sole. Bam transferred these funds to Sole either on the same day or within a few days of his receipt of the funds from the appellant.
5.12 The arrangement referred to above endured until January 1997 when Sole finally lost his Court challenge against his dismissal. In July 1997 the appellant reduced its payments to Bam to " 40% of what it had been paying up to that time. Bam no longer shared these payments with Sole. The appellant ceased paying Bam when the latter died in 1999 though it made further payments (or a further payment) to Mrs. Bam.

[6] It was the Crown case then that the only reasonable inference to be drawn from all the facts is that the appellant knew that it was paying Bam to use its money to bribe Sole and that it used Bam as a conduit to camouflage this fact. The Crown contended that the RA between the appellant and Bam was a device to disguise the true purpose of appellant's payments, being corrupt payments to Sole.

The Crown further argued that the evidence established that the pattern of payments into Bam's Swiss Bank account demonstrated that it was used as a vehicle *inter alia* to transfer bribe monies to Sole. These payments, all of which came from and were paid into overseas accounts, were never disclosed to the L.H.D.A., the J.P.T.C. or anyone involved in Contract 65.

[7] The true meaning, purpose and effect of the RA referred to above will be dealt with later in this judgment. However the Crown also contended that the payments by the appellant to Bam and from Bam to Sole cannot be justified on the basis of work performed by Bam in terms of the R A. The Crown pointed to the fact that no documentation such as invoices were produced in evidence to justify the payments in question and that no one within either the LHDA or JPTC knew that Bam was the appellant's agent. Indeed no records relating to this R A, such as

were normally maintained by appellant, were produced. None of the senior executives employed on the project who were appointed by parties other than appellant, knew of this arrangement. Neither did any of them observe Bam performing any of the obligations he undertook in the R A. Thus, e.g. Mrs. Sophia Mohapi who was the Financial Manager and later the Deputy Chief Executive of the LHDA and Mr. Putsoane, later to act as C.E.O. of the L.H.D.A. testified that Bam did not at any time involve himself in activities of the kind described in the agreement.

[8] It is common cause that Sole occupied an influential position at all material times until after his dismissal in October 1995. He could therefore influence decisions improperly benefiting contractors or consultants including the appellant. It was indeed through him that matters in respect of which the J.P.T.C. and the World Bank had to concur were channelled and - as would appear below - his failure to honour these obligations caused tensions and ultimately recriminations. It seems incontrovertible that he could improperly benefit those he favoured. Moreover these bodies and others tended to have acted on recommendations emanating from him. He was indeed a very influential member of the Board of the LHDA.

[9] On the Crown's case by the 23rd November 1990 the appellant found itself in a difficult situation. It had been working for four months without remuneration. During that period it was in effect financing Contract 65. It was contended that the conclusion is unavoidable that the appellant needed Sole's help in order to obtain payment for work done. The payment it received took the form of the advance payments referred to above.

[10] The evidence of the Crown witness Mr. Putsoane referred to above, established that Sole was certainly well disposed towards the appellant and favoured it. Moreover, despite the fact that Article 9 of the Treaty which established the LHDA required JPTC approval in writing for any decision by the LHDA, more particularly a decision involving the expenditure of funds, Putsoane's evidence pointed to non-compliance by Sole of JPTC procedures in so far as the appellant was concerned.

[11] In the light of the above, it is clear that the single issue which this Court is called upon to decide is whether the appellant has discharged the evidential burden it accepted. Before analysing the evidence it will be appropriate to outline the approach the law adopts in the evaluation of evidence in a case such as the present.

[12] The court a quo was faced with a case based on circumstantial evidence. As in all such cases it was, in significant measure, obliged to reason by inference. It is not in dispute that it was proper for the court to do so, though appellant contends for a different result. Defence counsel argued that the court misdirected itself in certain respects. We will presently consider the arguments advanced on

this ground but it is necessary before doing so to make some observations of a general nature relating to the correct approach to circumstantial evidence and the need to reason by inference. The problem is by no means unusual and the rules to be applied are in no sense new.

[13] For generations courts have found the tools they need in the cannons of logic and it is to these that they look for guidance so as to avoid error. The classic formulation of the rules followed in courts in Southern Africa are found in the decision of the South African Appeal Court in the case of *R v. Blom* 1939 AD 188. But over the years there has been a tendency (particularly by counsel "harassed by strongly inculpatory evidence") to overstate and misapply the proper principles. This tendency formed the subject matter of an essay published in a work *Fiat Justitia (Essays in Memory of Oliver Deneys Schreiner*) by H.C. Nicholas - a judge of the Supreme Court of South Africa and later a distinguished member of the Appellate Division in South Africa. We will, in what follows, refer to the author - as we think is proper - as the learned judge.

In the essay the rules relating to inferential reasoning are discussed and their relationship to the underlying onus resting on the prosecution in criminal cases is considered. What is important is the concept as a whole. This is well summarised by the learned judge at the conclusion of the essay. It is, however, necessary first to set out what is termed the second rule in the Blom case. This is that when reasoning by inference, a conclusion on the basis that the inference sought to be drawn is consistent with all the proved facts, can only be drawn if the proved facts are such that they exclude every reasonable inference save the one sought to be drawn. The conclusion to the essay is as follows: -

> "The second rule of logic in Blom is a salutary rule, whose field or application is limited by its nature. It is a tool for detecting and avoiding fallacy, for testing the logical validity of a conclusion. It is no more than that. It is not a legal precept. It is not another way of stating the criminal standard of proof. It does not in itself provide an automatic answer to the question whether guilt has been proved beyond a reasonable doubt. Even if the rule is satisfied, it does not follow that the trier of fact *must* convict the accused. It does not license speculation as to facts not proved by the evidence, nor does it mean that the State is obliged to close every avenue of escape which might otherwise be open to an accused. In investigating other reasonable inferences, the field of inquiry 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."

[14] Given the circumstances which arise in this case and in the light of certain arguments addressed to this Court, it is important to underline - as is explained in the essay - that it is a fallacy to suggest that each factor (or proved fact) must or can be taken separately, and if then each of them is possibly consistent with innocence it must be discarded. It is well recognised in the authorities that the

court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. On the contrary a court must weigh the cumulative effect of all the proved facts taken together and it is only after that has been done that it must consider whether it is entitled to draw the conclusion which it is asked to make on the basis of inference.

