EN BANC

G.R. No. 247924 – POWER SECTOR ASSETS AND LIABILITIES MANAGEMENT CORPORATION, *Petitioner*, **v. COMMISSION ON AUDIT,** *Respondent.*

Promulgated:

November 16, 2021

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CONCURRING AND DISSENTING OPINION

LEONEN, *J.*:

Public respondent Commission on Audit committed grave abuse of discretion in delaying to resolve petitioner Power Sector Assets and Liabilities Management Corporation's request for written concurrence to engage private counsels, and in later denying petitioner's request to engage the private counsels for this lack of written concurrence.

I

As the guardian of public funds, the Commission on Audit has broad powers over all accounts pertaining to government revenues and uses of public funds and property, including the exclusive authority to "define the scope of its audit and examination"; to "establish the techniques and methods required" for the review; and to "promulgate accounting and auditing rules and regulations, including those for the prevention and disallowance of irregular, unnecessary, excessive, extravagant, or unconscionable expenditures, or uses of government funds and properties."[1]

In line with this mandate, the Commission on Audit issued in 1986 Circular No. 86-255,[2] which was amended first on December 4, 1995,[3] and further amended on June 9, 1998.[4] It prohibits the hiring of private lawyers by government-owned and controlled corporations to render any form of legal service, without distinction as to whether the legal services would involve an actual legal controversy or court litigation.[5] Its purpose is "to

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1 CONST., art. IX-D, sec. 2.
2 As amended by COA Circular No. 95-011 (1995) and COA Circular No. 98-002 (1998).
3 COA Circular No. 95-011 (1995).
4 COA Circular No. 98-002 (1998).
5 COA Circular No. 86-255 (1986).

curtail the unauthorized and unnecessary disbursement of public funds to private lawyers for services rendered to the government."[6]

This means government-owned and controlled corporations must refer all their legal matters to the Office of the Government Corporate Counsel, per the Administrative Code of 1987:[7]

> Section 10. Office of the Government Corporate Counsel. — The Office of the Government Corporate Counsel (OGCC) shall act as the principal law office of all government-owned or controlled corporations, their subsidiaries, other corporate off-springs and government acquired asset corporations and shall exercise control and supervision over all legal departments or divisions maintained separately and such powers and functions as are now or may hereafter be provided by law. In the exercise of such control and supervision, the Government Corporate Counsel shall promulgate rules and regulations to effectively implement the objectives of the Office.[8]

Lawyers of the Office of the Government Corporate Counsel are "expected to be imbued with a deeper sense of fidelity to the government's cause and more attuned to the need to preserve the confidentiality of sensitive information."[9]

However, Circular No. 86-255 has also carved out an exception. Government-owned and controlled corporations can hire the legal services of a private lawyer or law firm if it "cannot be avoided" or in "extraordinary or exceptional circumstances":

> Accordingly and pursuant to this Commission's exclusive authority to promulgate accounting and auditing rules and regulations, including for the prevention and disallowance of irregular, unnecessary, excessive, extravagant and/or unconscionable expenditure or uses of public funds and property (Sec. 2-2, Art. IX-D, Constitution[],] public funds shall not be utilized for payment of the services of a private legal counsel or law firm to represent government agencies and instrumentalities, including government-owned or controlled corporations and local government units in court or to render legal services for them. *In the event that such legal services cannot be avoided or is justified under extraordinary or exceptional circumstances for* government agencies and instrumentalities, including *government-owned or controlled corporations, the written conformity and acquiescence of the Solicitor General or the Government Corporate Counsel, as the case may be, and the written concurrence of the*

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6 *Polloso v. Gangan*, 390 Phil. 1101, 1111 (2000) [Per J. Kapunan, En Banc].

7 *The Law Firm of Laguesma Magsalin Consulta and Gastardo v. Commission on Audit*, 750 Phil. 258 (2015) [Per J. Leonen, En Banc].

8 ADM. CODE, Book IV, Title III, Ch. 3, sec. 10, par. 1.

9 *PHIVIDEC Industrial Authority v. Capitol Steel Corporation*, 460 Phil. 493, 504 (2003) [Per J. Tinga, Second Division].

