

M.A. JIMENEZ ENTERPRISES, INC., REPRESENTED BY CESAR CALIMLIM AND LAILA BALOIS, PETITIONER, VS. THE HONORABLE OMBUDSMAN, JESUS P. CAMMAYO, ARTURO SANTOS, MANUEL FACTORA, TEODORO...

G.R. No. 155307. June 06, 2011

Ponente: VILLARAMA, JR., J.

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VILLARAMA, JR., J.:

Before us is a special civil action for certiorari and mandamus[1] praying that the Resolution[2] dated February 5, 2002 and Order[3] dated June 27, 2002 of the Ombudsman in OMB Case No. 0-01-0400 be nullified and a writ of mandamus be issued directing the Ombudsman to file informations against respondents for violation of Section 3(e) of Republic Act (R.A.) No. 3019 or the Anti-Graft and Corrupt Practices Act.

The facts, as culled from the records, are as follows:

On January 20, 1999, the Department of Public Works and Highways (DPWH) entered into a contract[4] for the proposed construction of the Baguio General Hospital and Medical Center (BGHMC) Building (Phase I) with Royson and Co., Inc. (Royson), represented by its President, respondent Manuel V. Roy. The contract was approved by DPWH Secretary Gregorio R. Vigilar on January 29, 1999, and construction ensued.

On March 4, 1999, an excavation of sixty meters deep was made on the area under the control and supervision of the Project Director, Engr. Arturo M. Santos. Thinking that its property which was adjacent to the project site was under threat of erosion, petitioner, through its representative Carolina Jimenez, sent three letters[5] addressed to Royson asking that Royson hasten the construction of a retaining wall.

Construction of a provisional slope protection measure in the construction and excavation area was then started. Unfortunately, on February 7, 2000, unusually heavy rains triggered the collapse of a portion of the slope protection, resulting in a landslide. Petitioner alleged that the landslide caused cracks in the house owned by it and prejudiced the structural integrity of the house. Thus, petitioner complained against the project before the Office of the Regional Director of the DPWH Cordillera Administrative Region (DPWH-CAR) and the Office of the City Mayor, which directed the Office of the City Engineer of Baguio City to conduct an investigation.

On March 23, 2000, the DPWH-CAR engineers submitted a Memorandum[6] to the DPWH Regional Director which stated, among others that "[t]he affected part of the lot (driveway) claimed by the complainant is actually part of the BGH property as shown on the attached lot plan."

The City Engineer of Baguio, for its part, found the following:

1. That the construction being implemented by Royson and Co., Inc. is not covered by a building and excavation permit.
2. That the personnel of Royson & Co., Inc. alleged that no death resulted in the accident that happened on

February 7, 2000 within their construction area.

3. That portion of Mr. & Mrs. Jimenez' garage allegedly encroached inside the property of BGH.

4. That the retaining wall is located approximately 7.50 meters to the nearest building line of the complainant. This building is a two (2) storey structure with a footprint area excluding the garage of approximately 10 x 15 meters.

5. That cracks on their driveway approximately 5.65 m. away from the edge of the complainant's building measuring approximately 6.00 meters is observed. The garage floor level is approximately 4.50 meters above the partially completed 2nd level retaining wall.[7]

Royson subsequently proceeded to build reinforced concrete slope protection, a grouted riprap, and a retaining wall for the compound. However, on June 8, 2000, when the reinforced concrete slope protection, grouted riprap, and retaining wall for the compound were already substantially completed, the retaining wall of the BGHMC Project collapsed.

Asserting that its property was damaged as a result, petitioner, through its representatives, Cesar Calimlim and Laila Balois, filed an Affidavit-Complaint[8] against all respondents before the Office of the Ombudsman.

Petitioner alleged that it is the owner of the land adjacent to the project site and that the said land was covered by TCT No. 31565. Before the incident, the land together with its improvements was valued at P25 million. However, according to petitioner, its property has now become virtually useless and danger-prone and can no longer be used profitably as the surrounding land has been eroded. Petitioner claimed that the damage to its property was due to respondents' gross negligence, incompetence and/or malicious conduct because they failed to construct a perimeter fence in the excavations made for the expansion of the BGHMC despite the fact that petitioner had written Royson about the possibility of an erosion happening. Thus, petitioner charged all the respondents of causing undue injury to it in the discharge of their official and administrative functions through manifest partiality, evident bad faith and inexcusable negligence in the construction of the expansion project of the BGHMC and its retaining wall.

Petitioner also averred in its affidavit-complaint that it filed a complaint for damages against the respondents before the Regional Trial Court of Quezon City, docketed as Civil Case No. Q-01-43224.

