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THIRD DIVISION

[G.R. No. 148269, November 22, 2010]

PRESIDENTIAL AD HOC FACT-FINDING COMMITTEE ON BEHEST LOANS THRU THE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, REPRESENTED BY ATTY. ORLANDO L. SALVADOR, PETITIONER, VS. HON. ANIANO DESIERTO, IN HIS CAPACITY AS OMBUDSMAN, ULPIANO TABASONDRA, ENRIQUE M. HERBOSA, ZOSIMO C. MALABANAN, ARSENIO S. LOPEZ, ROMEO V. REYES, NILO ROA, HERADEO GUBALLA, FLORITA T. SHOTWELL, BENIGNO DEL RIO, JUAN F. TRIVIÑO, SALVADOR B. ZAMORA II, AND JOHN DOES, RESPONDENTS.

D E C I S I O N

BRION, J.:

This is a Petition for *Certiorari* under Rule 65 of the 1997 Revised Rules of Court seeking the reversal of the Ombudsman's Resolution[1] dated October 16, 2000, dismissing the criminal complaint (docketed as OMB-0-97-1138, entitled *Salvador v. Tabasondra, et al.*) against private respondents Ulpiano Tabasondra, Enrique M. Herbosa, P.O. Domingo, Zosimo C. Malabanan, Arsenio S. Lopez, Romeo V. Reyes, Nilo Roa, Heradeo Guballa, Florita T. Shotwell, Benigno del Rio, Juan F. Trivino, Salvador B. Zamora II, and John Does[2] for violation of Section 3(e) and (g) of Republic Act No. (RA) 3019 (otherwise known as the Anti-Graft and Corrupt Practices Act). Petitioner Presidential Ad Hoc Fact-Finding Committee on Behest Loans also prays that we reverse the Order,[3] dated February 27, 2001, of the Ombudsman denying petitioner's Motion for Reconsideration of November 24, 2000.

The petitioner is a government agency created under Administrative Order No. (*AO*) 13 on October 8, 1992 by then President Fidel V. Ramos. It was tasked to inventory all behest loans, determine the parties involved and recommend the appropriate actions that should be taken.[4] Under the law, behest loans entail both civil and criminal liabilities. President Ramos later issued Memorandum Order No. (*MO*) 61, dated November 9, 1992, expanding the functions of the Committee to include the inventory and review of all non-performing loans, whether behest or non-behest. The memorandum also provided the following criteria for determining a behest loan:

a. It is undercollaterized (*sic*).
b. The borrower corporation is undercapitalized.
c. Direct or indirect endorsement by high government officials like presence of marginal notes.
d. Stockholders, officers or agents of the borrower corporation are identified as cronies.
e. Deviation of use of loan proceeds from the purpose intended.
f. Use of corporate layering.

g. Non-feasibility of the project for which financing is being sought.
h. Extra-ordinary speed in which the loan release was made.

Pursuant to its mandate under AO 13 and MO 61, the petitioner investigated a loan guarantee agreement between Coco-Complex Philippines, Inc. (*CCPI*), a domestic corporation in the business of manufacturing oil, and the National Investment Development Corporation (*NIDC*), the investment subsidiary of the Philippine National Bank (*PNB*)[5] The CCPI sought to have NIDC guarantee a loan payable to Fried Krupp of Germany for the turn-key purchase of an oil mill. On January 17, 1968, the NIDC issued Board Resolution No. 26 approving a guarantee agreement in favor of CCPI for the amount of DM7.4M plus interest at the annual rate of 6 1/4 %, or a total amount of P9,277,080.00. On March 12, 1969, the parties signed the Guaranty Agreement.[6] As of March 31, 1992, the Statement of Deficiency Claim disclosed that CCPI had an outstanding obligation of P205,889,545.76.

The petitioner, through Atty. Orlando Salvador, filed a Sworn Statement,[7] dated June 5, 1997, before the Ombudsman against Ulpiano Tabasondra, Enrique M. Herbosa, Zosimo C. Malabanan, P.O. Domingo, and/or all officers and members of the Board of Directors of the Development Bank of the Philippines (*DBP*),[8] Makati City; and Arsenio S. Lopez, Romeo V. Reyes, Nilo Roa, Heradeo Guballa, Benigno del Rio, Juan Triviño, and/or all officers and stockholders of CCPI. The petitioner alleged that the processing of the original loan was attended with haste considering that the CCPI was incorporated on July 12, 1967, and the Letter of Guarantee was approved in principle by the NIDC Board of Directors as early as September 20, 1967. It also claimed that the loan was without sufficient collateral at the time the loan guarantee was approved. CCPI's existing assets of P495,300.00 and assets to be acquired (turn-key cost of coconut mill) amounting to P6,986,031.00 had an aggregate sum of P7,481,331.00. Nevertheless, the NIDC considered this sufficient collateral for a loan of P9,277,080.00. The petitioner also pointed out that the loan was undercapitalized since at the time the NIDC granted the loan guarantee, the paid-up capital was only P2,111,000.00.