[15] The learned judge's essay is today generally regarded as a correct analysis of the law also in Lesotho and certain further quotations therefrom seem apposite. What we would quote are the following extracts: At page 320 it is stated:

> "In a criminal case the ultimate proposition to be proved, the *factum probandum,* is the guilt of the accused. Where the case is one depending upon circumstantial evidence, the *factum probandum* is established as a matter of inference from the proved facts, the *facta probantia.* But a *factum probans* may itself be a proposition to be proved by way of inference from other facts.
> In considering whether the *factum probandum* has been established in a criminal case depending upon circumstantial evidence, the trier of fact must decide two questions: whether the inference of guilt can on the proved facts logically be drawn; and whether guilt has been proved beyond a reasonable doubt. The latter requirement does not necessarily mean that every factor bearing on the question of guilt must be treated as if it were a separate issue to which the test of reasonable doubt must be distinctly applied".

Further at page 321 it is said:

> "In order to apply the second rule (in Blom), the trier of fact must consider what other possible inferences can be drawn from the proved facts. If any of them is a reasonable inference, then the inference sought to be drawn cannot validly be drawn. This does not mean, as has sometimes been suggested, that the trier of fact is entitled to speculate as to the possible existence of facts which, together with the proved facts, would justify a conclusion that the accused may be innocent."

[16] The essay also contains a reasoned but firm warning against improper speculation and guidance as to how a court must deal with a situation where the circumstances called for an explanation from an accused person and the explanation is not satisfactory. A further quotation will serve. At page 325 the learned judge says:

> "The investigation into other possible hypotheses is not an academic exercise. It is conditioned by the nature of the task in hand - the practical business of deciding a criminal trial. Legal reasoning works in an

atmosphere and not in a vacuum. And in considering whether there are other reasonable inferences, the fact that the accused has given an explanation, or the fact that, although an explanation was called for in circumstances, the accused failed to give one, may considerably narrow the inquiry.

Where the accused does give an explanation, whether extra-judicially or in the evidence at his trial, 'its effect may be to narrow the question to the consideration whether that statement be or be not excluded and falsified by the evidence'. If the explanation is a reasonable one, then unless it is negatived by the State (or it can be said that it cannot reasonably be true), the inference of guilt cannot be drawn. If the explanation is negatived by the State, then ordinarily the court will not investigate the possibility of other inferences not mentioned by the accused."

[17] The subject of inferential reasons was extensively debated in the court a quo. The learned Chief Justice charged appellants with "compartmentalising" the facts proved. Appellant's counsel denied in argument before this Court that they had done so and indeed argued for the proposition that the evidence should be considered as a whole. That this is so is beyond dispute. It has been so held by this Court in the case of *Moshephi and Others v R* (1980-1984) L.A.C. 57. In that case Marais A.J.A. said the following at p.59:

"The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."

See also *S. v. Hadebe and Others* 1998 (1) SA C.R. 422 (A). It is necessary only to add that it may transpire in the evaluation of the evidence as a whole that particular facts may be of a neutral character to any matter under consideration. There are in the present case examples of this. Such facts are not then disregarded. They are considered but found not to be of assistance in the process of inferential reasoning.

[18] This leads to a further observation. As will be seen presently the court a quo admitted and relied on certain evidence which in our view was inadmissible. An appeal court's approach in such circumstances is to consider the importance and effect of such evidence and weigh it in the overall balance. This is well illustrated by the following quotation from the case of *Rex v De Villiers* 1944 AD. 493. At page 509 Davis AJA said as follows:

> "To sum up: though the learned Judge thought for the moment that the inadmissible evidence was important, upon careful analysis I am satisfied that it was wholly superfluous for his finding upon the true issue and thus was of itself of little or no importance. I am further satisfied that the evidence of the guilt of the accused upon the whole case was so strong that in any event, without the inadmissible evidence, the learned Judge must inevitably have convicted. The accused having consequently suffered no actual and substantial prejudice as the result of the admission of exhibit H, though the first question of law reserved must be answered in his favour, that cannot affect his conviction; the second question is answered in favour of the Crown."

[19] With this preamble in mind we turn to the judgment of the court a quo. That it is expressed in robust and at times even colourful language is clear. But this does not of itself give any reason for criticism. The simple fact is that the record shows that the appellant was given a fair trial and that there is not the slightest indication or suggestion to the contrary. Indeed when debating the issues in this Court appellant's counsel readily conceded that the appellant had indeed been given a fair trial. In its judgment the court a quo carefully considered all the evidence that had been put before it. For reasons which we will give presently, it is not essential to this judgment that this Court concern itself with every submission made regarding the court a quo's judgment. It is however appropriate that we deal with certain aspects. Perhaps the most important comment to be made, is that the court a quo included in the facts which it took into account evidence relating to payments made by other contractors which found their way to Sole. These are illustrated in Exh. K4. This is the diagram depicting the flow of funds from appellant to Bam and from Bam to Sole. The firms or contractors so referred to need not be identified in this judgment. But assuming that this evidence would, as against those contractors, show or suggest that they too bribed Sole, the evidence was inadmissible against appellant and is prejudicial to it. The admission and reliance thereon constitutes a misdirection. The Crown argued, we suspect without great conviction, that the evidence was relevant as showing that Bam was "a bribe merchant" which it then said must have been known to the appellant. As to the latter - there is no evidence at all that appellant was aware of the fact that Sole was being bribed by other contractors. This seems a very strained argument, but even if correct, though in our view it is not, there is no basis for the admission of evidence showing misdemeanours by other persons as evidence against the appellant.

Another contention that the court misdirected itself refers to its reliance upon a submission by the Crown that the R A concluded by appellant with the entity A.C.P.M. (being the proposal made by Bam as to who the representative should be) involved a contravention of the Exchange Control Regulations in Lesotho and South Africa and that appellant was "aiding and abetting Bam to contravene the law". It is not necessary to decide this issue because in our view the value of this evidence and the impact on the inferences sought to be drawn are of such little weight that they can safely be ignored. The same considerations apply to the Crown's contention that tax evasion had taken place. It can for present purposes be accepted that these findings by the court a quo amounted to misdirections. If so they were inconsequential.

[20] Even if, therefore, the court a quo did misdirect itself in these respects the question before us is whether, without these considerations, its ultimate conclusion as to the guilt of the appellants was correct. See *R v De Villiers* (above). The present appeal as it developed constituted a rehearing of the issues and, in the result this Court has found itself obliged to evaluate the evidence afresh. We have however also re-examined the court below's findings on the credibility of the witnesses and considered to what extent they can be supported on the record.