Respondent Teodoro Barrozo, the former City Engineer of Baguio City, filed his Counter-Affidavit[9] denying any liability under R.A. No. 3019. He claimed that the project in question was not a public-work project of the City Government of Baguio but a project of the national government over which the Baguio City Engineer has no control and supervision. He maintained that the City Engineer's Office was never negligent or remiss in its duty: when it found out that the project was without the necessary permits, it immediately required the manager of Royson and BGHMC to obtain permits.

Respondent Jesus P. Cammayo, then Assistant Secretary of the DPWH, also submitted his Counter-Affidavit[10] denying that he was negligent in the performance of his duties and responsibilities. He also asserted that there was no basis for liability on his part because he had no participation whatsoever in the preparation, execution and approval of the contract and the project plans. The Contract for the Proposed Construction of the BGHMC (Phase I) was executed between DPWH, through Undersecretary Edmundo V. Mir, and Royson and was approved by DPWH Secretary Gregorio Vigilar. The BGHMC Project was a locally funded special project classified under Special Buildings, and as such, it was directly supervised by the Project Management Office for Special Buildings (PMO-SB) headed by the Project Director, Engr. Arturo Santos. It was also directly managed by Project Manager, Architect Angelito Damo, who was under the direct control and supervision of Engr. Santos. Although he

supervises and/or controls the PMO-SB, Cammayo averred that he does not directly participate in the actual oversight of the construction of the BGHMC Project.

Cammayo added that in any event, he did all he could do to prevent damage to petitioner's property. He stressed that in the original plans for the project, there was no provision for the construction of any reinforced slope protection or retaining wall for the area adjacent to or near petitioner's property. Thus, there was no obligation to construct such permanent protection measures. But recognizing the need for slope protection, he initiated the construction of provisional slope protection measures. A supplemental agreement providing for the addition of a reinforced concrete slope protection and grouted riprap, among others, was also executed on December 9, 1999 and implemented immediately. However, while the additional slope protection was being constructed, unusually heavy rains triggered the collapse of the portion of the slope protection within the Project Site near petitioner's property line. DPWH immediately took action to prevent further erosion.

He also maintained that when the reinforced concrete slope protection and the retaining wall of the BGHMC project collapsed on June 8, 2000, he immediately ordered respondent Engr. Santos to give him a complete report of the incident. His subordinates reported that the workers discovered a previously undetected pre-war tunnel which collapsed due to the heavy rains. This totally unforeseen and unfortunate event caused the slope protection to collapse and cause another landslide. Cammayo asserted that the cause of damage to petitioner's property was force majeure beyond the control of the DPWH and not any negligence, bad faith or partiality on his part.

Respondent Manuel Factora meanwhile claimed that he is the Medical Center Chief of the BGHMC and as such he had no participation whatsoever in the contract between the Republic of the Philippines through the DPWH and Royson. Being the Chief of the BGHMC, his concern is the proper and efficient operation and management of the hospital as well as the welfare of the patients brought to the hospital for treatment.[11]

In a Resolution dated February 5, 2002, the Ombudsman dismissed the complaint after finding no probable cause to hold any of the respondents liable for violation of Section 3(e) of R.A. No. 3019. The Ombudsman found no evidence of manifest partiality, evident bad faith and gross inexcusable negligence on the part of the respondents in the construction of the BGHMC Building. Further, it noted that the damage was not within petitioner's property but on a portion of BGHMC's property which petitioner merely encroached.

On June 27, 2002, the Ombudsman denied petitioner's motion for reconsideration.

Not satisfied, petitioner filed the instant petition contending that the Ombudsman acted without jurisdiction or with grave abuse of discretion in issuing the assailed resolution and order. Petitioner contends that:

A.

THE UNCONTROVERTED FACTS PROVE THAT CONSTRUCTION AND EXCAVATION ON THE BGHMC EXPANSION PROJECT WERE UNDERTAKEN WITHOUT BUILDING AND EXCAVATION PERMITS, SLOPE AND SOIL ANALYSIS.

B.

THE COLLAPSE OF THE RETAINING WALL AND THE EVENTUAL DAMAGE TO THE PROPERTY ARE SUFFICIENT TO RAISE A PRESUMPTION OR PERMIT AN INFERENCE OF NEGLIGENCE ON THE PART OF THE RESPONDENTS.

C.

EFFORTS TO CONSTRUCT THE RETAINING WALL WERE DONE ONLY AFTER DAMAGE HAD BEEN CAUSED TO PETITIONER'S PROPERTY.[12]

The sole issue to be resolved is whether the Ombudsman acted with grave abuse of discretion amounting to lack or excess of jurisdiction in dismissing the complaint against all the respondents.

