

## SECOND DIVISION

[ G.R. No. 147723, August 22, 2008 ]

**PRESIDENTIAL AD HOC FACT- FINDING COMMITTEE ON BEHEST  
LOANS AND/OR PRESIDENTIAL COMMISSION ON GOOD  
GOVERNMENT (PCGG), PETITIONERS, VS. HON. ANIANO  
DESIERTO, ALICIA LL. REYES, LOURDES M. MONTENEGRO,  
SERAFIN M. MONTENEGRO, BASILIO LIRAG AND FELIX LIRAG,  
RESPONDENTS.**

### DECISION

**TINGA, J,:**

Respondents Lourdes M. Montenegro, Serafin M. Montenegro, Basilio Lirag and Felix Lirag were all officers or stockholders of Midland Cement Corporation (Midland Cement), a corporation which was registered with the Securities and Exchange Commission on 14 June 1963. On 18 January 1968, Midland Cement obtained a foreign guarantee loan from the Development Bank of the Philippines (DBP) in the amount of USD 18.5M, or an equivalent of P110M. The loan was secured to finance the acquisition of a brand new cement plant to be supplied and installed by French contractor Fives Lille-Cail on a turn-key basis. The loan was approved by DBP in Board Resolution No. 539. At the time the loan was secured in 1968, Basilio and Felix Lirag, as well as Serafin Montenegro, were among the directors or officers of Midland Cement.

Between 1971 and 1982, Midland Cement and DBP entered into ten successive agreements for the obtention of additional loans and/or for restructuring of accounts. In 1972, DBP became the majority stockholder of Midland Cement, and by 1981, it was already the owner of 92.89% of the shares in the corporation.<sup>[1]</sup> In 1986, the properties of Midland Cement were sold by the Assets Privatization Trust (APT) for P171,825,000.00, even though the outstanding balance of the corporation at that point was over a billion pesos.<sup>[2]</sup>

On 8 October 1992, then President Fidel Ramos created the Ad Hoc Fact-finding Committee on Behest Loans (Ad Hoc Committee), petitioner herein, through Administrative Order No. 13, and broadened the scope of its powers through Memorandum Order No. 61 dated 9 November 1992. Among the functions tasked by the said memorandum order to the Ad Hoc Committee is the investigation, inventory and study of all non-performing loans, including both behest and non-behest loans. It also established an eight (8)-point criterion for possible utilization "as a frame of reference in determining a behest loan," namely: (a) it is undercollateralized; (b) the borrower corporation is under-capitalized; (c) direct or indirect endorsement by high government officials like the 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; and (h)

extraordinary speed in which the loan release was made.<sup>[3]</sup> It also stipulated that behest loans may likewise entail criminal liability in addition to civil liability.<sup>[4]</sup>

On 25 February 1998, the Ad Hoc Committee referred to then Ombudsman Aniano Desierto (Ombudsman Desierto) the accounts of Midland Cement, along with those of two other corporations, "for preliminary investigation to determine the existence of probable cause of violation of R.A. No. 3019, banking laws/regulations and/or other penal statutes."<sup>[5]</sup> The referral letter was accompanied by the Complaint-affidavit<sup>[6]</sup> executed by Atty. Orlando L. Salvador (Atty. Salvador), a Presidential Commission on Good Government (PCGG) consultant detailed at the Ad Hoc Committee. The complaint was docketed as OMB-0-98-0563.

Atty. Salvador averred that at the time the initial loan of P110M was procured from DBP in 1968, Midland Cement had no sufficient capital to be entitled to that large a loan since its total assets then amounted to only P77M and its paid-up capital amounted to only around P9.15M.<sup>[7]</sup> Allegedly, the loan itself was without sufficient collateral.<sup>[8]</sup> Atty. Salvador observed that despite these facts, Midland Cement was able to obtain additional loans from DBP until 1981.<sup>[9]</sup>

According to Atty. Salvador, as of 30 June 1986, Midland Cement had an outstanding and unpaid balance of P1,027,376,000.00 with a property appraised value of P329,479,000.00. As the properties of Midland Cement were sold by the APT sometime in 1987 for only P171,825,000.00, the Philippine government incurred a loss amounting to P855,551,000.00.<sup>[10]</sup> He further recounted that the cement plant that was constructed following the loan was leased to the Construction and Development Corporation of the Philippines for a minimal consideration of P2.00/40-kilogram bag of cement produced, and that Midland Cement committed misrepresentation when unknown to DBP, it entered with Fives Lille-Cail into a side agreement whereby Midland Cement bound itself to sub-contract the civil works on the plant with a local contractor even though DBP had already guaranteed the supply/construction of the plant on a turn-key basis.<sup>[11]</sup>

