

IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C OF A (CRI) 02/08

In the matter between:

THE CROWN

APPELLANT

And

**REATILE THABO MOCHEBELELE
LETLAFUOA T. MOLAPO**

**1STRESPONDENT
2NDRESPONDENT**

**CORAM: SMALBERGER, JA
MELUNSKY, JA
HOWIE, AJA**

**Heard : 1 October 2008
Delivered : 17 October 2008**

JUDGMENT

SUMMARY

Criminal law – bribery – accused charged with receiving payments from foreign company to induce them to advance its interests in competing for, and retaining, contracts connected with the Lesotho Highlands Water Project – acquittal – appeal by Crown.

Evidence – admissibility of statements made in execution of common purpose against other parties to that purpose – what such statements can be used to prove – weight to be attached to such statements.

Evidence – accomplice – whether corroborated in respects incriminating the accused.

Held – statements admissible and corroborate the accomplice – acquittal set aside and substituted by conviction as charged – Remittal to trial Court for sentence

HOWIE AJA

INTRODUCTION

[1] The Crown appeals against the acquittal of the respondents in the High Court on a charge of bribery. The case arose from the involvement of the respondents and a German engineering consultancy, Lahmeyer International GmbH/(Lahmeyer), in implementation of the Lesotho Highlands Water Project (the project). After hearing both the prosecution and defence cases, the trial court (Nomngongo J and assessors) concluded that the guilt of the respondents had not been established. Their acquittal was on 5 February 2008, the trial having commenced on 30 October 2006.

[2] The essence of the allegations in the indictment was that from 1988 until 1999, alternatively 2003, Lahmeyer bribed the respondents by paying each of them various sums of money to induce them to do what they could to ensure Lahmeyer's employment, and continued employment, in the project.

[3] The project has its origin in a Treaty between South Africa and Lesotho in 1986 in terms of which a body with members from both countries, the Joint Permanent Technical Commission (the Commission), oversees the project. At all relevant times the first respondent was Lesotho's chief delegate on the Commission and the second respondent was one of Lesotho's three permanent delegates. As such, they were public servants of Lesotho.

[4] Contracts for implementation of the project were awarded by the Lesotho Highlands Development Authority (the Authority), which then concluded the contracts with the relevant construction contractor or consultant.

[5] Most major decisions by the Authority, including contracts for implementation of the project, had to have the approval of either the whole Commission (in the case of water transfer contracts) or the Lesotho delegation (in the case of hydropower contracts). In particular, contracts funded by the World Bank were only approved by that institution

consequent on the Commission's approval. Commission decisions were taken by consensus, not majority vote.

[6] As members of the Commission the respondents were in a position to influence its decisions concerning the project, including the contractual appointment of consultants such as Lahmeyer.

[7] The failure of Lahmeyer's bid for the award of certain design contracts at a fairly early stage of the project and its dissatisfaction at this outcome, were followed relatively soon afterward by the appointment of a Dr Meyer, a Lahmeyer employee, as a Lesotho delegate on the Commission. The first respondent was involved in the appointment.

[8] Lahmeyer's successful involvement in the project materialised in the award by the Authority, pursuant to the Commission's approval, of eight supervisory contracts to a consortium in which it was a partner. The consortium's other member was a British company, Mott MacDonald International Ltd.

[9] The facts summarized thus far were common cause or not disputed. They justify the conclusion that the respondents' respective positions of

material influence qualified them at all relevant times as eminently eligible subjects if Lahmeyer singled out Lesotho officials in order to pay them corrupt inducements to secure Lahmeyer's inclusion in the project.

[10] On the prosecution evidence Lahmeyer did indeed embark upon a scheme to pay such inducements. Until 1999 it was not unlawful in Germany to pay financial inducements of that kind to foreign officials. Expenses thus incurred were tax deductible. However, agreement to pay, or payment of, such inducements was unlawful in Lesotho and constituted bribery. The evidence reveals that very substantial amounts were paid to induce Mr. E. M. Sole, Chief Executive of the Authority, and Mr. Z. M. Bam, who conducted business as Associated Consultants and Project Managers (ACPM), to use their influence to assist or strengthen Lahmeyer's involvement in the project. As a result Sole was subsequently convicted of bribery and other offences in the High Court. (This Court reduced his overall sentence of 18 years to 15 years). Bam died in 1999. The payments to them included payments in respect of the same contracts as those in connection with which the respondents were allegedly bribed.

[11] In respect of its relationship with Sole and Bam and payments to them, Lahmeyer made and maintained detailed documentary records. This was understandable given the pre-1999 lawfulness and tax deductibility in Germany of the expenses concerned.

[12] In their defence in the present matter the respondents testified that the only relationship between them and Lahmeyer was an exclusively professional one and they denied receiving the payments alleged in the indictment.

[13] Lahmeyer was initially charged together with the respondents but by agreement between the Crown and Lahmeyer the charge against it was withdrawn in return for Lahmeyer's co-operation in assisting the prosecution. Lahmeyer had also been charged, convicted and fined in respect of the bribes it had paid to Sole.

THE CROWN CASE

[14] The evidence tendered to incriminate the respondents falls into two categories. The first comprises voluminous Lahmeyer documentation,

carefully recorded and maintained in extensive detail, in which various references are made to apparent payments by Lahmeyer to the respective respondents. (I shall refer to these generally as ‘the documents’). The other consists of evidence by Lahmeyer’s chief resident engineer in Lesotho, Mr. R. Stock, who was involved in what he claimed were Lahmeyer payments to the respondents. He was rightly regarded by the trial Court, and in argument before us, as an accomplice.

