

Corruption on the Lesotho Highlands Water Project – a case study

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Presentation Structure

- 1. *Lesotho Highlands Water Project (LHWP)***
- 2. *The corruption trials – an overview***
 - *Outline of the offence***
 - *Factors to be decided prior to the trial***
 - *The legal arguments***
- 3. *Discussion & conclusion***
 - Factors promoting the prosecution of bribery**
 - Factors hindering the prosecution of bribery.**

Five completed trials:

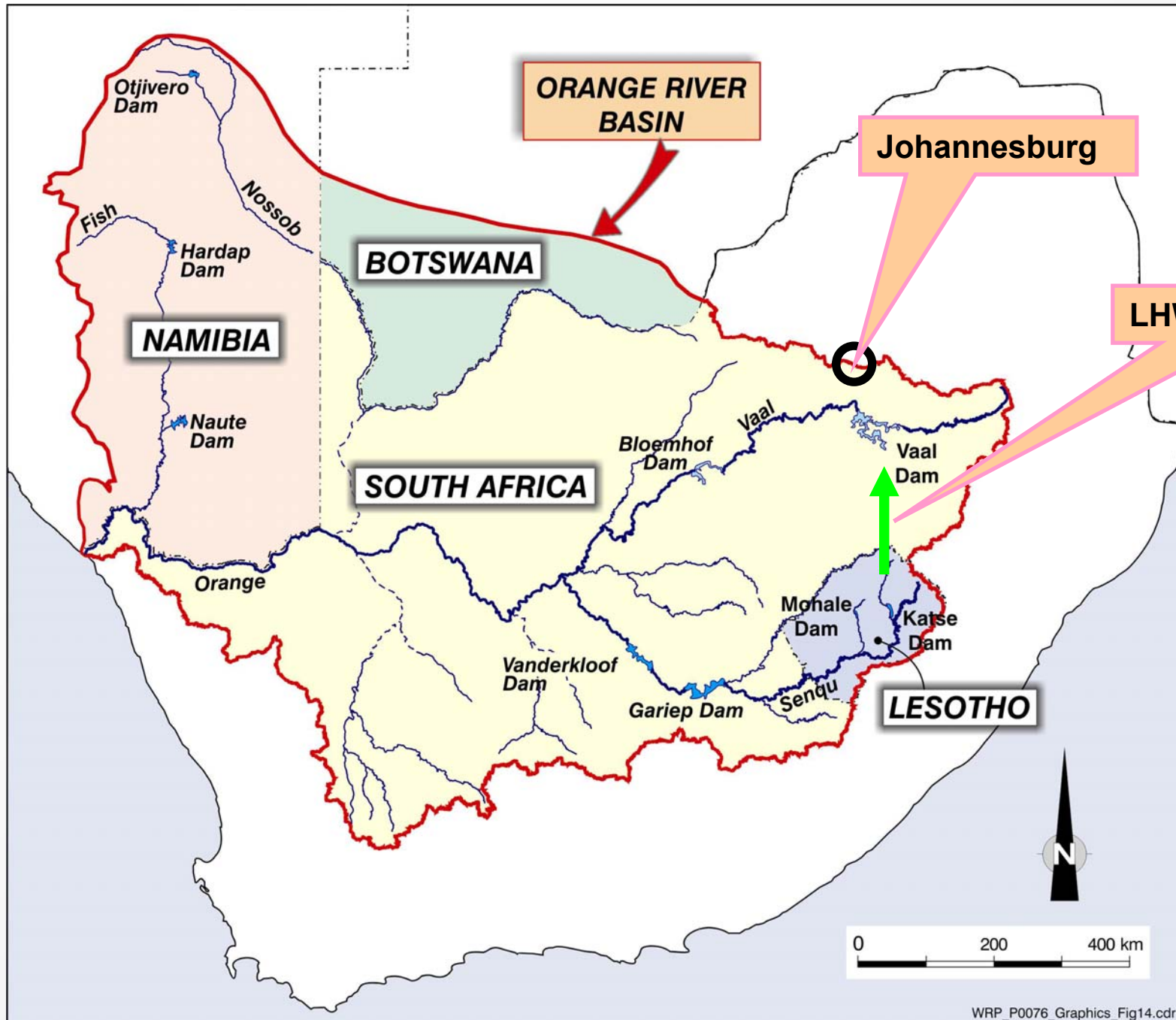
- Sole (Basotho individual) – fined M8.9 mil + 15 year sentence
- Acres (Canadian company) – fined M15 mil
- Lahmeyer (German company) – fined M12 mil
- Spie Batignolles (French company) – fined M10 mil
- Du Plooy (South African individual) – fined M500,000