From these premises, Atty. Salvador asseverated that the loans extended to Midland Cement were behest loans based on the following criteria:

1. It is under collateralized. That at the time the P110.00 million loan was granted, total assets including to be acquired amounted to P77,000,000 only;
2. The borrower corporation is under capitalized. That as of December 31, 1967 the paid-up capital amounted to P9,158,180.00 only;
3. The borrower corporation grossly violated the loan agreement by entering a side agreement unknown to DBP;
4. The stockholders and/or officers are known cronies of Ex-Pres. F.E. Marcos.<sup>[12]</sup>

Atty. Salvador further concluded that the transactions had been entered into in violation of Republic Act (R.A.) No. 3019 (The Anti-graft and Corrupt Practices Act),

particularly Section 3(e) and (g) thereof:

Sec. 3. *Corrupt Practice of Public Officers.*--In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful.

x x x x

e. Causing any undue injury to any party, including the Government or giving any private party any unwarranted benefit, advantage or preference in the discharge of his official, administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions.

x x x x

g. Entering on behalf of the Government, into any contract or transaction manifestly and grossly disadvantageous to the same, whether or not the public officer profited or will profit thereby.

Atty. Salvador identified eight (8) persons who could be made liable for violation of the loan terms and conditions. Four of them--G.S. Licaros,<sup>[13]</sup> J.V. de Ocampo, Leonides Virata and respondent Alicia Ll. Reyes (Reyes)--were members of the DBP Board of Governors. The other four--respondents Lourdes M. Montenegro, Serafin M. Montenegro, Basilio Lirag and Felix Lirag --were officers and principal stockholders of Midland Cement.<sup>[14]</sup>

In its 25 August 1998 Resolution,<sup>[15]</sup> the Evaluation and Preliminary Investigation Bureau (EPIB) of the Office of the Ombudsman concluded that the loans extended to Midland Cement could not be considered behest loans as the proceeds thereof were used for a business purpose--the construction of the cement plant--and that there was no deviation of use of the said proceeds from the intended purpose. The EPIB also observed that based on the allegations in the complaint, the government did not bear the burden of satisfying the loan obligation of Midland Cement; that there was no unwarranted benefit or preference accorded to the respondents since the loan was collateralized; and that the process of loan evaluation and investigation had been rigorously followed before the application was finally approved.<sup>[16]</sup>

The EPIB Resolution was elevated for review to the Office of the Special Prosecutor of the Office of the Ombudsman. On 5 October 1998, Special Prosecution Officer III Orlando I. Ines issued a Memorandum<sup>[17]</sup> for Ombudsman Desierto containing his assessment of the complaint. The memorandum recounted the allegations of Atty. Salvador in the latter's sworn statement, and determined:

[T]here is no doubt that the loans of Midland Cement Corporation are behest loan[s] based on the following criteria, as follows:

1. It is under collateralized. That at the time the P110.00 million loan was granted, total assets including those to be acquired amounted

only to P77M;

2. The borrower corporation is [under capitalized]. As of December 31, 1967 the [paid-up] capital amounted only to P9.758M;
3. The borrower corporation grossly violated the loan agreement by entering a side agreement unknown to DBP;
4. The stockholders and/or officers are known cronies of Ex-Pres. F.E. Marcos.

It appearing from the foregoing facts and circumstances on record, it is beyond doubt that the respondents violated Sec. 3(e) and (g) of [R.A. No.] 3019.

But could the State still prosecute the offense considering the illegal acts were committed way back 1968 up to 1982 or more than fifteen (15) years ago? The complaint was only filed in 1998.

All offenses punishable under the Anti-Graft and Corrupt Practices Act shall prescribe in FIFTEEN (15) years. In the case under review, there is no doubt that the offenses have been committed longer than fifteen (15) years, the earliest began in 1967 and the latest in 1982 x x x By prescription of the crime, it means the forfeiture or loss of the right of the State to prosecute the offender after the lapse of a certain period. Moreover, except for Ms. Alice Reyes, all the other respondent [sic] - DBP officials, namely [sic] Gregorio Licaros, J.V. de Ocampo, and Leonides Virata, are already dead. Reliable reports though not yet confirmed indicate that many of the private respondents are now dead.