[15] At the start of the trial it was admitted by the defence that the documents

‘are what they purport to be, Lahmeyer records kept in the ordinary course of Lahmeyer business. . .’

During the presentation of the Crown case counsel for the respondents stressed their opposition to the documents concerned being used in any respect to establish the truth of their contents. Counsel’s stance was repeated at the close of the prosecution case when they requested a ruling by the learned trial Judge as to the admissibility of the documents. The Judge deferred any decision in this regard until the end of the whole case. The defence contention was then repeated in closing arguments.

[16] The prosecution's object in tendering the documents was stated to be in reliance on the principle, supported by cases and legal texts, that declarations in execution of a conspiracy or common purpose are admissible against all other parties to the conspiracy or common purpose even if made in their absence or without their knowledge.

[17] The trial Judge ruled that because the Crown's argument was that such a compilation of meticulous records was more likely than not to convey that their contents reflected the true state of affairs obtaining between Lahmeyer and the respondents, the documents were therefore really tendered to prove the truth of their contents and constituted inadmissible hearsay. They were consequently excluded from consideration as to guilt.

[18] In this Court counsel for the Crown argued that the trial court's ruling was wrong. The documents, it was said, were admissible in two respects. First, they were executive statements by a party to a common purpose to bribe. They could therefore be used to show not only the existence and nature of that purpose but who the parties were. Secondly, they constituted relevant circumstantial evidence from which the only reasonable inference

was that the references to Lahmeyer paying the respondents what in law were bribes were true.

[19] That Lahmeyer paid bribes to Sole and Bam in regard to the same contracts as those in respect of which Lahmeyer sought the respondents' aid, is to my mind a relevant fact. The respondents do not say that there was no relationship between themselves and Lahmeyer. They say there was a relationship but that it was a purely professional one. The existence of Lahmeyer's corrupt relationship with Sole and Bam tends to strengthen the inference that the relationship between themselves and Lahmeyer was of the same nature.

[20] That inference is further strengthened by the fact that records of the same nature and extent, sometimes overlapping to refer simultaneously to Sole or Bam and one of the respondents, were maintained in relation to Sole and Bam as were tendered to prove the case against the respondents. All of this serves to show a fixed and ongoing course of conduct on Lahmeyer's part which, on the evidence, commenced and endured in conformity with the time period stated in the present indictment.

[21] The considerations mentioned in the previous two paragraphs stand quite apart from the matter of admissibility but it is necessary to stress them at the start of the discussion because they provide the factual matrix and the perspective with regard to which the admissibility issue must be resolved. Quite without doubt they show a common corrupt purpose between Lahmeyer on the one side and Sole and Bam on the other. Equally clearly they establish a set and continuous purpose on the part of Lahmeyer similarly to induce the respondents. The question then is whether the respondents were parties to that purpose. That question appears to have two parts – was there a common purpose and were they parties to it? However, it is essentially a single enquiry because evidence to show the existence of a counterparty will also identify that party.

[22] The admissibility of statements made in execution of a conspiracy or common purpose has been long established¹. In *Leibbrandt*, a trial before a Special Criminal Court, Schreiner J, giving judgment for the court said²:

‘As we understand the position, once there is other evidence of the conspiracy and the parties thereto the acts and statements, executive as opposed to narrative, of one of the co-conspirators

¹ R v Levy and Others, 1929 A.D. 312 at 327; R v Miller and Another, 1939 A.D. 106; R v Leibbrandt and Others, 1944 A.D. 253; R v Mayet, 1957(1) SA 492 (A.D.).

² This passage is quoted in *Leibbrandt* (in the Appellant Division) at 276.

are admissible to confirm the scope of the conspiracy and the nature of the steps taken to carry it out, and there seems to be no reason why such evidence should not also be used to confirm the other evidence as to the parties who took part therein (see *per* Tindall, J.A., at p. 126)³. The danger of arguing in a circle, to which reference is made in *Miller's* case, would seem to be present whether the matter in question is the scope of the conspiracy or the identity of the parties thereto. In either case there must be other evidence going far enough to warrant the use of the co-conspirator's statements but when the foundation exists it may itself be strengthened by the statements provided that they are executive and not narrative'.

[23] The same learned Judge gave the unanimous judgment of the Appellate Division in *Mayet*. There, the appellant was charged with having engaged a man named Jones to procure two people to murder her husband for reward. Jones approached men named Brown and Hoffman. Terms could not be arranged with them and they never met the appellant. When the prosecution tendered their evidence as to what Jones told them the defence objected, particularly to admission of Jones's mention of the appellant as his

³ The reference is to *Miller*.

principal. When the objection was raised Jones had already testified that the appellant had mandated him to procure two assassins and that he first put the proposition to Brown and Hoffman and then to two other men, Dalton and Ferreira. The latter had also already testified. They said after Jones spoke to them they interviewed the appellant with him and agreed to carry out the murder for her. The trial court admitted the evidence of Brown and Hoffman and in due course convicted the appellant. On appeal the issue which is the subject of the case report was the correctness of the admission of Brown and Hoffman's evidence.

[24] At 494A, having remarked that Jones, Dalton and Ferreira were not people on whose uncorroborated evidence much reliance could be placed, Schreiner JA emphasized that:

‘(W)hen the evidence of Brown and Hoffman was tendered and objected to there was evidence on the record, which might reasonably be true, that the appellant had conspired with Sam Jones to procure for her persons who would murder the deceased for reward.’