[21] We now proceed to consider the question whether the R A was a genuine contract or whether it was a mechanism to channel funds to Sole via Bam. The relevant facts and circumstances surrounding the conclusion of the R A are the following:
21.1 Acres had been involved in engineering work in Lesotho from 1986 onwards. From March 1987 it was involved under Contract 19 in providing personnel to the L.H.D.A. for engineering services required for the L.H.D.A.
21.2 Lescon, a limited liability company of which Bam was the effective owner and Sole a subscriber to its memorandum of Association, was appointed as the appellant's agent after Contract 19 was awarded to it. The purpose of this appointment was to render services in respect of that contract. No written agency agreement is extant. However there is evidence that Bam was involved in late 1988 via Lescon in connection with the award of engineering contracts to other Canadian firms. As we have also seen the appellant had targeted contract 65 as a desirable extension of its services to the project already in 1988 and that on the 3rd of April 1989 Sole advised the World Bank of his proposal to "sole source" the appellant to render engineering services under Contract 65. It is not without significance that Sole had visited appellants' senior management in Canada prior to this and that they were well acquainted with him and he with them.
21.3 "Sole sourcing" has been described in the evidence as follows: In contrast to the process called competitive bidding, sole sourcing authorises only one consultant being invited to submit proposals or tenders. This sole-sourcing process was seen as particularly appropriate in the case of Contract 65 because it was considered and described as a logical extension of Contract 19. The latter was primarily concerned with the design of tenders and the preparation of tender

documents, especially for the main construction activities. Contract 65 was directed at the provision of services for the establishment and implementation of the construction of the Katse dam and the tunnels - both delivery and transfer tunnels - required to facilitate the flow of the water to the south. What Contract 65 involved was essentially the secondment of appellant's employees to act as officials of the L.H.D.A. - a fact of some importance to the question of whether the execution of Contract 65 required the supervision of an outside agent.

[22] We now come to deal with the circumstances in which the relevant RA was concluded between the appellant and A.C.P.M. We will examine this document with reference to the description of the agent; how the parties themselves evidenced the document; the nature of the obligations undertaken by the representative and to what extent Bam or A.C.P.M. discharged those obligations. We will also consider the arrangements concerning where and how the payments were made and what the relationship was between the amounts paid to Bam and the services he was to render as well as the changes that were made after Sole's term of office finally came to an end.

[23] It is common cause that the fifth and final draft of the RA was concluded on the 23rd of November 1990. However negotiations in regard to its terms - particularly as to whom, how and where payments had to be made - were conducted over a period of some months. In so far as the identity of the payee under the RA was concerned it is also an admitted fact that the first draft submitted by D.W.1 - a Mr. Hare (appellant's principal witness) - to Bam, provided for the appointment of Lescon as the representative. This was only to be expected as Contract 65 was a successor to Contract 19 and would have required similar services from the representative. However at Bam's request the identity of the representative was altered to A.C.P.M. - an entity that was never formally constituted and was unknown to anyone other than to Bam and the appellant. A further observation to be made is that during the negotiations changes were made only to the clauses relating to payments, the amounts thereof and their structure. This despite material developments in the relationship between appellant and L.H.D.A. in so far as the conclusion of Contract 65 was concerned.

[24] The use of the name A.C.P.M. in the RA did of course have the effect of disguising the true identity of the person appellant wished to use as a representative and the fact that money was being paid to Bam. Indeed the appellant knew that it was paying Bam and not A.C.P.M. The witness Hare said so and the documentation disclosed by the appellant demonstrates that the appellant knew the true identity of the payee when it made payments to Bam. Despite Hare's protestations to the contrary, it is certainly a reasonable inference to be drawn from these facts that the change from identifying Lescon - known to be Bam's firm - as the appellant's representative - to A.C.P.M. was deliberately designed to obscure the true identity of the person to whom the appellant was making payments. Indeed had it not been for the discovery of Sole's Swiss

banking records, the link between the payments made by the appellant to Bam and thence to Sole would never have been discovered.

[25] Counsel for the appellant contended that the Court should not draw the inference that this substitution was a deliberate effort at concealment on the part of the appellant and Bam. However, Hare's evidence that the fact of the concealment of Bam's identity did not arouse his suspicion was correctly in our view rejected by the trial court.

[26] This inference is buttressed by other facts. At the time this contract was negotiated it was a notorious fact that the records of Swiss banks were secret and were regarded as a safe haven for "hot" money. Whilst reasons could be advanced why payment in a foreign currency, such as the then dominant currency - the US dollar - should be nominated as the monetary unit for payments under the contractual obligations, no acceptable reason was advanced why the payments should have been made to a non-existent agency called A.C.P.M., in a nominated Swiss bank account number. The objective of this device could certainly sustain the inference that it was intended to hide the true identity of the recipient. It is therefore a reasonable inference to be drawn in the absence of an acceptable explanation that the underpinning of these payments was an illegal and not a regular or transparent transaction. Hare, who was involved in the structuring of the RA, must have been aware that Bam, who was insistent on the concealment of his identity and who required that he be paid into numbered accounts in Switzerland, was making the appellant a party to an unlawful transaction.

[27] There is also evidence that the parties themselves viewed the transaction as one that had to be recorded in communications between them in obscure or opaque terminology. Thus Bam writes to Hare in a hand-written communication dated the 4th of June 1991 as follows:

> "Dear Mr. Hare,
> Following our discussions earlier today please accept this letter as confirmation that:
> - Submissions be made on a three monthly basis;
> - the address for submissions has changed twice from the original, to the one communicated to you o/a 26 May, which works properly I confirmed today.
>
> Thank you,
> Yours sincerely
>
> Z.M. BAM.
> (A.C.P.M)" (emphasis added).

The court a quo, in our view correctly, rejected Hare's protestations that the relationship with Bam was untainted and that payments were made to him as remuneration for lawful services rendered as a representative. This communication is a further and devastating demonstration of Hare's mendacity. What possible purpose could there be for using the term "submissions" if this was a transparent payment made pursuant to a valid and regular agreement and in accordance with acceptable international practice?

[28] That there was an attempt to present this agreement as regular and in conformity with the normal provisions of agency contracts is evident from the request by Hare for a bank guarantee from A.C.P.M. Whatever purpose could such a guarantee have served? A.C.P.M. did not exist as a corporate structure. It was only a designation of convenience and proceedings for the enforcement of such a guarantee would have been fruitless. Indeed, in view of the fact that A.C.P.M. did not exist, the appellant could not and did not make any payment whatsoever in terms of the RA.