Statements made in this presentation are primarily drawn from the public court documents from the above trials

Note: \$1 = M7 (maloti) = R7.

The LHWP (1)

- The largest international water transfer in the world
- Aim: provide extra water to Johannesburg by transferring it from the Orange to the Vaal river & generate electricity for Lesotho
- The Orange River flows into SA – thus Lesotho is providing high altitude storage capacity
- Lesotho receives royalties for the water = \$31 mil in 2004 – about 5% of its GDP
- Phase 1 created 4 dams & 110km of tunnels & cost about \$2 billion & transfers 750 mil m³ a year.





LHWP Treaty

- The idea of transferring water from Lesotho to SA originated in the 1920s - only formalised in 1986 with signing of the Treaty between the two countries
- Treaty covered all aspects of design, construction, operation & maintenance & institutions
- Three institutions created:
 1. Lesotho Highlands Development Authority (**LHDA**) – a Lesotho parastatal headed by Chief Executive (CE)
 2. Trans-Caledon Tunnel Authority (**TCTA**) – the SA parastatal responsible for components of the project in SA
 3. Joint Permanent Technical Commission (**JPTC**) – comprised of delegations of the two countries (later became the Lesotho Highlands Water Commission – LHWC).

JPTC Role

- Responsible for the overall supervision of the project
- Both the LHDA & the TCTA need to gain authority from the JPTC for operational plans, project works design, tender procedures, appointment of consultants or contractors & issuing of variation orders
- Authority over all professional & technical staff appointments, but not over the CEs of the two authorities.

Mr Sole

- Joined Lesotho public service in 1972 & progressed to position of Senior Engineer, Water Affairs by 1986.
- Seconded to the LHDA as its first CE in 1986 – a position of great power and responsibility
- He was, by accounts, a well liked & effective CE
- Questions were raised about his management style – specifically about staff appointments & finance
- A democratic government came to power in Lesotho in 1993 – and took steps towards good governance
- In 1993 the Minister of Natural Resources called for an audit of the LHDA affairs.

Investigations

- Irregularities related to Sole's affairs were identified in the audit – abusing the hosing scheme, charging personal expenses to work accounts, nepotism etc.
- These “irregularities” prompted the Minister to launch a full-scale disciplinary enquiry at the end of 1994
- Sole challenged, in the court, the Ministers' right to hold an enquiry – this he lost
- He was dismissed in 1995, went to court to appeal the dismissal & lost in January 1997 – formally terminating his tenure at the LHDA.

Mismanagement

- During the investigations & the attendant court challenges it became clear Sole was living beyond his means – classic “red flags” of corruption such as expensive cars, gifts & travel.
- Sole cost the LHDA money through the improper awarding of two contracts (129A & 129B) – forcing the LHDA to rely on commercial loans
- The Minister decided to re-coup this loss from Sole on the belief that Sole had the funds to pay compensation
- Civil action against Sole launched in 1996.

Bank Records

- In the trial Sole's banking records were exposed showing large movements of funds
- His bank manager testified that Sole had an, undeclared, bank account in South Africa
- The SA account showed large & regular payments from a Swiss bank account – believed to be Sole's
- With the easing of Swiss banking secrecy laws in the mid-1990s the Lesotho prosecutors were able to request access to the account (in 1997)
- This was fiercely opposed by Sole & some of the international companies on the project.

