

THIRD DIVISION

[G.R. No. 172222, November 11, 2013]

**VICTOR AFRICA, PETITIONER, VS. THE HONORABLE
SANDIGANBAYAN AND BARBARA ANNE C. MIGALLOS,
RESPONDENTS.**

[G.R. NO. 174493]

**EASTERN TELECOMMUNICATIONS PHILS., INC. [ETPI]-PCGG,
PETITIONER, VS. VICTOR V. AFRICA, RESPONDENT.**

[G.R. NO. 184636]

**VICTOR AFRICA, PETITIONER, VS. THE HONORABLE
SANDIGANBAYAN AND EASTERN TELECOMMUNICATIONS
PHILIPPINES, INC., RESPONDENTS.**

D E C I S I O N

ABAD, J.:

These consolidated petitions stem from Civil Case 0009, an action that the government filed with the Sandiganbayan for reversion, forfeiture, and accounting of ill-gotten wealth involving the sequestered shares of stock of Eastern Telecommunications Philippines, Inc.

The Antecedents

In 1972, Eastern Extension Australasia and China Telegraph Company, Ltd. (Eastern Extension), a subsidiary of foreign-owned Cable & Wireless, Ltd., got instructions from the Marcos government to reorganize its telecommunications business in the Philippines into a 60/40 corporation in favor of Filipinos. This prompted Eastern Extension to negotiate with Philippine Overseas Telecoms Corporation, a company controlled by Manuel Nieto, Jr. and represented by Atty. Jose Africa, for the formation of Eastern Telecommunications Philippines, Inc. (ETPI), 60% of the capital stock of which went to the group consisting of Roberto Benedicto, Atty. Africa, and Nieto (at times referred to as the BAN group) while 40% remained with Cable & Wireless. The latter company took charge of operations pursuant to a management contract with ETPI.

In the aftermath, ETPI generated substantial dividends for the BAN group. Eventually, the latter spread its shares to three corporations: a) Aerocom Investors, b) Universal Molasses, and c) Polygon Investors and Managers. With their combined holdings, the BAN group managed to fill up key management positions and issue shares to relatives and associates.

On March 14, 1986, following the fall of the Marcos government, the Presidential Commission on Good Government (PCGG) sequestered the ETPI shares of the BAN group and their corporations, relatives, and associates upon a *prima facie* finding that these belonged to favored Marcos cronies. On July 22, 1987, PCGG filed with the Sandiganbayan Civil Case 009 to recover these shares.

The suit gave rise to various incidents. In one, petitioner Victor Africa (Africa), who took the cudgels for his fellow registered stockholders, filed a motion with the Sandiganbayan for the holding of ETPI's 1992 annual stockholders' meeting to settle the conflict between two sets of ETPI Board of Directors: one elected on August 7, 1991 in which the PCGG voted the sequestered shares and the other on a subsequent date where the registered stockholders elected a second board. Apparently, however, the PCGG Board acquired control of ETPI's operations.

On November 13, 1992 the Sandiganbayan granted Africa's motion and ordered the holding of a stockholders' meeting to elect a new Board of Directors, at which meeting the PCGG was to vote only (a) the Benedicto shares (12.8% of total) that were voluntarily ceded to the Government; (b) the shares seized from Malacañang (3.1%), and (c) the shares that Nieto admitted as belonging to President Marcos (8.0%). On November 26, 1992, however, upon the PCGG's petition in G.R. 107789 this Court temporarily enjoined that stockholders' meeting.

Meantime, because of the need to comply with Executive Order 109^[1] and Republic Act (R.A.) 7925,^[2] on December 13, 1996 the PCGG, acting on referral from this Court, granted its petition to hold a special stockholders' meeting to increase ETPI's authorized capital stock. PCGG voted the sequestered shares of stock^[3] in the meeting held on March 17, 1997 to approve the increase in ETPI's authorized capital stock. Africa contested the validity of PCGG's vote in that stockholders' meeting before this Court in G.R. 147214.