There was, therefore, other evidence, to use the learned Judge's wording in the trial judgment in *Leibbrandt*, providing a foundation for the use of the co-conspirator's statement by which such foundation could itself be strengthened. He then (at 494 D-E) approved the following passage in *Phipson on Evidence*:

‘... (O)n charges of conspiracy, the acts and declarations of each conspirator in furtherance of the common object are admissible against the rest; and it is immaterial whether the *existence* of the conspiracy or the *participation* of the defendants be proved first, though either element is nugatory without the other’⁴

[25] The judgment in *Mayet* continues (at 494 F-H)

‘All the evidence of acts, and of words that, being executive, are indistinguishable from acts, must be looked at in order to ascertain whether there was a conspiracy, and, if so, who were the conspirators. If all the evidence brings the court to a conviction that the existence of the conspiracy and the identity of the conspirators are proved, the law does not find an

⁴ 9th edition, 98.

insuperable difficulty in the logical objection that some of the evidence could only be used if the eventual conclusion were established. This is in effect what was said in the judgment of the Special Court .. in *Rex v Leibbrandt and Others*, 1944 A.D 253 at p. 276. Although this Court did not expressly approve of what was said by the Special Court, I do not think that if it had doubted the correctness of the statement it would have left it without comment, since the law on the point was important for the decision of the case’.

The Appellate Division went on to hold that the evidence of Brown and Hoffman had been rightly admitted. (Of course, if more direct approval were required of the Special Court’s approach in *Leibbrandt*, *Mayet* provided it).

[26] For the respondents, attention was drawn to the remark in S v ffrench – Beytagh 1972 (3) SA (A) at 456 A that executive statements are ‘not necessarily evidence of the truth of the assertions they contain’. (This was said with reference to Miller at 119.) The qualified nature of the quoted remark may be seen to imply, however, that use of such statements can

indeed be made to prove the truth of their contents. What is in issue in the present matter, if there is proof, by other evidence, of Lahmeyer and others' corrupt common purpose, as alleged by the Crown, is the identity of those others. What the documents contain, among other assertions, are repeated references to the respondents as intended recipients of commission payments. To rely on those references at the end of the case, assuming the admissibility issue to be answered in favour of the Crown, may appear to involve using those references as proof of their truth. In reality what the documents provide is evidence relevant to the identity issue; that is to say, evidence consisting of repeated references always naming the respondents as parties to the scheme. That evidence is not to be viewed alone. It is weighed with the other relevant evidence. Accordingly, whether one regards the repeated references as evidence which is testimonial or circumstantial does not seem to matter. It is relevant evidence as to the identity of the other parties. (See also S v Nieuwoudt (1) 1985 (4) SA 503 (C) at 506C-507F.) The next question is whether the documents constitute executive statements. If not, that is an end of this aspect of the case.

[27] If any individual document in the batch were, for argument's sake, the only document in issue one would no doubt have regard to whether its

contents proclaimed it as speaking of what had already happened or, on the other hand, of what was still to be done. In this matter, however, it would be artificial to ignore the reality that, as stated already, Lahmeyer was, from 1988, engaged on a set and continuing course of corrupt payments to Sole and Bam and intended, from its side at least, to extend that conduct to include making such payments to the respondents. If there was indeed a corrupt common purpose between Lahmeyer and the respondents it would have existed, on the documents, from 1988 until 1999. Accordingly, it was the continuing intention of Lahmeyer during that period to execute such a purpose.

[28] Leaving aside the question whether the respondents were parties to that purpose and focusing solely on Lahmeyer's conduct, it seems to me that even if a single document can be said to record only a past payment to a respondent that document will have been made in the maintenance of a continuing record of an existing and ongoing course of conduct. Executing the purpose involved not only making fresh payments and recording what was currently being done and was yet to be done. It included, in my view, the maintenance, as in the ongoing conduct of a business, of a record of payments past, present and future. And what had been paid was necessary to

record in order to determine, for the further execution of the purpose, what was still to be paid. I accordingly find it notionally and practically irrelevant to distinguish between records of past payments and those entries which pertained to the time of the entry or to the future. It need hardly be added that for purposes of applying the admissibility rule in issue, the co-conspirator on the prosecution side was Lahmeyer, the company. One does not apply the rule by asking whether each of its relevant employees had the same criminal purpose or intent as the company. It therefore does not matter if an incriminating entry (given the requisites for admissibility in *Leibbrandt* and *Mayet*) was made by secretarial staff and not one of Lahmeyer's authorized decision makers.

[29] It follows, in my view, that the documents on which the Crown relies were brought into being in the course of executing Lahmeyer's corrupt purpose. They thus constitute executive statements.

[30] The documents contain references to what Lahmeyer called its 'representatives' in Lesotho. Other, uncontested, evidence shows this was a euphemism for those whom Lahmeyer bribed to advance its interests here. Similarly euphemistic were the descriptions in the documents and elsewhere

in the record of bribe payments as fees, incentives, promotion, inducements or commission. The documents, together with other evidence, indicate that Bam was a representative in terms of a written agreement with Lahmeyer whereas the first respondent was called a representative pursuant to a verbal agreement. It cannot be disputed, and indeed was not, that if such payments were indeed made to the respondents they were corrupt payments.

[31] Fuller discussion of the content of the documents is presently unnecessary. It suffices to say that the relevant passages and entries show, firstly, that there was a relationship between Lahmeyer and the recipients of its payments and, secondly, that such recipients included the respondents. The documents therefore contain evidence of both the existence of a corrupt common purpose and the identity of the respondents as parties to it.

[32] In view of the *dicta* in *Leibbrandt* and *Mayet* the next question is whether there is other evidence which lays the foundation for admitting the documents. That brings me to the evidence of Mr. Stock.