Civil Trial

- With the assistance of the Swiss authorities the Lesotho prosecution gained access to the banking records early in 1999
- The Swiss account showed that Sole had large funds at his disposal – a breakthrough for the trial
- In October 1999 the court awarded damages of M8.9 mil (\$1.3 mil) to LHDA against Sole
- This opened the way to Sole being tried for the common law offence of bribery – a criminal matter
- He was granted legal aid to stand trial.

Criminal trials

- Charges of bribery and fraud brought against 19 accused in July 1999 – including international engineering firms
- Judge Brendan Cullinan of Ireland (an ex Chief Justice of Lesotho) was brought out of retirement for the cases
- This was done to have a person with sufficient experience to handle the complex issues of the trials speedily & to counter any allegations of bias.

Criminal Trials (2)

According to Darroch (2003) four main issues for the judge to settle before the trials were:

1. Citation – whether the company or an individual should be named on the indictment. Ruled that the companies should be cited.
2. Joinder – who gets tried with whom? Defendants were successful in separating the trials.
3. Bribery – what has to be proved by the prosecution? Ruled that crime is committed when the agreement is made – no action on the part of the public official needs to be proved. Also – it has a demand & a supply side – both are guilty
4. Jurisdiction – where did the crime take place? Not possible to say – but the impacts of the crime were felt in Lesotho – thus jurisdiction in that country.

