

**MIAA-NAIA ASSOCIATION OF SERVICE OPERATORS, PETITIONER,
VS. THE OMBUDSMAN, PANTALEON D. ALVAREZ, VICENTE RIVERA,
JR., ANTONIO P. GANA, EDGARDO C. MANDA, DIOSDADO ACOB,
REYNALDO ...**

G.R. NO. 154190. October 17, 2005

Ponente: SANDOVAL-GUTIERREZ, J.

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SANDOVAL-GUTIERREZ, J.:

Before us is a petition for certiorari filed by MIAA-NAIA Association of Service Operators against the above-named respondents, seeking to set aside the Joint Resolution[1] dated February 22, 2002 of the Ombudsman (herein public respondent) in Case No. OMB-0-01-1001. Petitioner contends that in issuing the assailed Joint Resolution finding no probable cause to warrant the filing of an Information against the private respondents, the Ombudsman acted with grave abuse of discretion amounting to lack or excess of jurisdiction.

The facts of this case as shown by the records are:

On July 12, 1997, the Government of the Republic of the Philippines, through the Department of Transportation and Communications (DOTC) and the Philippine International Air Terminals, Co., Inc. (PIATCO) signed a "Concession Agreement for the Build-Operate-Transfer Arrangement of the Ninoy Aquino International Airport (NAIA) Passenger Terminal III" (the 1997 Concession Agreement). Under its terms, the Government granted PIATCO a franchise to operate and maintain the NAIA International Passenger Terminal III (IPT 3) for twenty-five (25) years commencing from the in-service date; and to collect fees, rentals and other charges in accordance with the stipulated rates. The franchise was renewable for another twenty-five (25) years at the option of the Government. At the end of the concession period, PIATCO shall transfer the IPT 3 to the Manila International Airport Authority (MIAA).

On November 26, 1998, the Government and PIATCO signed an Amended and Restated Concession Agreement (ARCA) modifying several provisions of the 1997 Concession Agreement. Subsequently, on August 27, 1999, September 4, 2000, and June 22, 2001, both parties signed three (3) Supplements to the ARCA.

On September 10, 2001, the MIAA-NAIA Association of Service Operators, petitioner, filed a complaint against the above-named respondents with the Office of the Ombudsman, docketed as OMB Case No. 0-01-0693. The charges are:

- Violation of Section 3 (e) and (i) of the Anti-Graft and Corrupt Practices Act (R.A. No. 3019) in relation to Article 186 of the Revised Penal Code;.
- Violation of the Code of Conduct of Ethical Standards for Public Officials and Employees (R.A. No. 6713); and
- Violation of the Plunder Law.

The complaint alleges inter alia, that private respondents, acting in conspiracy, created a monopoly related services as shown by the "onerous, disadvantageous, and unlawful provisions" of the 1997 Concession Agreement, the ARCA, and the three (3) Supplements thereto; that the exclusive nature of PIATCO's services at the IPT 3 will cause undue prejudice to the members of petitioner; that the Government ensured that the services or operations currently being undertaken by petitioner's members at the NAIA "shall not be carried over to the NAIA Terminal 3;" that the Government can be required to assume PIATCO's financial obligations to its foreign lenders if it defaults in payment; that PIATCO is entitled to indefinitely retain the IPT 3 despite the expiration of the concession period until the liquidated damages due it shall have been paid by the Government; that PIATCO is authorized to mortgage the facility; and that the P750 million a year that PIATCO shall pay the Government for 25 years is substantially lesser than the P12 billion a year being collected from NAIA Terminals 1 and 2.

Petitioner also alleged that private respondents, acting in conspiracy, entered into a contract with Wintrack Builders, Inc. (Wintrack) owned by respondent Pantaleon Alvarez to do clearing at the NAIA IPT 3 site; and that Wintrack made over-billings in the amount of P76,496,157.45, P56 million of which had been paid to private respondents by the Government.

The above allegations are based on the affidavit dated July 26, 2001 executed by respondent Venner M. Mendoza, an employee of Wintrack Builders, Inc., PIATCO's contractor for the demolition and removal of "the subterranean structures" of NAIA IPT 3. He stated in his affidavit that his co-respondents conspired to defraud the Government of P76 million by overstating the cost of demolishing the subterranean structures found on the site.