[29] We come to deal with the obligations undertaken by the "representative" in the RA. This in effect was Bam, because Hare conceded that he was the person whose services were under consideration. They are contained in Schedule 1 of the contract and remained unchanged from draft 1 to draft 5 - the final and signed contract. This schedule reads as follows:

"**Schedule 1**
The Services

ACPM shall perform for ACRES the following services with respect to the Lesotho Highlands Water Project - Technical Assistance Contract Engineering 2 - 1990-1996.

1. Keep ACRES informed of all developments with respect to the services.
2. Keep ACRES informed of general conditions and developments in Lesotho which could affect ACRES interest in undertaking the services or which could adversely affect ACRES ability to complete the services in a fully effective manner.
3. Make ACRES known to and assist if necessary in registering ACRES with appropriate agencies and staff.
4. When requested by ACRES, collect appropriate documents and information for forwarding to ACRES.
5. Promote ACRES interests in Lesotho by presenting brochures and other publicity material to appropriate officials.
6. Assist ACRES in seeking, negotiating and securing a contract or contracts in Lesotho for the performance of the services.
7. Assist ACRES in the conduct of business, financial and other affairs of ACRES in Lesotho so as to meet the legal requirements of the Government of Lesotho and properly and lawfully to minimise taxes and other public impositions to be met by ACRES.
8. Provide to ACRES support facilities in regard to office, secretarial, accounting, banking, telecommunication and other such matters as mutually agreed from time to time.
9. Assist ACRES maintain good relationships with LHDA and assist in expediting payments due to ACRES in accordance with its Agreements with LHDA."

[30] The genuineness of the agency contract would be best evidenced by proof that the services to be delivered by this mandate:

i) Were genuinely required by the consultant concerned;
ii) Could be delivered by the representative;
iii) Were in fact delivered; and
iv) Generated remuneration that was commensurate with the anticipated and the actual service delivery.

30.1 Mr. Putsoane testified that:
(i) There was no need for the services described in the agreement to be delivered by a representative acting on behalf of the appellant.
(ii) There was no record of any involvement of A.C.P.M. in respect of Contract 65 and he was unaware of the existence of such an entity.
(iii) He was unaware of Bam ever performing any such duties for the appellant.

30.2 In so far as 30.1 (i) above was concerned the witness testified that the appellant would not have such a need as they were as a team integrated into the L.H.D.A. Their "top man" was the closest to the C.E.O. (Sole) at a working level. They - the L.H.D.A. team - worked in the same offices with them and there was no need for the services of a representative. Moreover by the time the R.A. was signed in November 1990 the terms of and the parties to Contract 65 had already been settled - all that remained was for the contract to be signed. Mobilisation had already taken place and the effective date of that contract was 1 August 1990.

30.3 The defence case as put to the witness was that what the agency agreement obligated its representative to do was to provide "political intelligence". This was the explanation appellants gave to the World Bank in an inquiry that body initiated. It was to this mast that also Hare nailed his colours. Counsel for the appellants urged us to find that paras (1) and (2) of the RA obligated the representative to provide such a service ("political intelligence"). In so far as para. 1 is concerned we are unable to construe the contract in this strained and artificial manner. Thus, as in para. 2, the agreement defines the duties to relate to the "services", the undertaking thereof and the ability to complete the services in a "fully effective manner". This paragraph makes no explicit provision that would oblige the agent to "deliver political intelligence" as it would have done if that had been the intention. It was conceded that in respect of paras 3,5,7 and 8 no evidence was adduced that Bam/ACPM ever delivered any services.

We are unable to find any acceptable evidence that appellant needed, or that Bam supplied the services specified in paras 6 and 9 in respect of "the services to be provided under Contract 65". There is thus simply no obligation in the agreement on him to provide the one service the appellant alleges he was obligated to do. The terms of this schedule read as a whole were completely inappropriate for the services the appellant suggested Bam was to perform.

30.4 Appellant's counsel sought in the main to place his reliance on the witness Hare's evidence. It has already been recorded that the court a quo rejected his evidence as unworthy of any credence. We referred above to aspects of Hare's evidence that speak of mendacity. A careful reading of his evidence and that of the witness Brown tendered to support him - and also rejected by the court a quo - convinces us that this rejection was fully justified. Their strenuous attempts on the flimsiest of grounds to advance the defence case, seriously undermined their credibility. Hare's insistence, in the light of the evidence of the payments by Bam to Sole (as evidenced by Exh. K4) to defend Bam's conduct and to continue to assert that he was a man of the highest integrity was both indefensible and unacceptable.

[31] It was also contended by the appellant that:
(1) It was standard international practice to appoint representatives;
(2) Bam was eminently suitable to fulfil this function;
(3) The cost of his remuneration was in any event built into the contract price and did not have a material impact on the profitability of the services rendered by him; and that
(4) Bam indeed did render services in terms of the RA.

[32] For present purposes it will be accepted that contractors do use representatives when they work on foreign soil. However, it is clear from the evidence that this is not an invariable practice. It speaks for itself that no honest contractor will appoint an agent unless it needs one. Argument was addressed to us that the manner in which the contract price was structured meant that the costs of the employment of a representative *in casu* had no impact on the profit generated for the appellant. Even on this assumption, we find it difficult to accept that a contractor would enter into a bona fide representative agreement which would oblige it to pay what equates to 25% or more of its profit, merely because it was not for its account, unless it had good reasons to do so. Whether the charge-out of C.A.D. 682,000 (rounded off) was wholly, partially or not at all debited to the account of the contractor, it had to be paid by someone. If it was for the account of the L.H.D.A. and ultimately for the World Bank or other development agency, it would be most reprehensible for a contractor to levy such a charge unless it had reasonable grounds for believing that it needed such services and would receive value for such a substantial investment.

[33] Moreover it becomes incomprehensible that it would proceed and continue for six years to do so when it received little or no benefit from the arrangement. We have considered the references counsel advanced in argument to sustain the contention that Bam did on isolated occasions give advice which related to an issue that was of some concern to the appellant. However on such evidence as is on record, conceded by counsel for the appellant to be flimsy, we have no doubt that Bam rendered no significant services for the appellant under the RA. Bearing in mind that Contract 65 was already "in the bag" when the RA was concluded (this is common cause), Bam could have played no role in securing

the contract and in fact played no such role. During the first 3-4 years that the appellant was engaged on this contract, Bam was in full-time employment in Botswana. The Crown evidence justifiably relied on by the court below, made it clear that in view of the appellant's extensive and lengthy involvement in Lesotho during the eighties, there was no need for a representative and that Bam did not render the services mandated in the RA.