The petitioner further relayed in its Complaint that the NIDC granted CCPI an additional loan, restructuring and equity conversion of outstanding obligations, without sufficient collateral and adequate capital to ensure CCPI's viability and its ability to repay its loans. On November 25, 1970, the NIDC issued Board Resolution No. 361 which restructured CCPI's loan and increased it to DM12.2M, inclusive of interest.[9] It also alleged that the NIDC board issued, on December 2, 1970, Board Resolution No. 373, allowing the conversion of P7.07M out of a total P17.95M advances into CCPI common stocks. Soon thereafter, on June 9, 1971, the NIDC approved Board Resolution No. 183, permitting a further conversion of P14.2M of CCPI's advances into equity.[10] The petitioner also alleged that the NIDC agreed to guarantee CCPI's P4.5M credit line with PNB, through Board Resolution No. 40, dated February 10, 1972. And on February 10, 1972, the NIDC issued Board Resolution No. 48, granting CCPI a guarantee loan of $750,000.00.[11]

On September 5, 1997, the Office of the Ombudsman issued the Resolution dismissing the Complaint on the ground of prescription of the offense.[12] However, we reversed this ruling in G.R. No. 130140,[13]where we held that the crime had not

yet prescribed and ordered the Ombudsman to conduct a preliminary investigation.

On February 16, 2000, petitioner filed a Manifestation and Request for Issuance of *Subpoena Duces Tecumu*[14] due to previous difficulties in obtaining records from the PNB. It specifically sought from the PNB the names of the NIDC directors who issued particular NIDC Board Resolutions, the specific dates they were issued, and the amount of money involved.[15] However, the Ombudsman failed to act on this request.

On October 16, 2000, the Ombudsman promulgated a resolution dismissing the complaint for the failure of the petitioner to furnish the names of the NIDC officials who should be indicted. Instead, the respondents named in the complaint appeared to be DBP officers and board members who should not be implicated since the loan did not even pass through the DBP.[16]

On November 24, 2000, the petitioner filed a Motion for Reconsideration (With Motion for Leave to Admit Amended Complaint).[17] In the Amended Complaint,[18] the petitioner identified respondents Tabasondra, Herbosa, Domingo and Malabanan as officers and/or Board Members of PNB/NIDC, not the DBP; the mistake made in the original complaint was a mere typographical error. The officers and/or stockholders of CCPI - Shotwell, Roa, Zamora, Trivino, Lopez, Reyes, Guballa, and del Rio - were also included as respondents. However, the petitioner clarified that other individuals may still be included as respondents. The petitioner repeated its allegation that the loan granted to CCPI was under-collateralized, while CCPI was undercapitalized; these findings were reflected in a Memorandum[19] (dated January 17, 1968) submitted by NIDC Vice President Mario Consing to its Board of Directors. It added that the Executive Summary and the documents attached in the original complaint were made an integral part of the Amended Complaint.

In the assailed Order[20] of February 27, 2001, the Ombudsman denied the Motion for Reconsideration for lack of merit. He noted that there were no other documents attached to the Amended Complaint to prove that the respondents were liable for the acts complained of. He stated that the petitioner failed to provide copies of the resolution that the PNB/NIDC officials allegedly processed and approved. Thus, he considered the motion as a mere scrap of paper.

On June 7, 2001, the petitioner filed this Petition for Certiorari which assails the assailed Resolution and Order on the following grounds:

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> THE HONORABLE OMBUDSMAN GRAVELY ABUSED HIS DISCRETION IN ISSUING HIS SAID RESOLUTION AND ORDER PROMULGATED ON NOVEMBER 13, 2000 (sic) AND MARCH 23, 2001 (*sic*) RESPECTIVELY. MORE PARTICULARLY, HE GRAVELY ABUSED HIS DISCRETION IN HOLDING THAT "APART FROM THE FOREGOING ENUMERATION, NO OTHER DOCUMENT WAS ATTACHED TO THE SAME TO PROVE THE ALLEGATION THAT INDEED THE SAID RESPONDENTS WERE LIABILE FOR THE ACTS COMPLAINED OF."