However, on September 10, 2001, Mendoza executed an affidavit recanting the previous one.

On November 20, 2001, petitioner filed a supplemental complaint charging respondent Mendoza with perjury for executing the affidavit dated September 10, 2001 allegedly containing deliberate falsehoods. Respondents Pantaleon D. Alvarez, Luisito V. Clavano, Carlitos V. Clavano, and Ronald V. Clavano were also charged with subornation of perjury for having submitted to the Office of the Ombudsman the said affidavit. In addition, all the respondents were accused of obstruction of justice.

Respondent Ombudsman then required private respondents to file their respective counter-affidavits. All complied except Ernesto F. Hernandez and Roger D. Mercado. In their counter-affidavits, private respondents denied any liability, claiming that the 1997 Concession Agreement, the ARCA, and the Supplements thereto are valid and enforceable. Alvarez was the only respondent who filed a counter-affidavit. He denied all the charges contending that he has no knowledge of any falsity in Mendoza's second affidavit.

On March 12, 2002, then Ombudsman Aniano A. Desierto, "finding no evidence" to support the charges, approved the Joint Resolution[2] of Graft Investigation Officers Emily G. Reyes and Marilou Ancheta-Mejica recommending the dismissal of petitioner's complaint and supplemental complaint.

The dispositive portion of the Ombudsman's Joint Resolution reads:

"WHEREFORE, in view of the foregoing circumstances, this Office finds that:

- the instant denuncia against all the above-mentioned respondents for conspiracy to commit violations of Section 3(e), (g) and (j) of RA 3019, otherwise known as the Anti-Graft and Corrupt Practices Act, Article 186 of the Revised Penal Code, Section 2 of RA 7080 or the Law on Plunder, and Section 5 (e) in relation to Section 7(a) and (b) (1) of R.A. 6713, or the Code of Conduct and Ethical Standards for Public Officials and Employees; violation of the Constitution, RA 6957, otherwise known as An Act Authorizing the Financing, Construction and Operation Maintenance of Infrastructure Projects by the Private Sector and Conflict of Interest, is hereby DISMISSED.

- the charge of Plunder is hereby DISMISSED, without prejudice to the outcome of the special audit investigation of the Commission on Audit (COA). Let the records of this case be forwarded to COA, Quezon City for the conduct of a special audit investigation on the complainant's allegation of overpayment of over P56 Million to Wintrack Builders, Inc., through allegedly bloated work accomplishments, which amount was allegedly deducted by PIATCO from the guaranteed annual payments due to GRP pursuant to the assailed contracts above-mentioned, specifically on the four (4) billings mentioned by herein complainants in their complaint and the Affidavit of Venner Mendoza dated July 26, 2001;

- the charges of Subornation of Perjury and Obstruction of Justice against public respondent Pantaleon D. Alvarez are hereby DISMISSED;

- the charges of Perjury, Subornation of Perjury, and Obstruction of Justice against private respondents Venner Mendoza, Luisito V. Clavano, Carlitos V. Clavano, and Ronald V. Clavano are also DISMISSED, for lack of jurisdiction, but without prejudice to the re-filing of the same against the said private respondents in the appropriate office or proper agency who has jurisdiction over these cases.

SO RESOLVED."[3]

Petitioner filed a motion for reconsideration, but it was denied for lack of merit.

Hence, the instant petition for certiorari.

In order to better understand the reason why private respondents are being charged in this petition, their respective roles with respect to the Concession Agreement, the ARCA and the Supplements thereto are indicated below. They are reproduced from the allegations in the instant petition.

"3) Pantaleon D. Alvarez, Carlitos V. Clavano, Luisito V. Clavano, Diosdado N. Silva, Roger Mercado and Ronald V. Clavano, are all of legal age and may be found at c/o Primecars Corp. Bldg., 0211 Quirino Avenue, Tambo, Parañaque City, where they may be served with summons.