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Four years later on January 8, 2001 Aerocom Investors and Managers, Inc. (Aerocom) served notice on ETPI of its intent to sell its Class "B" shares to A.G.N. Philippines, Inc. (AGNP) as to enable ETPI to decide whether to exercise its option of first refusal. On January 25, 2001 the ETPI Board decided to waive the option. Upon notice to the shareholders, the Africa-led group wrote ETPI a letter, reserving the exercise of their own options until after a validly constituted ETPI Board could waive the company's option.^[4] This notwithstanding, Aerocom transferred its shares to AGNP on April 5, 2001 for US\$20 million.^[5]

Eventually, on April 30, 2003 this Court held in G.R. 107789 and G.R. 147214^[6] that, to be able to vote sequestered shares and elect the ETPI Board or amend its Articles of Incorporation to increase its authorized capital stock, the PCGG needed to satisfy the two-tiered test that the Court applied in *PCGG v. Securities and Exchange Commission*,^[7] namely, that (1) there is *prima facie* evidence that the shares are ill-gotten and (2) there is an imminent danger of dissipation. With this ruling, the Court referred the various incidents pending before it to the Sandiganbayan for the latter to determine after hearing whether the PCGG met the

test. The dispositive portion of the Court's Resolution reads:[8]

WHEREFORE, this Court Resolved to REFER the petitions at bar to the Sandiganbayan for reception of evidence to determine whether there is a *prima facie* evidence showing that the sequestered shares in question are ill-gotten and there is an imminent danger of dissipation to entitle the PCGG to vote them in a stockholders meeting to elect the ETPI Board of Directors and to amend the ETPI Articles of Incorporation for the sole purpose of increasing the authorized capital stock of ETPI.

The Sandiganbayan shall render a decision thereon within sixty (60) days from receipt of this Resolution and in conformity herewith. x x x.[9]

Meantime, Aerocom's transfer of its shares to AGNP in the Stock and Transfer Book (STB) was delayed by the need to secure the Bureau of Internal Revenue Certificate Authorizing Registration and Tax Clearance which was issued only on September 27, 2005 more than four years after the sale. To complete the transfer, the ETPI's corporate secretary filed with the Sandiganbayan a motion dated October 10, 2005, for the issuance of new stock certificates and the recording of entries in its STB. On February 1, 2006 the Sandiganbayan granted the motion[10] upon a finding that there had been "due compliance with the requirements of the ETPI's Articles of Incorporation."^[11]

But petitioner Africa filed a motion for reconsideration alleging that the Sandiganbayan should first determine, before allowing the transfer in its book, whether the PCGG validly voted the sequestered shares that elected the ETPI's board. He reasoned that if the votes were invalid, the board's waiver of its right of first refusal would be void. The Sandiganbayan denied the motion on February 27, 2006.

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On May 15, 2006, the Sandiganbayan ruled after hearing that the PCGG's votes during the ETPI stockholders' meetings were invalid for failure to satisfy the two-tiered test. It found that, while the sequestered shares were *prima facie* ill-gotten, the PCGG failed to prove that ETPI's assets were in such imminent danger of dissipation as to warrant PCGG's intervention in the August 7, 1991 and March 17, 1997 stockholders' meetings. The Sandiganbayan said:

Apparently, the question of dissipation should be viewed within the parameters of two time frames, i.e., at the time the sequestered shares were voted on August 7, 1991, and again on March 17, 1997 when the capital stock of ETPI was increased from P250 Million to P2.6 Billion. Hence, the more important question here is whether at the time when the PCGG voted the sequestered ETPI Class A shares on August 7, 1991 and on March 17, 1997, there was evidence that the BAN-controlled Board of Directors were dissipating ETPI's assets.[12]

After the Sandiganbayan denied ETPI's motion for partial reconsideration on August 28, 2006, the PCGG-dominated Board of Directors^[13] filed a petition for *certiorari* before this Court in G.R. 174493, claiming that the two-tiered test did not apply to ETPI. They alleged that, while the company was in no imminent danger of dissipation, this became possible only because the PCGG had ousted the BAN group from control. Prior to this, that group allowed management acts that prejudiced ETPI's interests. The PCGG acted as conservator and saved ETPI from dissipation.