[34] It follows that for these reasons the appellants failed to discharge the evidential burden that a representative was necessary, that Bam was an appropriate person to be appointed or that he rendered any significant services. Moreover the substantial payments made to him were in any event out of all proportion to either the contracted services or such services as he may have rendered independently of his obligations under the RA.

[35] We now deal with the "pattern of payments" from the appellant to Bam, its significance and the attempt to explain the inferences that could be drawn from these payments. As can be seen from Exhibits K1 and K4, and as admitted by the appellant, the monies paid by the appellant into the Swiss Bank accounts were generally divided between Bam and Sole on a 60% allocation to Sole; 40% being retained by Bam. The transfers made to Sole by Bam were generally made on the same day as he received the payments from the appellant. From January 1997 these regular payments, being a monthly honorarium of CAD 7 800, were reduced to CAD 3 500.

This constituted approximately 40% of the originally agreed amount as provided in the RA. It will be remembered that Sole had been first suspended in October 1994 and then dismissed from his post in October 1995. He mounted a court challenge which was dismissed in October 1996, but reasons were only given in January 1997. Counsel for the Crown contended that the reduction in the payments to Bam at this time is supportive of the inference that the appellant knew, not only that their payments were being channelled to Sole by Bam, but that the appellant also knew how these payments were to be divided.

[36] The evidence of the Swiss Bank records and of the forensic report (K1) of the Crown witness Roux would, in the absence of an acceptable explanation, constitute damning support for the Crown's contention. The court a quo found accordingly. A concerted effort was therefore mounted to challenge the correctness of the inference drawn by the court a quo with reliance upon the contents of Exhibit "L" as supported by the evidence of the defence witness Gibbs. This evidence was adduced in an attempt to prove that the payments were reduced in conformity with the provisions of the RA and it was urged upon us for the same reason.

Appellant contended that the reduction was triggered by the fact that at that time (January 1997) the percentage payable to Bam by the appellant exceeded the 3.6% provided for in the RA. However, the attempt to address this

discrepancy was only effected by Mr. Gibbs on the 3rd of July 1997 when he wrote a memorandum to the appellant's representative in Maseru that it "does not seem feasible" to continue to pay A.C.P.M. CAD 7 826,09 per month. He suggested reducing the amount to CAD 3,500 per month as from January 1997, to be paid every three months.

[37] A reading of Gibbs' evidence leaves us unconvinced as to the sustainability of his reasoning for the reduction, for its timing and the quantum thereof. It is an extraordinary coincidence that the reduction is mooted in July 1997 - some 6 months after Sole's review application had been disposed of and his appeal against such decision abandoned and became operative retrospectively from January 1997. Sole was as from that date no longer in a position to perform any services for the appellant. However, this coincidence is compounded by a second one. The quantum of the reduction equates to that share of the appellant's payments that Bam had previously channelled to Sole. Moreover, the RA itself does not appear to us to justify a reduction in the payments as contended for. There is therefore considerable force in counsel for the Crown's submission that the reduction is arbitrary and not made in conformity with the RA. Certainly, the evidence of the witness Claasens called by the Crown and accepted by the court a quo is strongly supportive of this contention.

[38] For these reasons it is our view that the court a quo was entitled to infer as it did; i.e. that the reduction in the payments was effected because Sole was no longer in a position to favour the appellant in the services it was obligated to perform or might in future be called upon to perform. The appellant could not cease to make payments to Bam because it was clearly obligated to do so in terms of a contract to which it was a party - albeit not for its avowed purpose.

[39] We should add that the fact of these coincidences between the RA and its de facto external manifestations do not necessarily point to the legality or probity of its purpose. As we pointed out above, the agreement did obligate the appellant to pay as per its terms. This conformity does not establish the validity of the RA. It is one of the neutral manifestations referred to in the analysis of the law set out above. These could not be accorded any weight one way or the other.

[40] The Crown also relied upon a range of other factors that it contended supported the inference to be drawn that the appellant made the payments to Bam, knowing that they were, at least in part, intended to be used to bribe Sole. Amongst these were the occasions Sole departed from the prescribed procedures of the Treaty and the contractual obligations and controls that it imposed on the L.H.D.A. and its chief executive. Some of the approvals in the processing of Contract 69 were given by Sole without regard to these procedural checks. The minutes of the J.P.T.C. reflect their discontent with the rough-shod manner in which Sole disregarded the monitoring and approval safeguards in the process of the approvals, the mobilisation, the issuing of the M.O.U. and the letter of intent to the appellant. The Crown also pointed to the chronology in

which various events occurred as a supportive consideration for its contentions. These events can certainly be construed as indications that Sole had manoeuvred the approvals and the payments thereunder in such a manner so as to place the appellants at risk. The unacceptable delays to obtain signed approvals must have been particularly irksome and exposed the appellants to the unilateral exercise of discretion by Sole. However, these and the other less weighty considerations do not in our view require separate debate and determination. We have also considered other submissions and arguments advanced by counsel [for the] appellant. An example of these is the reliance counsel sought to place on an inadmissible affidavit by a Mr. Witherall a senior employee engaged on the project by the appellant. This and similar submissions do not in our view justify individual debate.

[41] We say this, because we have acted as this Court laid down in *Moshephi and Others v Rex* (above). We have done "a detailed and critical examination of each and every (significant) component in (the) body of evidence". We have "step(ped) back a pace and considered the mosaic as a whole", to ensure that we do not err and "fail to see the wood for the trees". We are of the view that the appellant did not succeed in discharging the evidential burden that rested upon it to advance a satisfactory explanation for the substantial body of evidence that points to the fact that it was a party to the bribery of Sole.

[42] The inferences which the trial court was entitled to draw must now be related to the two charges as contained in the indictment. As appears above, the Crown chose to separate the payments made to Mrs. Bam from those made to Bam. They accordingly charged the appellant on two counts. It is clear that in the light of our findings the conviction on count 1 is upheld and the appeal on this count is dismissed.

[43] There is however a significant distinction between the two counts. It was established by the investigation of the witness Roux that the monies paid into Mrs. Bam's account as particularised in count 2 were never, either in whole or any part thereof, paid to Sole. It is common cause that this payment was in due course transferred to another Swiss bank account in the name of Bam where it remained for some 7 years until in 1998 it was transferred to an account in London. At this point the money trail disappeared.