[33] By way of prelude it is necessary to recount some background. At all relevant times those sections of the project in which Lahmeyer was

contractually involved were under the direction of Dr. Zimmermann at Lahmeyer's head office in Frankfurt. His immediate subordinate was Dr. Emsmann. Lahmeyer's project administration department in Frankfurt was headed by Mr. Hager from 1975 until 1999. Zimmermann, in conjunction with Hager and Lahmeyer's accounting department, was in charge of administering Lahmeyer's project contracts. Included in payments made in connection with the contracts were payments to Lahmeyer's representatives, one of them allegedly being the first respondent. The senior employees of Mott MacDonald involved in the contracts were Mr. Walters and Mr. Elliot. Stock entered Lahmeyer's employ in 1986 but only became involved with the project late in October 1996. He was answerable to Zimmermann. Stock's secretary was Emily Thamae. She made a written statement, the contents of which were admitted by the defence. Stock kept diaries in which he made contemporaneous entries concerning, among other subjects, visits by Zimmermann and Emsmann to Lesotho, meetings he attended with them in Maseru and cash amounts he withdrew from Lahmeyer's Maseru bank at Zimmermann's request. The prosecution engaged a forensic auditor, Mr. White of Pricewaterhouse/Coopers, to examine Lahmeyer's accounting and bank records with a view to confirming that the amounts allegedly paid to the respondents were expended by Lahmeyer.

[34] Hager was a prosecution witness. The effect of his evidence is that all the payments referred to in the documents as due or paid to the respondents were in fact disbursed by Lahmeyer. They were paid out pursuant to what he was told by Zimmermann was a verbal agreement with the first respondent to pay commissions. He conceded that although the payments were lawful in Germany he knew they were criminally corrupt under Lesotho law. Payment was effected by transferring money from Germany to the Maseru account from which it was then drawn in cash. Lahmeyer's monthly cash book and expenditure vouchers in Maseru were sent to Germany at month end where the details were incorporated in Lahmeyer's accounting system.

[35] White analysed and discussed the documents in far more detail than Hager. He confirmed that the accounting and bank records relevant to the period 1995 to 1999 showed that what was allegedly paid to the respondent was indeed expended, in the sense that the money left Lahmeyer. The bank documents from 1991 to 1994 were not available but White reported that, based on the documents that were available, there was nothing he saw which caused him to doubt that the monies allegedly paid in the earlier years

were actually expended. Under cross-examination he admitted having been given sight of the first respondent's bank records although this was not part of his brief. He conceded that nothing in them indicated that the respondent was living beyond his means, or that he received credits beyond what was usual.

[36] Zimmermann retired from Lahmeyer's employ in 2001. He was approached to give evidence but refused to do so. Emsmann was also approached but claimed to have no recollection of the matters in issue.

[37] Coming now to the evidence given by Stock, he said that Zimmermann, with or without Emsmann, came to Lesotho twice a year for management meetings and site inspections. They would stay for five or six days. In that period they also met with one or other respondent. (If the first respondent was for any reason absent the second respondent would attend.) They met the respondents most times in the first respondent's office. Ahead of Zimmermann's visits Stock received instructions from Zimmermann or Lahmeyer's head office to draw substantial amounts of cash from Lahmeyer's Maseru bank account. He complied and sent Emily Thamae or a driver to make the withdrawals. He kept the money in his office's safe and

handed it to Zimmermann or Emsmann shortly before their meetings with the respondents. Appropriate entries were made in the cashbook and an expenditure voucher. After Sole's arrest in July 1999 Zimmermann ordered that the Maseru records for August and September 1999 be transmitted to Germany forthwith.

[38] At meetings with the respondents the money was in the possession of either Zimmermann or Emsmann in a plastic airline duty-free bag. The meetings were informal, not minuted and involved a general conversation. It was set procedure that towards the end of the meetings Stock was given an indication to leave. He did so. When the meetings ended Zimmermann or Emsmann would appear with one or other respondent but without any sign of the bag. Stock said he knew the money was being paid to bribe the respondents, that this was corrupt and that he was party to it. His departure from the meetings he ascribed to a desire on the part of his superiors to have nobody but themselves and the respondents present at the handing over – 'a semi-secret', as he described it. He said they would tell him beforehand to give them time alone at a later stage of the meetings.

[39] Stock's evidence as to the cash withdrawals and the fact of the meetings was supported by his diaries, Emily Thamae and, as already indicated, Lahmeyer's books of account.

[40] One of the amounts withdrawn by Stock was M356 535. Because he expected the size of this sum to be queried by Lahmeyer's external auditors he reflected it on the relevant cheque stub as being for the purchase of a car. He also wrote on the expenditure voucher that any query should be referred to Zimmermann. Stock testified that this amount was nevertheless bribe money and his evidence and the documents show that it constituted the total of three separate sums in respect of different contracts. Stock accepted that his reference to a car purchase was a dishonest misrepresentation.

[41] In November 1999 Lahmeyer was charged with bribing Sole. Later that month, according to Stock, Zimmermann arrived in Maseru on Lahmeyer business but, fearing arrest, left immediately for Ladybrand across the border and booked into a hotel there. Zimmermann contacted the first respondent who went to the hotel to have a discussion with him. Stock was present but not involved with them.

[42] Stock was subjected to a thorough cross-examination on a number of matters. In the first place, he made two written pre-trial statements which conveyed that at the meetings with the respondents the only other people present were Lahmeyer personnel. In his evidence, however, he said there were times when Walters and Elliot of Mott MacDonald were also there. He admitted the inconsistency but said his evidence was correct.

[43] Secondly, in the course of the cross-examination on the discrepancy point, counsel suggested it was extraordinary that if Stock knew that corrupt payments were taking place and that his superiors were aware that he knew it, he was required to absent himself from the meeting. He insisted he did withdraw and was absent when any payment was made.