In view of the foregoing circumstances, the undersigned recommends the dismissal of the instant case.<sup>[18]</sup>

The recommendation for the dismissal of the complaint on the basis of prescription was approved by Ombudsman Desierto on 29 January 1999.<sup>[19]</sup>

On 11 July 2000, the Ad Hoc Committee, represented by Atty. Salvador, filed before the EPIB a Motion to Revive/Reinstate<sup>[20]</sup> the instant criminal complaint, citing the 25 October 1999 Decision of this Court in *Presidential Ad Hoc Fact-finding Committee v. Hon. Desierto*<sup>[21]</sup> where, according to the Ad Hoc Committee, it was held that it should be given the fair chance to prove that prescription has not barred the filing of charges against the respondents.<sup>[22]</sup>

It appears that the EPIB issued an order requiring the public and private respondents to file their counter-affidavits on 4 September 2000.<sup>[23]</sup> Only Reyes among the respondents filed a Counter-affidavit,<sup>[24]</sup> wherein she stated that she was a member of the DBP Board of Governors only from 1980 until 1986,<sup>[25]</sup> or thus long after the loan was first extended to Midland Cement in January 1968. She nevertheless asserted that the DBP guarantee was secured by: (a) a first mortgage on all the assets of Midland Cement worth at least P77M; (b) an assignment to the DBP of Midland Cement's mining claims and quarry rights; (c) the pledge to the DBP

of common shares of Midland Cement's stockholders worth at least P9M; (d) the assignment of subscription receivables worth P10M; and (e) the joint and several signatures with Midland Cement of its stockholders. Thus, claimed Reyes, DBP was sufficiently protected when it approved the guarantee in favor of Midland Cement.  
[26]

Reyes likewise averred that DBP had taken over Midland Cement in 1972, that it had become the owner of 92.89% of the corporation's shares in 1981, and that the succeeding loan transactions after the takeover had been in fact approved by DBP as the owner of Midland Cement and consummated in order to protect the interests of both entities.<sup>[27]</sup> She further stated that nothing in the transactions adverted to in the complaint manifested that she herself had committed any of the acts sanctioned under Section 3(e) and (g) of R.A. No. 3019.<sup>[28]</sup>

On 25 October 2000, the EPIB promulgated the now-assailed Resolution<sup>[29]</sup> recommending the dismissal of the complaint for insufficiency of evidence.<sup>[30]</sup> Ombudsman Desierto approved the recommendation on 24 November 2000.<sup>[31]</sup> Petitioners filed a motion for reconsideration with the EPIB, but this was denied for lack of merit in a Resolution<sup>[32]</sup> dated 6 February 2001, which was also subsequently approved by Ombudsman Desierto on 16 February 2001.<sup>[33]</sup>

Hence, the present petition.

Petitioners point out that in the 1998 Resolution, the Ombudsman categorically asserted that "it is beyond doubt that respondents violated Section 3(e) and (g) of [R.A. No.] 3019,"<sup>[34]</sup> even as the complaint was dismissed on the ground of prescription, yet in the 2000 Resolution, "completely deviated, ignored and disregarded his previous resolution"<sup>[35]</sup> when he ruled that the evidence was insufficient to prosecute respondents. Such *volta face*, petitioners claim, constitutes not only grave but palpable gross and excessive abuse of discretion on the part of the Ombudsman. Petitioners adduce as compelling reason to prosecute respondents the fact that as of 30 June 1986, Midland Cement had an outstanding and unpaid balance of over P1B, with a property appraisal value of only around P329M.<sup>[36]</sup>

This Court directed respondents to file their respective comments<sup>[37]</sup> but the resolution containing the said directive could not be served on respondents Basilio Lirag, Felix Lirag, Lourdes Montenegro and Serafin Montenegro despite repeated and diligent efforts on the part of the PCGG to ascertain their present addresses.<sup>[38]</sup> Thus, only the Office of the Ombudsman and Reyes were able to file their respective comments.

In its Comment, the Office of the Ombudsman adverts to the rule that "it is beyond the ambit of [the] Court to review the exercise of discretion of the Ombudsman in prosecuting or dismissing a complaint before it."<sup>[39]</sup> It defends its finding that the loans were not "behest" in nature and character, citing its findings in the assailed resolution that the initial loan had been sufficiently collateralized and that the subsequent loans were approved by DBP in its new capacity as the owner of Midland Cement, to protect the interests of the two corporations.<sup>[40]</sup> It points out that after DBP had taken over Midland Cement, there resulted a merger or confusion of rights