[44] This means that in respect of this count one of the most significant elements of the Crown case admitted and proved in respect of count 1, is missing. One of the factors the Court is entitled to take into consideration in drawing an inference of guilt on count 1, is the link between the payments to Bam and from him to Sole. The question is, can the Court infer an intention to bribe Sole on the part of the appellant, when in contra-distinction to all the other payments, this, the first and largest single payment did not, either in whole or in part as far as can be determined on the evidence go to Sole.

[45] The Crown's submission was that in the absence of an explanation for this payment the Court a quo was right in all the circumstances in inferring that the same intention must be ascribed to this payment as to the payments charged under count 1.

Counsel referred us in this regard to the definition of the common law crime of bribery as formulated by the courts in Southern Africa. The leading case in this regard is *R. v Patel* 1944 A.D. 511. At p.521 Feetham JA endorses the following statement as a "sufficient working definition of bribery":

> "It is a crime at common law for any person to offer or to give to an official of the State, or for any such official to receive from any person, any unauthorised consideration in respect of such official doing, or abstaining from, or having done or abstained from, any act in his official capacity".

We were also referred to the Chapter "Bribery" in Vol. 12 of the *American Jurisprudence* 2nd ed, page 752 para. 6 where the following is said:

> "The existence of a corrupt intent to influence, or be influenced in, the discharge of official duties is a necessary element of the crime of bribery. The corrupt intent need not exist in the mind of both parties to the offer, solicitation, or passage of money, however. It is sufficient if the intent exists in the mind of either, the one having the corrupt intent being guilty."

[46] The indictment is quite specific. It specifies that the appellant made the payment with the intention to bribe Sole. It is clear, therefore, that in order to prove the guilt of the appellant on count 2, the Crown has to prove that when appellant made the payment of CAD180,000,000 into a Swiss bank account, it intended the payee to transfer all or some of those monies to Sole. It is not necessary for proof of the conviction of the crime of bribery to prove that the benefit was in fact handed over. The crime of corruption is completed the moment an agreement or even a mere offer is made to hand over the benefit (see Snyman, *Criminal Law*, 3rd ed, pages 362-365 and the cases cited *op. cit)*.

[47] While it has been established that the appellant's explanation - namely that this too was a payment in terms of a valid RA - has been found to be unacceptable, the question is whether on the evidence viewed as a whole, the only reasonable inference to be drawn is that when the appellant made this payment it intended all or some of the benefit to go to Sole. This may have been and probably was the intention. However, can a court on the evidence find this proved beyond a reasonable doubt? Counsel submitted that it has been proved that all the other payments were made with this intention and that this enhances the probability that this payment was also made for this purpose - more particularly since no explanation for this payment has been given.

[48] The latter consideration is certainly one which has considerable significance. The former contention is, however, a double-edged sword. Why does Bam not

transfer any part of this money to Sole if it was the true objective of the payment, and then does so promptly on receipt of all subsequent payments in a consistent and defined pattern? The first payment is made several months before the other payments, it is a single, discreet and distinctive payment unrelated to the other transactions which are the subject of count 1 and which we have found to have been paid by the appellant with an intent to corrupt Sole.

[49] Having "step(ped) back a pace" and "having considered the mosaic as whole" - see the *Moshephi* decision cited above - we concluded that on the facts of this case viewed as a totality, a piece of the mosaic is missing. It is our view that we cannot hold that the only reasonable inference to be drawn is that when making this payment the appellant intended the payment or part thereof to be paid to Sole. We therefore find that there is a reasonable doubt that this was the appellant's intention in making this payment.

[50] In the result the conviction on Count 1 is confirmed and the appeal is dismissed. The appeal on Count 2 succeeds and the conviction is set aside.

[51] We come to deal with sentence. The appellant was sentenced to pay a fine of M22,058,091.00. This amount represents what the court a quo said was appellant's profit under Contract 65, plus the amount appellant paid to Bam as alleged in counts 1 and 2. These two counts were taken together for purposes of sentence.

[52] It is an established principle of our law that sentence in a criminal case is pre-eminently a matter for the discretion of the trial court. An appellate court will not interfere, save where there is a material misdirection resulting in a miscarriage of justice or the sentence is so unduly severe as to compel interference.

[53] It is also trite that when sentencing an accused person the court must have regard to the triad consisting of the crime, the offender and the interests of society. As Holmes JA put it in *S. v. Rabie* 1975 (4) SA 855 (A) at 862:

> "Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances."

[54] The appellant in its grounds of appeal complained that the court a quo failed to take into account the consequences of the bribery conviction on the appellant. It was submitted that the court overemphasised what it perceived to be aggravating circumstances and the need for deterrence.

[55] Before dealing with these criticisms, we need to consider the approach a court should adopt when seeking to measure an appropriate punishment for a corporation. It is our view that as a matter of principle the approach of the trial

court in having regard to the profit the appellant made in respect of the tainted transaction when determining its sentence cannot be faulted. Support for such an approach is to be found in the decision of the South African Court of Appeal in *S. v. Scheepers* 1977 (2) S.A. 156 (A). At page159 the Court says the following (in translation):

> "In my opinion the imposition of a fine is a particularly appropriate punishment in a case like the present where the appellant's unlawful conduct was directed towards monetary gain. Where materialism as motive plays a big part in the unlawful conduct it is usually a hard blow to the offender if he has to part with his illegally gained profits or if that which he held out as a prospect to himself is converted to a loss. This complies with the requirements of retribution as well as deterrence."

[56] It would be wrong however if, in having regard to such a consideration, a court were to ignore other relevant considerations and to settle upon a monetary sentence simply equated to the financial benefits reaped by a convicted corporation.

[57] Similarly, and once again as a matter of principle, the trial court's approach in having regard to the need to consistency between offenders convicted of the same crime cannot be faulted. In *Molapo v. Rex* 1999-2000 L.L.R. and L.B. 316 at 321, this Court said the following:

> "However, in determining sentence the following factors must in our view also be taken into account:
> 1. Offenders who have the same or similar degrees of moral guilt and involvement in the commission of a crime, should, in the absence of circumstances that justify discrimination, be treated equally. The Court's impartiality and fairness could be seriously questioned if marked disparities between offenders whose moral guilt is indistinguishable from one another were to occur. The fact that the appellant's co-conspirators were each sentenced to 2 years imprisonment and that the appellant's guilt is certainly no greater than theirs is therefore a compelling factor in determining his sentence."