[44] Thirdly, he was closely questioned about entries in his diaries which showed payments of loans to a Mr. Tohlang without corresponding entries recording repayment. By the time of the trial Stock was employed by the Commission and Tohlang was its chief Lesotho delegate. The implication urged by defence counsel was that Stock had been making corrupt payments of his own to Tohlang. He denied this and said all the loans were personal transactions and he received repayment. He added that his employment by

the Commission had not been in Tohlang's gift but, according to information given him by another Lesotho delegate, it was subject to discussion within the Commission.

[45] Stock was asked if he ever enquired from the respondents whether they had received the money he said was intended for them. He said he had not. It was suggested to him that this was a significant omission on his part. He said he and the respondents were friends and played golf together and they did not talk business on those occasions. In addition he was required by his superiors, of whose inner circle he was not a member, to be out of the way when the payments were made and in effect not to witness anything.

[46] As regards the biggest amount which Stock said was paid to respondents, namely, the sum of M356 535, he was unable to say for which respondent it was intended. It was suggested to him this was improbable given the size of the amount. He simply said it was to go to whichever respondent was at the meeting and because he was not present when it was paid he could not say who received it.

[47] The foregoing suffices to recount the salient features of Stock's evidence. I shall revert to Stock as a witness when considering the trial court's findings and counsel's argument.

[48] In their evidence the respondents admitted the truth of much that is in the documents where it was recorded that they attended meetings in Lesotho or Germany. However they denied the truth of any entry or any statement in the documents that expressly or impliedly asserted that Lahmeyer was paying or had paid them fees or commission pursuant to agreements with them. They maintained that there were at all relevant times legitimate reasons for meetings between Lahmeyer personnel and themselves concerning the project. Any relationship between Lahmeyer and them therefore revolved around the Lahmeyer contracts. They denied that they received any payments as Stock's evidence tended to imply.

[49] More specifically, and in answer to Stock's evidence as to the meetings to which Zimmermann or Emsmann took cash withdrawn from Lahmeyer's Maseru bank by Stock, the first respondent's version was that the only meetings involving the respondents and Lahmeyer's people were attended also by Lesotho delegates on the Commission, among others. The

purpose of these meetings was to discuss project business. They were official meetings but minutes were not kept. If action had to be taken pursuant to the meetings then this was followed up in writing. At these meetings the people present were never just those mentioned by Stock. There would always be other persons there as well.

[50] Implicit in the respondents' denial of the truth of the documentary matter ostensibly implicating them is this. In the course of maintaining undoubtedly genuine ongoing and detailed records of relationships with, and payment to, Sole and Bam, the relevant Lahmeyer employees in Germany for some reason, or no reason, added details and documentation containing false references to the respondents.

[51] In addition, in respect of a number of the documents which referred to meetings involving themselves, they acknowledged that events, discussion or decisions that were recorded by Lahmeyer's relevant personnel were largely accurate and true but not where any document implicated them. An example involving the first respondent is a Lahmeyer internal memorandum concerning a meeting in Maseru on 29 January 1988 which he admitted was

almost all correct. But not a reference in it that referred to a scheme to pay him what would undoubtedly have been bribes.

[52] Then there are two documents which referred to a discussion he had with Lahmeyer's president in Frankfurt in 1994. He admitted that their contents were for the most part correct save for references to his 'commission' and that it would be increased.

[53] As an example of a document referring to both respondents there is a memorandum which refers to a visit by them to Lahmeyer in July 1991. They accept it is accurate in all respects save where it mentions their being paid an overall daily allowance of DM 2300. (This visit was at a time when Lahmeyer was competing in a bidding process for one of the major contracts which it was subsequently awarded. I shall revert to that aspect).

[54] A document that concerned the second respondent was an internal Lahmeyer memorandum on the subject of a meeting in Frankfurt in May 1995. In evidence he was constrained to admit the truth and topicality of much of it but not its reference to an agreement to pay the respondents 'commission' in return for their assistance on the water project.

[55] There are other documents to which reference could be made but the implication is that Lahmeyer's staff, having compiled records that were predominantly true and correct, for some reason or, again, for no reason, added false information concerning the respondents.

THE TRIAL COURT'S JUDGMENT

[56] The trial Judge said that Stock and Zimmermann were, on the evidence, 'quite shady characters' and it was not beyond them to obtain money from their employer by false pretences. Rhetorically, the Judge asked

'How do we know where it started and where it ended?'

Immediately before those comments he had said

'As if it is not enough that Stock has admitted to participating in corruption he has admitted to lying as well.'

Stock's mendacity referred to concerned the false inscription recording a car purchase. The findings on Stock ended with this remark:

'In short Mr. Stock was an unreliable witness'.

[57] The trial Judge's conclusion was expressed as follows:

‘(T)he documentary evidence that was placed before me was inadmissible; it therefore could not support the conclusion that there was an agreement between Lahmeyer and the accused that the one should give a bribe and that the other should receive it.

2. The *viva voce* evidence led was unreliable and it could not prove beyond reasonable doubt that either Mr. Mochebelele or Mr. Molapo received any bribes’.

[58] The trial Court did not make any findings or express any view concerning the impression made by the respondents as witnesses or the content of their evidence.