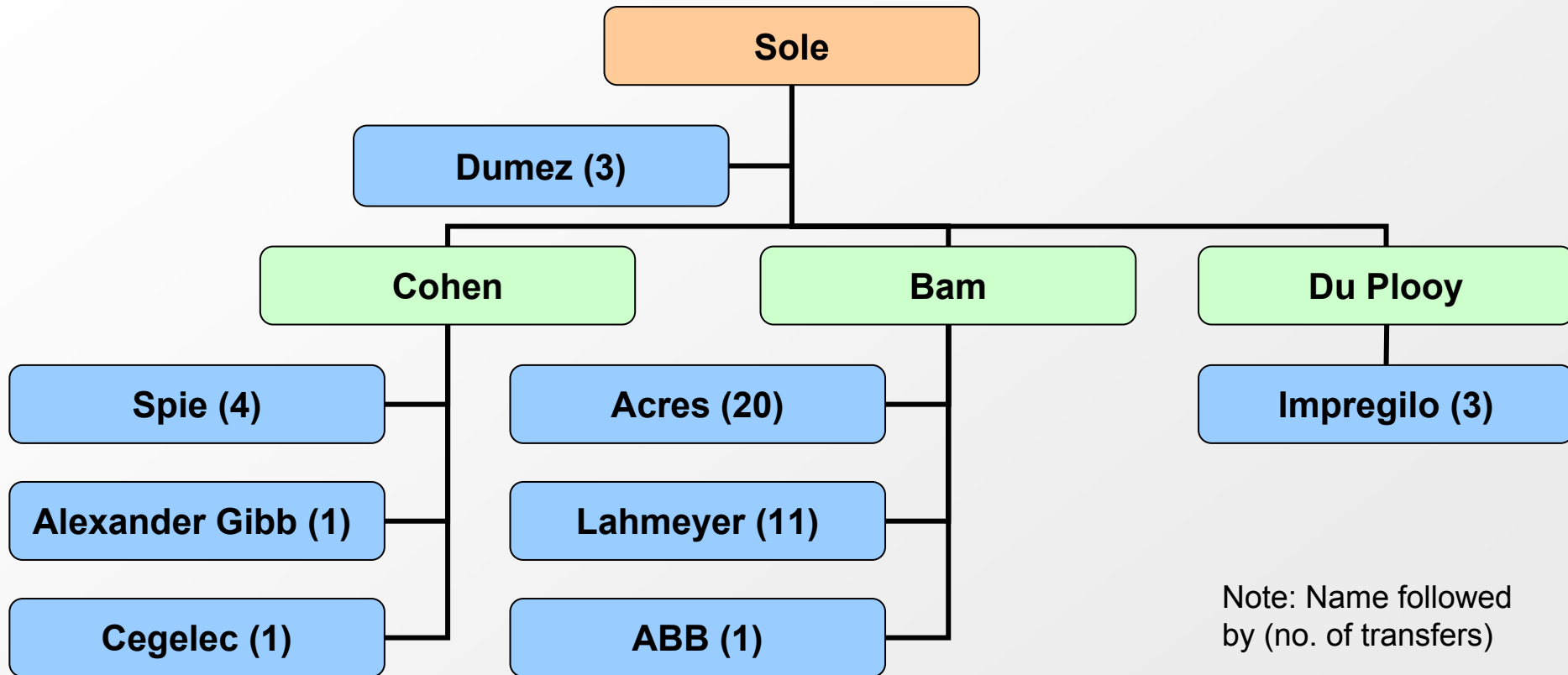
Representative Agent

- Payments were made from one of the companies to a representative agent (middle man) to Sole
- The prosecution had to prove that the money being paid to the agent was indeed intended for bribing Sole
- The defence team's case rested on the representative agreement (RA) – stating that the agent was providing certain legitimate services in return for compensation
- These included secretarial & translation services, local office space & promoting the name of the company
- The RA includes the “no duck – no dinner” clause – another corruption red flag.

The money web

- A forensic analysis of the accounts of the accused was carried out by PWC
- This showed movements of funds from one of the companies to the agent followed promptly by a transfer to Sole from the agent
- The ratios paid to Sole were kept the same:
 - Zalisiwonga Bam would pay 60%
 - Michiel Du Plooy would pay 50%
 - Max Cohen paid smaller & variable percentages
- Payments from Acres to Bam dropped by 60% on the month Sole lost his appeal against his dismissal.

Flow of funds – from PWC forensic analysis in Sole case judgement



Note: Name followed by (no. of transfers)

Prosecutions

- Taken individually the pieces of evidence may point towards innocence – but taken together they point to guilt (Judge Lehohla in the Acres judgement)
- Sole sentenced to 18 years – dropped to 15 on appeal
- The payments Acres made to Sole coincided with the period where the company was awarded a contract on a “sole source” basis – i.e. not put out to tender
- Acres was found guilty of bribing a public official & fined M15 mil (\$2.2 mil) making it the first MNC to be successfully tried outside of its home country.

Further prosecutions

- Lahmeyer was also found guilty & fined – the case benefiting from Du Plooy turning state witness
- The Spie case was complicated by name changes associated with company take-overs – the new firm (Schneider Electric) taking on the responsibilities of Spie, but another firm getting the Spie name
- Charges have been laid against Impregilo & more against Lahmeyer as well as another Lesotho official
- Following the successful prosecution of Acres the company was debarred in July 2004 for a period of 3 years of tendering for World Bank contracts – but was bought out by Hatch (Canada)
- LHWP has demanded that the bribes be paid back to the project – as they are a cost to the project (has been done by Spie).

Factors influencing the trials

Promoted the prosecution of bribery in the Lesotho case

- Changes to the Swiss banking law allowing some access to banking records
- World Bank records and outputs of their 2001 investigation into Acres
- French government cooperation (in the Spie Batignolles case)
- OLAF cooperation (in the Spie Batignolles case & others)
- Political support within Lesotho for the trials – no interference in the work of the prosecution team
- Bridging finance from the LHWP for the Impregilo trial has been secured.

Hindered the prosecution of bribery in the Lesotho case

- Company name changes
- World Bank letter requesting that Sole's suspension be lifted during his initial disciplinary investigation
- Lack of financial support for the trials from the international community
- The crime of "bribery" is not well defined in common law
- Until recently bribery of a foreign official was not a crime in most OECD countries
- Complicated and opaque banking arrangements of the accused.

Conclusions

- Demand side as well as supply side measures need to be instituted against bribery
- The Lesotho case shows what can be achieved when the political will to fight corruption is in place
- The trials have improved governance in the country
- In SA the TCTA have added a specific section to their pre-qualification and final contracts dealing with bribery. Firms must declare:
 - If they have been accused of bribery anywhere in the previous 10 years
 - That they have not & will not engage in bribery on this project
 - If the above is contravened the company loses its profits on the contract (deemed to be 5% of the project cost)
- Debarment from future IFI work is a credible threat.