[58] In a case such as the present where a very lengthy period of imprisonment has been imposed on Sole - a natural person - it is a well-nigh impossible task to settle upon a monetary punishment that would equate to a sentence of e.g. 12 years imprisonment. We believe the court's attention should be more properly directed at determining a fair punishment having regard to all the relevant considerations, both aggravating and mitigating.

[59] In embarking upon this process, we believe that we are obliged to do so afresh. We say this because of two considerations. Firstly, we have only convicted the appellant on one of the two counts on which he was convicted in

the trial court. Even though that court took the two convictions together for purposes of sentence, the degree of the moral guilt of the appellant must be regarded as diminished to the relevant extent.

[60] Secondly, the trial court, with considerable justification, took into account several aggravating circumstances which it listed in its judgment. Having done so, it concluded as follows:

> "As has often been said, it is easier to reach a verdict in a criminal trial than consider what would be the right punishment to suit the offence taking all factors pertinent to the case into account, including the post-verdict and a new procedure altogether that has to take into account the personal circumstances of the accused. In this regard I paid particular attention to Mr Alkema's submissions. The question of conviction alone is a far-reaching punishment, because Acres will be unlikely to secure contracts funded by the World Bank. While I do accept this proposition, I find the proposition compelling on the other hand that bribery whose essential character is that it renders detection wellnigh (*sic*) impossible and conviction such a rare event that on that score it may well be worth risking by those participating in it for the benefit they reap therefrom, would be best discouraged by sending a clear message that participants in it should not be so foolhardy as to even think of taking such a risk."

[61] We are of the opinion that in the articulation of its motivation for the sentence it imposed, the court tended to over-emphasise the aggravating features of the appellant's conduct and to minimise the mitigating features evident on the record. These are, *inter alia*, the extra-curial impact the conviction will have not only on the corporation itself but also on its employees who number some 1 000 persons. The reputation of the appellant will be sullied by the conviction and it will live in the shadow of the taint of the corruption. As an international corporation it is to a considerable extent dependent on project activities undertaken and funded by development agencies both international such as the World Bank and by national governments. Its capacity to be gainfully involved in such work will for some time be seriously and negatively impacted. Such profits as it may have made on Contract 65, will we are certain, be dissipated by not only the very large fine we intend to impose, but also by all the costs it incurred in the various protracted proceedings not only in these courts, but also before the World Bank. Its travails are also by no means over. An embargo by the World Bank and other institutions such as e.g. donor agencies is no remote possibility.

[62] Having said that, the gravity of the offence must not be under-estimated; both generally and also particularly in relation to this project and this country. The devastating impact bribery has on society was dealt with in an affidavit by the witness Camerer which served before the trial court. The witness is a policy researcher and analyst with focused experience and expertise concerning corruption and its consequences, particularly on developing societies. She said:

> "Corruption, defined as the abuse of public power for private gain, is of growing international and regional concern. In a context of political and economic globalisation we are all affected. Corruption is not a victimless crime, but negatively affects a number of people, mainly the poor. While corruption is a feature of all societies to varying degrees it has a particularly devastating impact on development and good governance in developing countries in Africa, because it undermines economic growth, discourages foreign investment and reduces the optimal utilisation of limited resources available for infrastructure, public services and anti-poverty programs. It may also undermine political institutions by weakening the legitimacy and accountability of governments."

[63] Courts in Southern Africa have also taken a serious view of this offence. In *S. v. Narker* 1975 (1) SA 583 (A), at 586 the Court describes bribery as a "corrupt and ugly offence, striking cancerously at the roots of justice and integrity" and that it is calculated to deprive society of fair administration. The Court confirmed that they view the crime with abhorrence. See also *S. v Kelly* 1980 (3) SA 301 (A) at 313.

[64] This Court in *R. v Sole* said that: "corruption is inimical to sound public administration, itself essential to the strength of constitutional democracy; it also threatens investor confidence, development projects and employment including in Lesotho". We endorse these sentiments. Lesotho is a small land-locked country. It has limited resources. Its economic development was seriously damaged because of the policies and actions of its large and powerful neighbour and the sanctions imposed on that country. The L.H.W.P. was a visionary initiative to put the country back on the road to recovery. Its cynical exploitation by the appellant - motivated as it was by greed - is the more reprehensible.

[65] Having said that, we are mindful of the need "not to approach punishment in a spirit of anger". Corbett JA (as he then was) said the following in *S. v. Rabie* (above) at pp.865-866:

> "In his *Commentary on the Pandects,* 5.1.57, Voet writes on the need for Judges to be free from hatred, friendship, anger, pity and avarice. In a note on this section in his *Supplement* to the Commentary (published in 1973) Van der Linden makes interesting reference to the views of a number of writers, classical and otherwise, as to the proper judicial attitude of mind towards punishment. (A translation of this particular note conveniently appears in the *Selective Voet* - Gane's translation, vol. 2, at p. 72). The note (quoting Gane's translation) commences:
>
> > 'It is true, as Cicero says in his work on *Duties*, bk. 1, ch. 25, that anger should be especially kept down in punishing, because he who comes to punishment in wrath will never hold that middle

course which lies between the too much and the too little. It is true also that it would be desirable that they who hold the office of Judges should be like the laws, which approach punishment not in a spirit of anger but in one of equity.'

Van den Linden further notes that among the most harmful faults of Judges is, *inter alia*, a striving after severity (*severitatis affectatio*). Apropos this, a passage is quoted from Seneca on *Mercy*, including the declaration: 'Severity I keep concealed, mercy ever ready' (*severitatem abditam, clementiam in promptu habeo). Van den Linden* concludes with a warning that misplaced pity (*intempestiva misericordia*) is no less to be censured.

Despite their antiquity these wise remarks contain much that is relevant to contemporary circumstances. (They were referred to, with approval, in *S. v. Zinn,* 1969 (2) S.A. 537 (A.D.) at p.541). A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case."

[66] As indicated above we are at large to impose what we believe to be a proper sentence. The fact of the conviction is in itself perhaps more important than any sentence we could pass. It demonstrates to those who do business in developing countries that they do not have a licence to buy favours from governments by making corrupt payments to persons in authority. If they do so, they will be vigorously prosecuted and if found guilty fairly but severely punished.

[67] In launching the prosecution in respect of the criminal activities of developers and the officials engaged on this project, the Lesotho authorities demonstrated courage, determination and competence. It has been an arduous task. However they set an example of good governance and have delivered a blow on behalf of all countries who face major challenges in strengthening their infrastructure through project activity. This Court particularly commends the Director of Public Prosecutions and his team for their dedicated and resolute efforts.