DISCUSSION

[59] Dealing first with the admissibility of the documents, I have already mentioned that after closure of the Crown case the trial Judge deferred a ruling on this subject until the end of the whole case. Immediately after that

he refused an application for the respondents' discharge, holding that there was evidence before the court on which a reasonable person might convict. Obviously he can only have been referring to Stock's evidence because the documents were at that stage not admitted save on the limited basis of their authenticity. It follows that Stock's evidence, viewed at the end of the prosecution case, was evidence that might reasonably be true (cf. Mayet at 494A). On the authorities referred to above, if there is evidence of that quality before the court in the course of the prosecution case, and such evidence provides the foundation on which to find that the accused was a party to the common purpose alleged by the prosecution, then documentary evidence tending to prove the same fact may be admitted to strengthen that foundation. The documents were accordingly admissible and it could properly have been so ruled at the close of the Crown's case. It was consequently permissible for the respondents to be cross-examined on the contents of the documents, as they indeed were, in regard to the nature and extent of their relationship with Lahmeyer and whether it included their receipt of payments for 'commission'. One should add, of course, that the weight to be attached to the relevant contents of the documents was a matter for decision at the end of the trial, as was the impact, if any, which cross-examination as to those contents made on the respondents' credibility.

[60] Apart from the admissibility question one is chiefly concerned in this case with an issue of credibility. Usually an appeal court has the trial court's findings regarding the witnesses on both sides. Such findings may assist appellate adjudication or not. They may, if they are sufficiently detailed and motivated, make it so difficult for an appellate court to differ from them that it is moved to decide the case on the basis of those findings. Here, the trial court, having drawn the ultimate conclusions it did, very conceivably felt it unnecessary to evaluate or even comment on the defence evidence. Be that as it may, the fact is that the absence of recorded findings concerning the worth of the respondents as witnesses means that there is nothing of any substance to impede this Court's own evaluation of their credibility.

[61] Stock was an accomplice. The dangers of convicting on accomplice evidence have been discussed in many cases of high authority. We are aware of those dangers. One of them is that in giving their evidence in convincing detail born of personal participation they can mislead one into the failure to realize that the accused might have been substituted for the true culprit. That exact risk does not exist here. If there was bribery, the recipients of the bribes can only have been the respondents. The real

inquiry, on the defence argument, is whether, as a reasonable possibility, Zimmermann or Emsmann failed to hand over the money drawn by Stock and appropriated it. Stock could, notionally, have known that and be protecting them.

[62] The trial Judge did not find adversely to Stock as regards demeanour. Nor did he find Stock to have been untruthful in his evidence. Stock's fault consisted of falsifying certain entries in Lahmeyer's Maseru records and in that and other respects, contributing to achievement of Lahmeyer's corrupt purpose. All of that Stock readily admitted. There is no evidence supporting the Judge's reference to Stock as a 'shady character'. That would suggest somebody inherently dishonest. An accomplice is always *ex hypothesi* a participant in crime. The question is whether Stock was honest in the witness box and a reliable reporter of what occurred at the 'bribe' meetings, by which I mean the meetings at which, on the Crown case, the money was handed over.

[63] A great deal of Stock's evidence is not in dispute. What is really in issue is whether the persons who attended the 'bribe' meetings were as testified by Stock; whether he withdrew, leaving Zimmermann or Emsmann

(with or without their Mott MacDonald counterparts) alone with whichever respondent was present; and whether he is correct in saying that Zimmermann or Emsmann emerged without the duty-free bag.

[64] To support an argument that Stock was inadequate in those respects counsel for the respondents advanced a number of submissions criticizing his evidence. I shall deal with them one by one.

[65] It was contended that his so-called loans to Tohlang were unexplained and gave rise to the suspicion that he bribed Tohlang to achieve his present employment. There were certainly valid questions which arose from Stock's diary entries concerning his contact with Tohlang. The relevant chronology is that Lahmeyer was charged in relation to the Sole payments late in 1999. In 2000 Tohlang had already been designated by the Lesotho authorities as the next chief delegate of the Commission. The first respondent ceased holding that position in 2002. It is not clear when Stock became contracted to the Commission but the diary entries which referred to loans or other transactions between Stock and Tohlang were not shown, in my view, to relate to that period when Tohlang was in office as chief delegate and Stock had not yet been appointed by the Commission. Stock's evidence that his

appointment was decided on by the Commission, not just Tohlang, was not contradicted. The two men were on friendly terms, so Stock said, and each lent to the other at a time when Tohlang was working for a contracting company.

[66] As to the discrepancy between Stock's statements and his evidence, the persons who he said attended the 'bribe' meetings and were not mentioned in his statements, namely, Walters and Elliot, were employees of the other consortium member and, on the evidence, their company was party to the corrupt purpose which Lahmeyer was seeking to implement. This was not a case of Stock admitting the presence of people who were not party to it. In addition, a study of Stock's statements indicates that they were directed at explaining entries in Lahmeyer's documents and Stock's diaries in so far as they concerned Lahmeyer's role. Reference to the meetings in question was only made at the end of the first statement and then in the context of explaining that they were private, unminuted and separate from the meetings about the project. The focus was really on the Lahmeyer personnel who were present.

[67] Stock's alleged withdrawal from the meetings was commented on during cross-examination concerning his statements. It was not directly challenged. What counsel at most suggested was that it was improbable that Stock withdrew. Yet it was the first respondent's evidence that Stock was untruthful when he claimed that he was required to leave the meetings which they jointly attended. The omission of a direct and explicit challenge weakens the defence argument if it does not remove its impact altogether.

[68] It is favourable to Stock's credibility, in my view, that he did not claim to have seen money being handed over. If he was intent upon implicating the respondents falsely that would have been an irresistible allegation to make. And the same holds true if Stock knew that Zimmermann was appropriating the money and wished to protect him.