Petitioner asserts that there is probable cause to charge respondents with violation of Section 3(e) of R.A. No. 3019. Petitioner insists that the collapse of the retaining wall was due to respondents' gross inexcusable negligence in their respective duties because they failed to ensure that the necessary building and excavation permits have been secured before excavation commenced. Petitioner assails the finding of the Ombudsman that the collapse was due to unusually heavy rains and typhoon Feria and the pre-war tunnel that caved-in which were all beyond the scope of respondents' authority. Petitioner argues that the occurrence of heavy rains at the time of construction should not be considered as force majeure as to exempt respondents from liability. It points out that there was no proof that the collapse was due to the rains, and that it had forewarned the respondents of the possibility of erosion occurring but they continued being negligent. The Ombudsman likewise committed grave abuse of discretion in holding that the property damaged was BGHMC's property based on the report of the DPWH-CAR engineers because said engineers were allegedly in no position to determine whether petitioner encroached on a portion of BGHMC's property.

As to Cammayo's protestations of good faith and due diligence in trying to protect petitioner's property from damage, petitioner alleged that the effort to construct a retaining wall was done only after the two landslides. And although petitioner had attached a copy of the supplemental agreement to its complaint before the Ombudsman, petitioner contended that Cammayo's allegation that he initiated the construction of provisional slope protection was also allegedly not proven.

Respondents, for their part, maintained that the Ombudsman did not act with grave abuse of discretion when it dismissed the complaint against them. They further claim that the petitioner failed to establish that it suffered actual damage; that respondents DPWH and BGHMC officials gave unwarranted benefits, advantage or preference to any private party or even to the government; or that respondents acted with gross inexcusable negligence.

Private respondent Roy meanwhile stressed that under Royson's contract with the DPWH, it had no obligation to secure the permits and that it was issued a Notice to Proceed prior to its construction of the BGHMC expansion project.

We dismiss the petition.

It is well-settled that the determination of probable cause against those in public office during a preliminary investigation is a function that belongs to the Ombudsman.[13] The Ombudsman is vested with the sole power to investigate and prosecute, *motu proprio* or upon the complaint of any person, any act or omission which appears to be illegal, unjust, improper, or inefficient.[14] It has the discretion to determine whether a criminal case, given its attendant facts and circumstances, should be filed or not.[15] As explained in *Esquivel v. Ombudsman*: [16]

The Ombudsman is empowered to determine whether there exists reasonable ground to believe that a crime has been committed and that the accused is probably guilty thereof and, thereafter, to file the corresponding information with the appropriate courts. Settled is the rule that the Supreme Court will not ordinarily interfere with the Ombudsman's exercise of his investigatory and prosecutory powers without good and compelling reasons to indicate otherwise. Said exercise of powers is based upon his constitutional mandate and the courts will not interfere in its exercise. The rule is based not only upon respect for the investigatory and prosecutory powers granted by the Constitution to the Office of the Ombudsman, but upon practicality as well. Otherwise, innumerable petitions seeking dismissal of investigatory proceedings conducted by the Ombudsman will grievously hamper the functions of the office and the courts, in much the same way that courts will be swamped if they had to review the exercise of discretion on the part of public prosecutors each time they

decided to file an information or dismiss a complaint by a private complainant.

The Court respects the relative autonomy of the Ombudsman to investigate and prosecute, and refrains from interfering when the latter exercises such powers either directly or through the Deputy Ombudsman, except when there is grave abuse of discretion. [17] Indeed, the Ombudsman's determination of probable cause may only be assailed through certiorari proceedings before this Court on the ground that such determination is tainted with grave abuse of discretion defined as such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction. For there to be a finding of grave abuse of discretion, it must be shown that the discretionary power was exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and the abuse of discretion must be so patent and gross as to amount to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined or to act in contemplation of law. [18]

Here, however, an assiduous examination of the records, as well as the assailed resolution and order of the Ombudsman dismissing the case against all the respondents for insufficiency of evidence, shows that the Ombudsman did not act with grave abuse of discretion.

Respondents were charged with violation of Section 3(e) of R.A. No. 3019, the Anti-Graft and Corrupt Practices Act, which is committed as follows:

SEC. 3. Corrupt practices 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 benefits, 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.