[68] So that, whilst the prosecution and the conviction are milestones on the road hopefully to greater morality in the initiation and management of development activity, a significant deterrent sentence is called for this premeditated and

carefully planned criminal act. In our view a sentence of a fine of M15 million would meet the requirements and criteria laid down for the determination of a fair sentence.

[69] For these reasons this Court makes the following Order:

The appeal against the conviction on Count 1 is dismissed;
The appeal against the conviction on Count 2 is upheld and the conviction is set aside;
The appeal against the sentence is upheld and altered to read:

The accused is sentenced to the payment of a fine of 15 Million Maloti.

Criminal Law -- bribery -- appeal against conviction and sentence
Representation agreement -- factors to be considered when determining genuineness of agreement
Evidence -- admissibility -- evidence of payments by other contractors to intermediary -- whether evidence against the appellant
Sentence -- appropriate procedure for determining sentence for corporation
Sentence -- need for deterrent sentence -- need to take into account both aggravating and mitigating features

LAHMEYER INTERNATIONAL GmbH v THE CROWN

Court of Appeal of Lesotho
Steyn, P, Grosskopf and Smalberger, JJA

Executive Summary

STEYN, P gave the judgment of the court
[1] The appellant, Lahmeyer International GmbH ("Lahmeyer"), appeared in summary proceedings in the High Court before Mofolo J and two assessors on twelve counts of bribery allegedly committed over the period 21 December 1989 to 10 April 1997. At the conclusion of a protracted trial Lahmeyer was convicted on seven counts (being counts 2, 6, 7 and 9 to 12) and acquitted on the remaining five counts. It was sentenced to fines on each of the seven counts amounting to M10 650 000 in all. The present appeal is directed against Lahmeyer's convictions on all seven counts. There is no appeal by Lahmeyer against sentence. The Crown has noted a cross-appeal in respect of four of the counts on which Lahmeyer was acquitted. It also seeks to appeal against what it claims to be the leniency of the sentences imposed.

[2] The essence of the charges against Lahmeyer was that it, with intent to bribe, had from time to time paid varying sums of money into Swiss bank accounts held by one Z.M. Bam ("Bam") and his wife ("Mrs. Bam") who thereafter, acting as intermediaries, had transferred the amounts in question, or part thereof, to Mr. Sole ("Sole"), who at all material times was the Chief Executive Officer of the Lesotho Highlands Development Authority ("the LHDA") and a civil servant in the employ of the Lesotho Government (and as such a public official). The Crown alleged that the payments in question were made in respect of action or inaction by Sole in his aforesaid capacity and were intended to influence him in such capacity. That Sole was a public official is not in issue in the appeal.

[3] The L.H.W.P. is one of the biggest and most ambitious projects in the world and entailed *inter alia* the construction of the Katse Dam in a remote and inaccessible part of the Highlands

of Lesotho. The ambit and objects of the project are set out in the judgment. One of its principal purposes was the delivery of water to South Africa.

[4] It is not necessary to set out the details as to how Lahmeyer came to be involved in the project and how they developed a relationship with Bam referred to above. However, it is common cause that Lahmeyer paid Bam vast sums of money, some of which was on-paid to Sole. The amounts paid to Bam were substantial amounts in cash i.e. M1,495,590 and by way of bank transfers into Bam's Swiss Bank accounts some M804,213. In all rounded off the sum of M2,300,000. In terms of the charges before us payments from Bam to Sole were made from the bank transfers into Swiss bank accounts held by Sole.

[5] The crux of the present appeal is whether the payments to Bam, particularly those on paid to Sole, were bribes or were legitimate remuneration for agency work done by Bam under valid representative agreements. It was common cause that the question to be answered was: were these agreements genuine or were they shams calculated to disguise the true nature of the relationship - i.e. bribery?

[6] We have analysed the evidence extensively in the judgment (see para 15 at p.15 to para 44 at p.39). We proceed to pose the ultimate question at para 45 - p.39 of the judgment, where we say :

> "… in the light of all the evidence adduced at the trial, was Lahmeyer's guilt established beyond reasonable doubt?"

We go on to say that : "This translates into whether the only reasonable inference to be drawn consistent with all the facts, is that Lahmeyer bribed Sole."

[7] We then conclude as follows:

> "[46] It is common cause that the evidence with regard to counts 6, 7 and 9 to 12 establishes a flow of money from Lahmeyer to Bam and in turn from Bam to Sole. It was conceded on behalf of Lahmeyer that bribery could have been the cause of the payments to Sole, but it was contended that this had not been proved beyond all reasonable doubt. We are satisfied on a conspectus of all the evidence, and having duly stepped back a pace to "consider the mosaic as a whole" that, applying accepted principles of inferential reasoning, the only reasonable inference to be drawn in the present matter is that Lahmeyer paid Bam money for the purpose of bribing Sole, that the money that was passed on to Sole by Bam in respect of the counts in question was in furtherance of that purpose and that the RAs [representation agreements] were not genuine in that they were primarily entered into as devices to disguise the true relationship between Lahmeyer and Bam and to facilitate unlawful payments to Sole. In the result Lahmeyer's appeal against its conviction on counts 6, 7 and 9 to 12 falls to be dismissed."

[8] We then deal with count 2 and conclude as follows at para 57 p.44:

"[51] In our view the Crown has failed to prove any link between Lahmeyer's payment of FF135 760 to Bam and Bam's payment of FRF 458 600 to Sole. The probabilities in fact show that the payment to Sole derived from Acres and not from Lahmeyer. In the circumstances the Crown has failed to proved its case on count 2 and Lahmeyer's appeal against its conviction on count 2 accordingly succeeds."

[9] The Cross Appeal by the Crown
Counsel for Lahmeyer contended that the Crown did not have a right to appeal in accordance with the provisions of section 7(2) of the Court of Appeal Act (Act 10 of 1978) which limits the right of the Crown to appeal only "upon a point of law". This provision was however amended by Act 8 of 1985. As a consequence the Crown now has the same rights of appeal as an accused, i.e. it can appeal on any matter of fact or law.

[10] The Crown cross-appealed on counts 3, 4, 5, and 8 on which the High Court acquitted Lahmeyer. We hold that the Crown's appeal succeeds on counts 3 and 5 and is dismissed in respect of counts 4 and 8.

[11] Sentence
We deal with the various considerations that should be borne in mind by a Court of Appeal in general, and by this Court on the facts of this case in particular.