THE ALLEGED INSUFFICIENCY OF EVIDENCE WAS DUE TO THE OMBUDSMAN'S GROSS NEGLIGENCE IN THE PERFORMANCE OF HIS DUTIES, SPECIFICALLY HIS FAILURE TO ISSUE SUBPOENA DUCES TECUM AS REQUESTED BY PETITIONER.[21]

Ruling of the Court

We find the petition meritorious.

Ordinarily, the Court does not interfere with the Ombudsman's determination of the existence or non-existence of probable cause. The rule, however, does not apply if there is grave abuse of discretion, or if the action is done in a manner contrary to the dictates of the Constitution, law or jurisprudence.[22] In these exceptional cases, the Ombudsman's action becomes subject to judicial review.

The Ombudsman, in dismissing a complaint - whether for want of palpable merit or after the conduct of a preliminary investigation[23] - carries the duty of explaining the basis for his action; he must determine that the complainant had failed to establish probable cause.

The probable cause that a complainant has to establish need not be based on clear and convincing evidence of guilt or evidence of guilt beyond reasonable doubt. *It simply implies probability of guilt and requires more than a bare suspicion but less than evidence that would justify a conviction*. A finding of probable cause need only rest on evidence showing that more likely than not, a crime has been committed and was committed by the suspects.[24]

Given this quantum of evidence, we find that the Ombudsman gravely abused his discretion when he immediately dismissed the Amended Complaint for being insufficient. We find it particularly unsettling that the Ombudsman dismissively set aside the petitioner's voluminous exhibits with only one paragraph, and failed to discuss whether the questioned transactions bore the characteristics of a behest loan[25] and whether the respondents - those whose names were identified and those who were identified merely as directors and officers of the entities involved - were probably guilty of violating Section 3(e) and (g) of RA 3019. Lastly, the elements of the offenses charged should have been examined and discussed, before a conclusion regarding the existence or non-existence of probable cause is arrived at.

In the present case, the Ombudsman dismissed the Amended Complaint because he considered fatal the petitioner's failure to provide copies of the resolutions duly approved by the officers and directors of the PNB and the NIDC, showing that they were responsible for the processing and the eventual approval of the questioned loan. In its own words -

> Apart from the aforementioned enumeration no other document was attached to the same to prove the allegation that indeed the said respondents were liable for the acts complained of. There were no copies of the resolution duly approved by said officials of the PNB/NIDC showing that they were responsible for the processing and eventual approval of the questioned loan. To our mind, the enumerations, standing alone, is (*sic*) not sufficient to establish sufficient basis to proceed with the conduct of preliminary investigation against said respondents. In other words, this motion is no more than a mere scrap of paper.[26]

In his Comment,[27] the Ombudsman added that instead of burdening the Office of the Ombudsman with the issuance of the *subpoena duces tecum*, the petitioner should have asked the Presidential Commission on Good Government (PCGG) to subpoena the required documents, *i.e.*, the relevant board resolutions, as it was charged with the investigation of graft and corruption cases and it was empowered to issue subpoenas under Section 3 of Executive Order (*EO*) No. 1.

The questioned transactions bear the characteristics of behest loans.

We find that despite the petitioner's failure to attach the relevant board resolutions in this case, the records provide ample support to the petitioner's claim that the officers and directors of the PNB and the NIDC had approved, in favor of CCPI, a loan that qualifies with at least three criteria of behest loans - (1) the borrower was undercapitalized; (2) the loan accommodation was under-collateralized; and (3) the NIDC Board of Directors approved the loan accommodation with extraordinary haste.

There is prima facie proof that CCPI was undercapitalized when it applied for and was granted the loan guarantee.

Under MO 61, one of the criteria for determining a behest loan is an undercapitalized borrower corporation. Undercapitalization is the financial condition of a firm that does not have capital to carry on its business. Related to this concept is that of thin capitalization - the financial condition of a firm that has a high ratio of liabilities to capital.[28]

The Guaranty Agreement between CCPI and the NIDC, which was attached to the Amended Complaint, clearly shows that (1) the amount of the loan guarantee was P9,277,080.00 and (2) the amount of the paid-in capital at the time CCPI applied for the loan was P400,000.00.[29]

The Guaranty Agreement sought to address the wide discrepancy between the amount of the loan guarantee and CCPI's paid-in capital by adding the provision, included among the "Borrower's Covenants," that requires CCPI to pay in cash P1.7M as paid-in capital before the agreement is signed, and to pay cash installments of P600,000.00, P400,000.00 and P500,000.00 on the 9th, 12th, and 18th month after the signing of the agreement; these sums are over and above the paid-in capital of P400,000.00.[30] Under the terms of the agreement, the paid-in