Pantaleon D. Alvarez, prior to and at the time of the filing of OMB-0-01-0693, was the Secretary of Transportation and Communications and who, prior thereto, was a Senior Assistant General Manager of the Manila International Airport Authority and then was elected representative of the First District of Davao del Norte. It was he, who having acquired access to the requirements for the construction of the NAIA IPT III, formed with Roger Mercado, Diosdado N. Silva, Ronald V. Clavano, Carlitos V. Clavano and Luisito V. Clavano, Wintrack Builders, Inc., a corporation which, thereafter, using the peculiar knowledge of Alvarez in NAIA IPT III and his influence as Congressman, obtained juicy contracts for demolition of subterranean structures, site development and earthworks of the project resulting in its enjoying a P76,496,157.45 windfall on its overbillings on the project.

They were among the respondents in OMB-0-01-0693.

4) Vicente Rivera, Jr., is of legal age, former Secretary of the Department of Transportation and Communications and at present residing at #12 12th Avenue, Caloocan City, where he may be served with summons.

It was Vicente Rivera, Jr. who executed the Amended Restated Concession Agreement (ARCA) and the First Supplement thereof, which materially altered in a manner grossly prejudicial to the Republic of the Philippines, the original Concession Agreement with the Philippine International Air Terminals Co., Inc. (PIATCO) and, thereafter, had it supplemented by adding thereto more onerous burdens to the Republic of the Philippines.

5) Antonio P. Gana, Edgardo C. Manda, Diosdado Acob, Reynaldo Roa, Lewelyn A. Villamor, Jose Gabriel Benedicto, Jose N. Go and Elpidio Mendoza, all of legal age, officials of the Manila International Airport

Authority who, by the nature of the offices they occupy, are related to the construction of NAIA IPT III and may be found as such at c/o Project Management Office, MIAA Admin. Building, Pasay City, where they may be served with summons.

They are the government officials who, by their contemporaneous performance of their official functions, facilitated the processing and approvals of the billings of Wintrack Builders, Inc., resulting in the latter's obtaining a windfall of P76,496,157.45 in excess of actual works done by it on NAIA IPT III.

6) Bernd L. Struck, Vic Cheng Yong, Jefferson G. Cheng, Jason Cheng, Alfred Johannes (Hans) Arthur Vogel, Stephan Bauchspiess, S. Samim Aydin, Hachiman Yokoi, Gil Camacho, Katherine Agnes Arnaldo, Mario Tongson, Marife Oplencia, Mary Antonette P. Manalo and Ernesto F. Hernandez, are of legal age and hold offices at c/o 3rd Floor, PAIR/PAGS Center, NAIA Compound, Ninoy Aquino Avenue, Pasay City, where they can be served with summons.

They are the officers or directors of PIATCO who facilitated the processing and approval of the overbillings of Wintrack Builders, Inc. in the aforesaid sum of P76,496,157.45, to the damage and prejudice of the Republic in the aforesaid amount.

7) Raoul Hilloe, Manfred Reimer, Henry T. Go, Lilia G. Cheng, Jean G. Cheng, Eberhard Mueller and Karl May are all of legal age and may be found at c/o 3rd Floor, PAIR-PAGS Center, NAIA Compound, NAIA Avenue, Pasay City, where they may be served with summons.

They are directors or officers of Philippine Airport and Ground Services, Inc. (PAGS) and as such participated actively in the processing and approval of the over-billings of Wintrack Builders, Inc. despite the findings of Karl May that, really, there were such overbillings.

8) Venner M. Mendoza, is of legal age and a resident of c/o Primecars Corp. Bldg., 0211 Quirino Avenue, Tambo, Parañaque City, where he may be served with summons.

It was Venner M. Mendoza who brought to the attention of the petitioner the anomalies attending to the billings made by Wintrack Builders, Inc. which netted it for work not really done on NAIA IPT-III the amount of P76,496,157.45. It was he who brought to the petitioner various documents for scrutiny by petitioner's counsel and who thereafter executed an affidavit supporting his allegations and subscribed to it before a duly qualified public prosecutor. It was also Mendoza who later on executed another affidavit disowning not only this signature but also the contents of the first affidavit originally sworn to by him. The second affidavit was made the basis of the Ombudsman when, through his Deputy, Margarito Gervacio, he immediately crowed in various metropolitan papers that with the recanting affidavit of Mendoza, the case of the petitioner could already be dismissed."