Commission on Audit shall first be secured before the hiring or employment of a private lawyer or law firm.[10] (Emphasis supplied)

This is reinforced by Office of the President Memorandum Circular No. 9, dated August 27, 1998, which provides that the hiring of a private lawyer or law firm can be done only "in exceptional cases":

> SECTION 1. All legal matters pertaining to government-owned or controlled corporations, their subsidiaries, other corporate offsprings and government acquired asset corporations (GOCCs) shall be exclusively referred to and handled by the Office of the Government Corporate Counsel (OGCC).
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> GOCCs are thereby enjoined from referring their cases and legal matters to the Office of the Solicitor General unless their respective charters expressly name the Office of the Solicitor General (OSG) as their legal counsel.
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> However, under exceptional circumstances, the OSG may represent the GOCC concerned, Provided: This is authorized by the President; or by the head of the office concerned and approved by the President.
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> SECTION 2. All pending cases of GOCCs being handled by the OSG, and all pending requests for opinions and contract reviews which have been referred by said GOCCs to the OSG, may be retained and acted upon by the OSG; but the latter shall inform the OGCC of the said pending cases, requests for opinions and contract reviews, if any, to ensure proper monitoring and coordination.
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> SECTION 3. GOCCs are likewise enjoined to refrain from hiring private lawyers or law firms to handle their cases and legal matters. *But in exceptional cases, the written conformity and acquiescence of the Solicitor General or the Government Corporate Counsel, as the case may be, and the written concurrence of the Commission on Audit shall first be secured before the hiring or employment of a private lawyer or law firm.* (Emphasis supplied)

Thus, *before* a government-owned and controlled corporation can hire a private lawyer or firm, both Circular No. 86-255, as amended, and Memorandum Circular No. 9 require that it obtain: *first*, the written conformity and acquiescence of the Government Corporate Counsel or the Solicitor General; and *second*, the written concurrence of the Commission on Audit. The rules specifically require a ***prior*** written conformity and acquiescence of the Solicitor General or the Government Corporate Counsel and the written concurrence of the Commission on Audit.[11] The former is

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[10] *The Law Firm of Laguesma Magsalin Consulta and Gastardo v. Commission on Audit*, 750 Phil. 258, 278 (2015) [Per J. Leonen, En Banc] citing COA Circular No. 86-255 (1986), as amended by COA Circular No. 95-011 (1995) and COA Circular No. 98-002 (1998).

[11] *See Salalima v. Guingona, Jr.*, 326 Phil. 847 (1996) [Per J. Davide, Jr., En Banc].

required to determine the necessity of engagement; the latter, to determine the reasonableness of the rates.[12]

II

Circular No. 86-255, as amended, specifically applies in the hiring of private lawyers or law firms, rather than the various and separate circulars on pre-audit. I do not agree that it is a specie of pre-audit. This interpretation is congruent to the rule of statutory construction that where two statutes are of equal theoretical application to a particular case, the one specially designed for it should prevail.[13]

The Commission on Audit's written concurrence under Circular No. 86-255, as amended, is required solely to check on the reasonableness of the rates, while a pre-audit seeks to determine the presence of the following conditions: "(1) the proposed expenditure complies with an appropriation law or other specific statutory authority; (2) sufficient funds are available for the purpose; (3) the proposed expenditure is not unreasonable or extravagant, and the unexpended balance of appropriations to which it will be charged is sufficient to cover the entire amount of the expenditure; and (4) the transaction is approved by the proper authority and the claim is duly supported by authentic underlying evidence."[14]

Nonetheless, the Commission on Audit's mandate is to audit the disbursement of public funds, be it through pre-audit or post-audit. Even if its written concurrence were considered as pre-audit, petitioner in this case sought its concurrence in May 2011,[15] when pre-audit was still allowed:

> The COA later issued Circular No. 94-006 on 17 February 1994 and Circular No. 95-006 on 18 May 1995. Both circulars clarified and expanded the total lifting of pre-audit activities on all financial transactions of NGAs, GOCCs, and LGUs. The remaining audit activities performed by COA auditors would no longer be pre-requisites to the implementation or prosecution of projects, perfection of contracts, payment of claims, and/or approval of applications filed with the agencies.
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> It also issued COA Circular No. 89-299, as amended by Circular No. 89- 299A, which in Section 3.2 provides:
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> > 3.2 Whenever circumstances warrant, however, such as where the internal control system of a government agency is inadequate, This Commission may reinstitute pre-audit or adopt such other control measures, including temporary or special pre-audit, as are necessary and appropriate to protect the funds and property of the agency.