The following essential elements must therefore be present: (1) the accused must be a public officer discharging administrative, judicial or official functions; (2) the accused must have acted with manifest partiality, evident bad faith or gross inexcusable negligence; and (3) the action of the accused caused undue injury to any party, including the government, or gave any private party unwarranted benefits, advantage or preference in the discharge of the functions of the accused.[19]

But as correctly noted by the Ombudsman, petitioner failed to point out specific evidence and concrete proof that respondents demonstrated manifest partiality or evident bad faith in the construction of the BGHMC and its retaining wall. There is manifest partiality when there is a clear, notorious, or plain inclination or predilection to favor one side or person rather than another.[20] Evident bad faith, on the other hand, connotes a manifest deliberate intent on the part of the accused to do wrong or cause damage.[21] It connotes not only bad judgment but also palpably and patently fraudulent and dishonest purpose to do moral obliquity or conscious wrongdoing for some perverse motive or ill will.[22] Petitioner has not shown that respondents were impelled by such motives in the performance of their official duties and functions. Neither did petitioner establish that respondents acted with gross inexcusable negligence. As found by the Ombudsman:

Respondents adopted emergency slope protection at the onset of the BGHMC Project. The Supplemental Agreement provided reinforced concrete slope protection and grouted rip rap, installation of polyurethane sheets and hiring of structural design specialist x x x. In fact, as recommended by complainant's Architect Angelo Lazaro three hundred (300) RSB soil nails were installed on site. The collapse was due to heavy rains

and typhoon Feria. This was followed by the discovery of a pre-war tunnel under which caved-in and collapsed also. The delay was beyond the control of respondents. There was the Open public bidding and the review of plans and structural design by the Bureau of Design. These factors were beyond the scope of authority of respondents. Conformably to the series of acts done by the respondents, we find no negligence or inexcusable negligence as claimed by complainants. The recommendation of complainant's architect was even implemented and yet, due to "force majeure", the collapse happened.

The Report or Memorandum for DPWH-CAR dated March 23, 2000 attached to the complaint remain undisputed. It clearly states that the damage is NOT within complainant's property. The affected part is actually a part of the BGHMC property as shown by the plan x x x and the Memorandum Report dated March 30, 2000 which states that the damage is 7.5 meters NEAREST the building line of complainant and that portion of Mr. & Mrs. Jimenez' garage allegedly encroached inside the property of BGHMC x x x.[23]

The foregoing findings of the Ombudsman are based on substantial evidence. As long as substantial evidence supports it, the Ombudsman's ruling will not be overturned. Evidently, the collapse of the retaining wall was not mainly attributable to respondents' acts but due to a confluence of several factors, such as the unusually heavy rains during the start of the construction, discovery of a pre-war tunnel which collapsed, typhoon Feria and the fact that because the construction site was on a slope, there was always a possibility of a landslide happening in the area. These factors were beyond respondents' control and contributed to soften the soil on the construction site which resulted in soil erosion and collapse of the retaining wall.

As to petitioner's allegation that respondents DPWH officials and Teodoro Barrozo, by their inaction, were grossly negligent in their official duties, such assertion is bereft of merit. For an action to constitute as gross inexcusable negligence, it is essential to prove that the breach of duty borders on malice and is characterized by flagrant, palpable and willful indifference to consequences insofar as other person may be affected.[24] Here, public respondents had not acted maliciously and with utter and willful indifference or disregard of other persons affected. In fact, by respondent Cammayo's act of employing additional slope protection to prevent further landslides in the area, he could not be deemed to have acted with gross inexcusable negligence. In addition, the DPWH through its contractor installed polyurethane sheets for slope protection to the affected area in order to prevent further erosion. Soil nails consisting of steel bars and grouted cement motor was also installed. The project director immediately hired a structural design specialist to prepare plans for a new reinforced concrete retaining wall which will provide for permanent slope protection. Furthermore, as explained by respondents, the delay of the BGHMC administration in obtaining the permits was due to the need to submit documents from other offices which public respondents did not have control over. All these acts negate petitioner's assertion that respondents are guilty of gross inexcusable negligence in the construction of the BGHMC expansion project. Gross inexcusable negligence does not signify mere omission of duties nor plainly the exercise of less than the standard degree of prudence. Rather, it refers to negligence characterized by the want of even the slightest care, acting or omitting to act in a situation where there is a duty to act, not inadvertently but willfully and intentionally, with conscious indifference to consequences insofar as other persons may be affected.[25] Even if respondents failed to fully prevent the landslide which occurred at the construction site, they had exercised due diligence in order to forestall the occurrence of landslide on the area and to adjacent properties and hence, they cannot be deemed to have acted with gross inexcusable negligence.