[69] Stock's failure to enquire from the respondents whether they received any payments is a matter of no real significance. They were friends and fellow golfers and did not discuss business on social occasions. They must all have known such payments, if made, were against Lesotho law and if the handing over occurred only in the presence of the foreigners and the

respondents, so much the better, one would think, for the success of Lahmeyer's (and Mott MacDonald's) corrupt purpose.

[70] Counsel's criticism that Stock could not say which respondent received the amount of M356 535 is also of no moment. It was of no importance to him at the time. Lahmeyer did expend this amount and if the payment reached one or other respondent it has not been shown to have been in conflict in any way with what Lahmeyer intended and to have gone to the wrong person. Moreover, on the evidence, it did not matter to Lahmeyer which respondent took physical receipt. Stock focused on deceiving Lahmeyer's external auditors and on complying with Zimmermann's instructions. Accordingly, it would not, as a probability, have triggered his curiosity as to which respondent was the recipient.

[71] Turning to the evidence of the respondents, it is, as I have said, implicit in their version that false entries implicating them were inserted in Lahmeyer documents in which the balance of the documents' entries or statements were true, correct and relevant. It is common cause that the documents were compiled in the ordinary course of Lahmeyer's business. Such entries sometimes refer not only to the respondents but also to the

corrupt relationships – indisputable on the evidence – which Lahmeyer had with Sole and Bam. For Lahmeyer to compile documents referring at one and the same time to real relationships with Sole and Bam and fictitious relationships with the respondents would be inherently improbable and extraordinarily so.

[72] The respondents advance no explanation for any of the ostensibly incriminating entries. Accepting that they would, in all likelihood, be unable to explain them if innocent, one must consider what inferences arise from the existence of such entries. There is no suggestion that the entries implicating the respondents were made to defraud the German tax authorities (which could have been explored with Hager but was not). And the money allegedly paid to the respondents was, according to White and Hager, indeed expended by Lahmeyer so to that extent even the disputed entries convey the true position.

[73] The only other inference, apart from the inference that the respondents did receive the payments alleged by the Crown, is that Zimmermann, with or without the collaboration of Emsmann (and possibly other Lahmeyer employees) stole the expended funds.

[74] There is no reason to think that if that was happening it was confined to the times to which Stock referred. The undisputed evidence is that from some time in 1991 Lahmeyer was expending money destined for the respondents. Considering the co-existence of Lahmeyer's respective relationships with Sole, Bam and the respondents, in relation to the same contracts, and taking into account the smallness of the local community involved in the project, it would be most improbable that Zimmermann's postulated conduct would have remained undiscovered. Lahmeyer would surely have queried the absence on the part of the respondents of the kind of favours they were paying for.

[75] A further inherent improbability is that Zimmermann or Emsmann whose employer, and whose employment, would be placed at severe risk if they sabotaged its prospects in the manner suggested, would do so. Despite their absence from the witness box, the opportunity existed for cross-examination of Hager (who headed the overall international contract administration and worked with Zimmermann and Emsmann) so as to explore the possibility of either their disloyalty to the company or any problem in their respective financial positions. This was not attempted. It

does not reflect adversely on counsel. It simply serves to discount the theory of possible theft.

[76] What also does not reflect adversely on counsel but does redound to the disadvantage of the respondents is that it was not put to Stock that he withdrew from the meetings or that the subject matter of the meetings was not what Stock described or that other Commission delegates were present. This supports the submission by Crown counsel that these features were belated inventions.

[77] Several aspects of the relationship between Lahmeyer and the respondents carry implications unfavourable to the defence case. In July 1991 they were guests of Lahmeyer in Frankfurt. This was at a time when Lahmeyer was bidding for one of the contracts (which it was ultimately awarded the following year).

[78] In September or October 1994 the first respondent met with Lahmeyer's president. He conceded that their discussion was for the most part accurately recorded. Apart from the fact that it mentions that his own contract with the Commission was due for renewal very soon (the reference to which he found difficult convincingly to explain), the meeting took place

at a time when Lahmeyer was one of the bidders for a contract subsequently awarded to its consortium.

[79] In May 1995 the second respondent met with Zimmermann in Frankfurt. This was when Lahmeyer was bidding for the award of a contract connected with the Mohale dam. Lahmeyer's attempt to win the contract was not successful. Among the documents is a memorandum purporting to record the meeting as well as the respondent's home telephone number. In cross-examination the respondent initially said that the memorandum was false. Subsequently he conceded he could have been in Frankfurt at the time. His evidence on the subject reads unimpressively.

[80] As already mentioned, Lahmeyer was charged in November 1999 in relation to the Sole payments; Zimmermann arrived in Maseru that month and immediately left for Ladybrand to avoid arrest; and the first respondent went very soon afterwards to Ladybrand to meet with him. The documents contain references to Zimmermann's having sent for him and the first respondent admitted that Zimmermann requested such a meeting but said that he actually went at the suggestion of the Authority to find out how the prosecution of Lahmeyer could affect the project, and to urge that Lahmeyer

stayed on in Lesotho and continued with it. This evidence must be viewed in the light of the other features I have mentioned concerning the respondent's relationship with Lahmeyer. If Lahmeyer was facing prosecution its further involvement in the project was potentially problematic. Alleviation of its plight needed an approach to the prosecuting authorities. It is far more likely that Zimmermann was attempting to get the respondent to make such an approach rather than that the respondent was trying to persuade Zimmermann to continue with the project. It is also significant that Zimmermann did not seek the assistance of the Authority which was after all the party that contracted with Lahmeyer. In the circumstances it is consistent with all the other prosecution evidence that Zimmerman looked to the respondent because he had done Lahmeyer favours in the past. (Sole was unavailable due to his own prosecution and Bam had by then died).