The present petition raises the following:

"I

THE OMBUDSMAN ERRED, AND WHEN HE DID, HE COMMITTED A GRAVE ABUSE OF DISCRETION AMOUNTING TO EXCESS OR LACK OF JURISDICTION, WHEN HE DISMISSED THE COMPLAINT FILED BY THE PETITIONER WITHOUT A FULL AND COMPLETE PRELIMINARY INVESTIGATION.

"II

THE OMBUDSMAN ERRED, AND WHEN HE DID SO, HE COMMITTED A GRAVE ABUSE OF DISCRETION AMOUNTING TO EXCESS OR LACK OF JURISDICTION WHEN HE IGNORED THE EVIDENCE AND FOUND NO PROBABLE CAUSE TO INDICT THE PRIVATE RESPONDENTS FOR THE OFFENSES CHARGED AGAINST THEM WHICH, IN EFFECT, WAS EVEN A TRANSGRESSION

OF THE DUTIES OF HIS POSITION.

Meanwhile, on May 5, 2003, during the pendency of the instant case, this Court En Banc promulgated its Decision in *Agan vs. Philippine International Air Terminals Co., Inc.*[4] declaring null and void the 1997 Concession Agreement, the ARCA, and the Supplements thereto entered into between the Government and PIATCO.

We quote this Court's narration of facts and ratiocination in *Agan* pertinent to the instant case, thus:

"x x x

"In G.R. No. 155001 individual petitioners are employees of various service providers [MIASCOR, MACROASIA-EUREST, MACROASIA OGDEN and Philippine Airlines] having separate concession contracts with MIAA and continuing service agreements with various international airlines to provide in-flight catering, passenger handling, ramp and ground support, aircraft maintenance and provisions, cargo handling and warehousing and other services. Also included as petitioners are labor unions MIASCOR Workers Union-National Labor Union and Philippine Airlines Employees Association. These petitioners filed the instant action for prohibition as taxpayers and as parties whose rights and interests stand to be violated by the implementation of the PIATCO Contracts.

Petitioners-Intervenors in the same case are all corporations organized and existing under Philippine laws engaged in the business and providing in-flight catering, passenger handling, ramp and ground support, aircraft maintenance and provisions, cargo handling and warehousing and other services to several international airlines at the Ninoy Aquino International Airport. Petitioners-Intervenors allege that as tax-paying international airline and airport-related service operators, each one of them stands to be irreparably injured by the implementation of the PIATCO Contracts. Each of the petitioners-intervenors have separate and subsisting concession agreements with MIAA and with various international airlines which they alleged are being interfered with and violated by respondent PIATCO.

In G.R. No. 155661, petitioners constitute employees of MIAA and Samanhang Manggagawa sa Paliparan ng Pilipinas - a legitimate labor union and accredited as the sole and exclusive bargaining agent of all the employees in MIAA. Petitioners anchor their petition for prohibition on the nullity of the contracts entered into by the Government and PIATCO regarding the build-operate-and-transfer of the NAIA IPT III. They filed the petition as taxpayers and persons who have a legitimate interest to protect in the implementation of the PIATCO Contracts.

Petitioners in both cases raise the argument that the PIATCO Contracts contain stipulations which directly contravene numerous provisions of the Constitution, specific provisions of the BOT Law and its Implementing Rules and Regulations, and public policy. Petitioners contend that the DOTC and the MIAA, by entering into said contracts, have committed grave abuse of discretion amounting to lack or excess of jurisdiction which can be remedied only by a writ of prohibition, there being no plain, speedy or adequate remedy in the ordinary course of law.

In particular, petitioners assail the provisions in the 1997 Concession Agreement and the ARCA which grant PIATCO the exclusive right to operate a commercial international passenger terminal within the Island of Luzon, except those international airports already existing at the time of the execution of the agreement. The contracts further provide that upon the commencement of the operations at the NAIA IPT III, the Government shall cause the closure of Ninoy Aquino International Airport Passenger Terminals I and II as international passenger terminals. With respect to existing concession agreements between MIAA and international airport service providers regarding certain services or operations, the 1997 Concession Agreement and the ARCA uniformly provide that such services or operations will not be carried over to the NAIA IP III and PIATCO is under no obligation to permit such carry over except through a separate agreement duly entered into with PIATCO.