The PCGG directors claimed that the Sandiganbayan's finding of December 13, 1996 is proof that the second tier had been satisfied. They said:

However, the propriety and legality of allowing the PCGG to cause the holding of a stockholders' meeting of the ETPI for the purpose of electing a new Board of Directors or effecting changes in the policy, program and practices of said corporation (except for the specified purpose of amending the right of first refusal clause in ETPI's Articles of Incorporation and By-Laws) and impliedly to vote the sequestered shares of stocks has been upheld by the Supreme Court in the case of "*PCGG vs. SEC; PCGG vs. Sandiganbayan, et al.*", G.R. No. 82188, promulgated June 30, 1988. x x x Thus the Supreme Court *en banc* held in said G.R. No. 82188 that:

"But while we find that Sandiganbayan to have acted properly in enjoining the PCGG from holding the stockholders' meeting for the special purpose of amending the 'right of first refusal' clause in ETPI's Articles of Incorporation and By-Laws. We find the general injunction imposed by it on the PCGG to desist and refrain from calling a stockholders' meeting for the purpose of electing a new Board of Directors or effecting substantial changes in the policy, program or practice of the corporation to be too broad as to taint said order with grave abuse of discretion. Said order completely ties the hands of PCGG, rendering it virtually helpless in the exercise of its power of conserving and preserving the assets of the corporation. Indeed, of what use is the PCGG if it cannot even do this?"^[14]

On November 22, 2006, this Court ordered the consolidation of G.R. 174493 with G.R. 172222.

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Prodded by the Sandiganbayan's May 15, 2006 Resolution that invalidated the PCGG directors' votes during the 1991 and 1997 stockholders' meetings,^[15] on November 28, 2006 Africa filed a petition in G.R. 184636 to allow him to hold a stockholders' meeting to elect a new ETPI Board of Directors. On December 5, 2006 the Court referred Africa's petition to the Sandiganbayan for "appropriate action considering that these cases had already been decided and judgment had become final."^[16]

On December 7, 2007 the Sandiganbayan denied Africa's petition,^[17] stating that the holding of a stockholders' meeting was not within its powers to decide. Assuming it had the power, the Sandiganbayan said that Africa had no authority to call the meeting since he did not hold at least 20% of the corporation's outstanding capital stock, a requirement of ETPI's by-laws. With the denial of his motion for reconsideration on July 29, 2008, Africa filed a petition on October 13, 2008 before this Court in G.R. 184636 questioning the Sandiganbayan's actions. On November 11, 2008 the Court consolidated the case with G.R. 174493 and G.R. 172222, now subject of the present Decision.

The Issues

These consolidated cases present the following issues:

1. In G.R. 174493, whether or not the two-tiered test regarding PCGG's right to vote the sequestered shares as established in *Cojuangco v. Calpo*^[18] could be made to apply to the ETPI stockholders' meetings in 1991 and 1997;
2. In G.R. 172222, whether or not the Sandiganbayan acted with grave abuse of discretion in allowing the transfer of Aerocom's shares to AGNP in its book and in issuing new stock certificates to the latter; and
3. In G.R. 184636, whether or not the Sandiganbayan has jurisdiction to order the holding of a stockholders' meeting at the call of petitioner Africa.

The Court's Ruling

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To recall, the Court ordered the Sandiganbayan^[19] on April 30, 2003 to determine whether there is *prima facie* evidence that the sequestered shares in ETPI were ill-gotten and the company assets were in imminent danger of dissipation as to entitle the PCGG to vote the sequestered shares and elect the ETPI Board of Directors in 1991 and 1997.

Evidently, whether or not the PCGG's vote using sequestered shares validly elected a PCGG-dominated Board should by now be academic considering that such board had been performing its functions for the past 22 years from 1991 to this date with neither the Sandiganbayan nor this Court enjoining it from doing so or ordering the holding of a new election.

Besides the second tier of the two-tiered test assumes a situation where the registered shareholders had been dissipating company assets and the PCGG wanted to step in, vote the sequestered shares, and seize control of its board of directors to save those assets. Apparently, this was the situation obtaining at ETPI before 1991. The BAN group was then in control but the PCGG held a stockholders' meeting that year, sanctioned by this Court, and voted the sequestered shares to elect a new Board of Directors. Were the company's assets in danger of dissipation in 1991 as to warrant the PCGG's actions?