[81] To complete this discussion of the defence case, there is a memorandum among the documents recording a meeting between the first respondent and Zimmermann at Lahmeyer's head office in March 2000. Lahmeyer had, as I have mentioned, already been charged. The respondent said at first he could not recall the meeting but later that it could have taken

place. He denied that the recorded issues, which certainly were relevant at the time, were discussed. He did not suggest why the meeting took place or what was discussed. One of the items in the memorandum was a pending study on a further stage of the project and Lahmeyer was a possible candidate to be given this work. The question arises why the respondent went to Germany at that stage, given Lahmeyer's pending prosecution. No answer emerges which is favourable to the respondents.

[82] What is significant about the picture of the respondents' relationship as a whole and particularly the Ladybrand meeting and the final meeting in Germany, is that after November 1999 Lahmeyer, having been prosecuted, made no further payments to the respondents.

CONCLUSION

[83] With regard to the considerations examined above in regard to the oral evidence, it seems to me that those adverse to Stock do not detract from his worth as a witness. I bear in mind his criminal complicity which, as I have said, he conceded, and that it requires one to exercise caution in evaluating his credibility. It also does him no credit that he falsified documents in

respect of one payment but that was part and parcel of his role as accomplice. The criticisms levelled against him in other respects are, for reasons stated when discussing them, explicable on a basis which does not warrant the inference that he gave false evidence. Nor was he shown to have been untruthful in his evidence. The suggested possibility that he could be protecting Zimmermann or Emsmaan can be discarded. On grounds already stated, the theft theory holds no water. I also find no basis for the trial Judge's finding that Stock was 'unreliable'.

[84] On the authority of *Leibbrandt* and *Mayet* the documents provide confirmation of Stock's evidence, including identification of the respondents as Lahmeyer's partners in its corrupt scheme. This is evidence which corroborates Stock in respects incriminating them and which, on settled authority, provides a reliable safeguard against the possibility of a wrong conviction on Stock's evidence.

[85] The fatal weakness in the respondents' case is the implication that the documents, although authentic and compiled in the course of Lahmeyer's business, and although true and correct in all other respects, are gratuitously false whenever they implicate the respondents. Coupled with this are the

circumstantial impact of the existence of the relationship with the respondents side by side with the relationship with Sole and Bam, which was unquestionably corrupt, and the respondents' meeting with Lahmeyer personnel in Germany at times of material significance to Lahmeyer's fortunes.

[86] Then there are the shortcomings of the respondents as witnesses which have been detailed in the foregoing analysis of their evidence.

[87] Understandably, counsel for the respondents laid stress on White's inability to find any indications in the first respondent's bank statements which would justify the inference that he had received the payments alleged. Naturally there would be nothing of significance if the respondent were innocent. On the other hand, as White's and Stock's evidence shows, if the payments were made they were made in cash. It would not necessarily be surprising to find no trace of receipt were the respondent guilty. The feature relied on by counsel is essentially neutral.

[88] Having weighed up the disputed evidence, I am satisfied that the respondents' evidence was false beyond reasonable doubt.

[89] Although Stock's evidence only covered the period from October 1996 until the last payment in 1999 there is no reason to think Lahmeyer's or Zimmermann's modus operandi in making corrupt payments to the respondents was really any different from 1991 to September 1996. On Hager's evidence and the documents there was no different pattern of events in the earlier years. It follows that the Crown case was established beyond reasonable doubt as regards those payments proved by the prosecution evidence. The respondents ought therefore to have been convicted in respect of those payments that were proved to have been made to them.

[90] What the Crown evidence establishes is that Lahmeyer, while regarding the first respondent as one of its so-called representatives, and therefore the senior, so to say, of the couple, nevertheless documented the payments as essentially due to the respondents jointly. Stock's evidence, moreover, shows that the recipient of the payments which I have inferred were made, was either one respondent or the other. On all the evidence the only reasonable further inference is that the payments were made to the respondents as a team and that any division of the spoils was up to them. On White's evidence 20 cash payments totalling M1 247 855 were made to the

respondents. In addition each received a daily allowance of DM2 300 for their visit to Frankfurt in 1991. Finally, a separate payment of DM500 was made to the second respondent in 1995. I accordingly find that the Crown proved that those amounts were received by the respondents, jointly or separately, as indicated above.

[91] As regards the passing of sentence, the respondents might well wish to give or lead evidence in mitigation. This is therefore not a case in which this Court should undertake the imposition of sentence. The matter must be remitted to the trial court to pass sentence on the basis of the findings made in this judgment. Although the respondents acted in concert with Lahmeyer and in concert with each other, their sentences may recognize the difference between their respective acts of participation and the difference between what each personally received out of what they were paid jointly. If indeed the evidence on sentence should reveal the latter difference.

[92] This Court's order is as follows:

1. The appeal succeeds.

2. The acquittal of the respondents is set aside and substituted for it is the following –

‘The accused are convicted as charged in respect of the following amounts:

(a) **M1 247 855 paid to them jointly;**

(b) **DM2 300 paid to each;**

(c) **DM500 paid to the second respondent.**

3. The matter is remitted to the trial court for the hearing of such evidence as either the accused or the Crown tender in relation to sentence and thereafter, in the light of such evidence, and on the findings made in this judgment, the imposition of sentence.

C. T. HOWIE
ACTING JUSTICE OF APPEAL

I agree:

J. W. SMALBERGER
JUSTICE OF APPEAL

I agree:

L.S. MELUNSKY
JUSTICE OF APPEAL

For the Crown : Adv. G. H. Penzhorn SC
Adv. H.H. T. Woker

For the Respondents : Adv. I.A.M. Semanya SC
Adv. K. Mophethe