With respect to the petitioning service providers and their employees, upon the commencement of operations of the NAIA IPT III, they allege that they will be effectively barred from providing international airline airport services at the NAIA Terminals I and II as all international airlines and passengers will be diverted to the NAIA IPT III. The petitioning service providers will thus be compelled to contract with PIATCO alone for such services, with no assurance that subsisting contracts with MIAA and other international airlines will be respected. Petitioning service providers stress that despite the very competitive market, the substantial capital investments required and the high rate of fees, they entered into their respective contracts with the MIAA with the understanding that the said contracts will be in force for the stipulated period, and thereafter, renewed so as to allow each of the petitioning service providers to recoup their investments and obtain a reasonable return thereon.

Petitioning employees of various service providers at the NAIA Terminals I and II and of MIAA on the other hand allege that with the closure of the NAIA Terminals I and II as international passenger terminals under the PIATCO Contracts, they stand to lose employment."

xxx xxx xxx

"The right granted to the public utility may be exclusive, but the exercise of the right cannot run riot. Thus, while PIATCO may be authorized to exclusively operate NAIA IPT III as an international passenger terminal, the Government, through the MIAA, has the right and the duty to ensure that it is done in accord with public interest. PIATCO'S right to operate NAIA IPT III cannot also violate the rights of third parties.

xxx xxx xxx

"We hold that while the service providers presently operating at NAIA Terminal I do not have an absolute right for the renewal or the extension of their respective contracts, those contracts whose duration extends beyond NAIA IPT III's In-Service-Date should not be unduly prejudiced. These contracts must be respected not just by the parties thereto but also by third parties. PIATCO cannot, by law and certainly not by contract, render a valid and binding contract nugatory. PIATCO, by the mere expedient of claiming an exclusive right to operate cannot require the Government to break its contractual obligations to the service providers. In contrast to the arrastre and stevedoring service providers in the case of *Anglo-Fil Trading Corporation v. Lazaro*, [G.R. No. L-54958, September 2, 1983, 124 SCRA 494] whose contracts consist of temporary hold-over permits, the affected service providers in the cases at bar, have a valid and binding contract with the Government, through MIAA, whose period of effectivity, as well as the other terms and conditions thereof cannot be violated.

xxx xxx xxx

"WHEREFORE, the 1997 Concession Agreement, the Amended and Restated Concession Agreement and the Supplements thereto are set aside for being null and void.

"SO ORDERED."

Petitioner's members in the present case are likewise service providers operating at the MIAA-NAIA. As held by this Court in *Agan*, it cannot be prejudiced by the stipulation between the Government and PIATCO, as specified in the Concession Agreement, the ARCA and Supplements thereto, that "the concession contracts of the service providers currently servicing Terminals 1 and 2 would no longer be renewed and those concession contracts whose expiration are subsequent to the In-Service Date would cease to be effective on the said date."

In dismissing petitioner's complaint, the Ombudsman in effect ruled that the Concession Agreement, the ARCA and the Supplements thereto are valid. On this point alone, the assailed Joint Resolution of the Ombudsman is obviously tainted with grave abuse of discretion on the basis of this Court's ruling in *Agan*. Necessarily, the criminal acts allegedly committed by private respondents pursuant to those agreements, subject of petitioner's complaint, have to be re-investigated by the Ombudsman to determine whether a probable cause exists against

them.

Moreover, we are concerned about petitioner's allegation that the preliminary investigation is incomplete and was hastily conducted. The records bear these out.

WHEREFORE, the petition is GRANTED. The challenged Joint Resolution of the Ombudsman in OMB-0-01-0693 is hereby SET ASIDE.

The Ombudsman is directed to conduct a preliminary investigation anew of petitioner's complaint against private respondents with dispatch.

SO ORDERED.

Panganiban, (Chairman), Corona, Carpio Morales, and Garcia, JJ., concur.

[1] Vol. I, Rollo at 90-117.

[2] Id. at 114.

[3] Id. at 116-117.

[4] G.R. Nos. 155501, 155547, 155661, May 5, 2003, 402 SCRA 612, 679.

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