More importantly, petitioner failed to substantiate its claim that it suffered damages when its property lost lateral support by reason of the collapsed retaining wall. In the case of Santos v. People[26] cited in the case of Soriano v. Marcelo,[27] the Court equated the concept of "undue injury," in the context of Section 3(e) of the Anti-Graft and Corrupt Practices Act, with the civil law concept of "actual damage." It is required that undue injury must be specified, quantified and proven to the point of moral certainty.[28] Speculative or incidental injury is not

sufficient. The damages suffered cannot be based on flimsy and non-substantial evidence or upon speculation, conjecture or guesswork[29] but must depend on competent proof and on the best evidence obtainable regarding specific facts which could afford some basis for measuring compensatory or actual damage. The Memorandum of the Office of the City Engineer of Baguio City, which petitioner has not refuted, clearly stated that "the retaining wall is located approximately 7.50 meters to the nearest building line of the complainant. x x x [T]he main structure of the complainant is evaluated to be outside the critical slip circle which is approximately 5.00 meters lateral distance from the retaining wall x x x." Absent any controverting evidence submitted by petitioner which would clearly prove actual damage of its property, the Ombudsman will not be faulted for relying on the said memorandum report.

As to petitioner's prayer for the issuance of a writ of mandamus, suffice to say that mandamus is similarly unavailing to petitioner for mandamus is employed to compel the performance of a ministerial, not a discretionary duty. In the performance of an official duty involving discretion, the corresponding official can only be directed by mandamus to act, but not to act one way or the other, except where there is grave abuse of discretion, manifest injustice, or palpable excess of authority.[30]

WHEREFORE, the present petition for certiorari and mandamus is DENIED for lack of merit. The Resolution dated February 5, 2002 and Order dated June 27, 2002 of the Ombudsman in OMB Case No. 0-01-0400 are AFFIRMED.

No costs.

SO ORDERED.

Carpio Morales, (Chairperson), Brion, Bersamin, and Abad,[*] JJ., concur.

[*] Designated additional member per Special Order No. 997 dated June 6, 2011.

[1] Rollo, pp. 4-30.

[2] Id. at 31-43.

[3] Id. at 44-47.

[4] Id. at 63-67.

[5] Records, pp. 89-91.

[6] Id. at 94.

[7] Id. at 95.

[8] Id. at 1-5. Dated May 8, 2001.

[9] Id. at 139-140.

[10] Id. at 169-186.

[11] Id. at 137.

[12] Rollo, p. 15.

[13] Soriano v. Marcelo, G.R. No. 160772, July 13, 2009, 592 SCRA 394, 402, citing Presidential Commission on Good Government v. Desierto, G.R. No. 139296, November 23, 2007, 538 SCRA 207, 215.

- [14] Vergara v. Ombudsman, G.R. No. 174567, March 12, 2009, 580 SCRA 693, 708.
- [15] Id.
- [16] G.R. No. 137237, September 17, 2002, 389 SCRA 143, 150.
- [17] Galvante v. Casimiro, G.R. No. 162808, April 22, 2008, 552 SCRA 304, 314-315.
- [18] Presidential Commission on Good Government v. Desierto, supra note 13 at 216; Office of the Ombudsman v. Magno, G.R. No. 178923, November 27, 2008, 572 SCRA 272, 287.
- [19] Belongilot v. Cua, et al., G.R. No. 160933, November 24, 2010, p. 12.
- [20] Albert v. Sandiganbayan, G.R. No. 164015, February 26, 2009, 580 SCRA 279, 290.
- [21] Tayaban v. People, G.R. No. 150194, March 6, 2007, 517 SCRA 488, 500-501.
- [22] Id. at 500; Albert v. Sandiganbayan, supra note 20.
- [23] Records, pp. 249-250.
- [24] Sistoza v. Desierto, G.R. No. 144784, September 3, 2002, 388 SCRA 307, 316.
- [25] Catindig v. People, G.R. No. 183141, September 18, 2009, 600 SCRA 749, 769, citing Soriano v. Marcelo, supra note 13 at 404 and Albert v. Sandiganbayan, supra note 20; De la Victoria v. Mongaya, A.M. No. P-00-1436, February 19, 2001, 352 SCRA 12, 20.
- [26] G.R. No. 161877, March 23, 2006, 485 SCRA 185, 197.
- [27] G.R. No. 163178, January 30, 2009, 577 SCRA 312, 319-320.
- [28] Buyagao v. Karon, G.R. No. 162938, December 27, 2007, 541 SCRA 420, 431.
- [29] Llorente, Jr. v. Sandiganbayan, G.R. No. 122166, March 11, 1998, 287 SCRA 382, 400.
- [30] Albay Accredited Constructors Association, Inc. v. Desierto, G.R. No. 133517, January 30, 2006, 480 SCRA 520, 537.

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