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12 *Rollo*, p. 169.
13 *Santayana v. Atty. Alampay*, 494 Phil. 1 (2005), [Per J. Sandoval-Gutierrez, Third Division].
14 *Dela Llana v. Commission on Audit*, 681 Phil. 186, 196 (2012) [Per J. Sereno, En Banc].
15 Ponencia, p. 4.

> On 18 May 2009, COA issued Circular No. 2009-002, which reinstituted the selective pre-audit of government transactions in view of the rising incidents of irregular, illegal, wasteful and anomalous disbursements of huge amounts of public funds and disposals of public property. Two years later, or on 22 July 2011, COA issued Circular No. 2011-002, which lifted the pre-audit of government transactions implemented by Circular No. 2009-002. In its assessment, subsequent developments had shown heightened vigilance of government agencies in safeguarding their resources.[16]

III

The prior written conformity and acquiescence of the Government Corporate Counsel or the Solicitor General and the written concurrence of the Commission on Audit are absolute requirements. Partial compliance or honest mistake due to ignorance of the law can never be a valid defense.[17] When either requirement is lacking, the engagement of the private lawyer or law firm is deemed unauthorized.[18]

In *PHIVIDEC Industrial Authority v. Capitol Steel Corporation*,[19] this Court upheld the dismissal of the case due to the private lawyer's lack of authority to file the case, since the prior written concurrences of both the Office of the Government Corporate Counsel or the Solicitor General and the Commission on Audit were not yet secured before the private lawyer was hired:

> It is also apparent that petitioners failed to comply with the requirements laid down by the COA in its Circular No. 86-255. The Circular requires the prior written concurrences of the OGCC or the Solicitor General and the COA before GOCCs may hire private counsels. It must be noted though that the COA Circular is not decisive in the disposition of this case. *It cannot by any measure grant or disallow the authority for GOCCs to hire private counsels. The function pertains to the executive branch. Its mandate is to audit the disbursement of public funds.* As regards the payment of funds belonging to GOCCs to lawyers retained by them, COA Circular 86-255 is the governing regulation.[20] (Emphasis supplied, citation omitted)

In *Polloso v. Gangan*,[21] a government-owned and controlled corporation hired a private counsel to provide legal services without the prior conformity and acquiescence of the Office of the Solicitor General or

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16 Id. at 190–191.

17 *Oñate v. Commission on Audit*, 789 Phil. 260 (2016), [Per J. Peralta, En Banc].

18 *Almadovar v. Commission on Audit*, 773 Phil. 165 (2015) [Per J. Mendoza, En Banc]; *The Law Firm of Laguesma Magsalin Consulta and Gastardo v. Commission on Audit*, 750 Phil. 258 (2015) [Per J. Leonen, En Banc].

19 460 Phil. 493 (2003) [Per J. Tinga, Second Division].

20 Id. at 505–506.

21 390 Phil. 1101 (2000) [Per J. Kapunan, En Banc].

the Government Corporate Counsel, and the written concurrence of the Commission on Audit. Thus, this Court held that the Commission on Audit correctly disallowed the payment of fees to the private counsel, as "[i]t is only in special cases where these government entities may engage the services of private lawyers because of their expertise in certain fields."[22]

In *The Law Firm of Laguesma Magsalin Consulta and Gastardo v. Commission on Audit*,[23] this Court held that the Board of Directors' act of contracting the private law firm's legal services without the prior approval of the Office of the Government Corporate Counsel and the Commission on Audit was clearly unauthorized. It explained:

> The cases that the private counsel was asked to manage are not beyond the range of reasonable competence expected from the Office of the Government Corporate Counsel. Certainly, the issues do not appear to be complex or of substantial national interest to merit additional counsel. Even so, there was no showing that the delays in the approval also were due to circumstances not attributable to petitioner nor was there a clear showing that there was unreasonable delay in any action of the approving authorities. Rather, it appears that the procurement of the proper authorizations was mere afterthought.[24]

Here, petitioner is a government-owned and controlled corporation created under Section 49[25] of Republic Act No. 9136, or the Electric Power Industry Reform Act of 2001 (EPIRA). In hiring the private counsels, petitioner cannot claim exemption from the coverage of Circular No. 86-255, as amended, which specifically prohibits government-owned and controlled corporations from hiring private lawyers to render *any form* of legal service, without distinction on the kind of legal service.[26]

Even petitioner sought the concurrences of the Commission on Audit and the Office of the Government Corporate Counsel before engaging private counsels as legal advisors on the privatization of the generation assets and contracts of the National Power Corporation,[27] in line with Circular No. 86-255[28] and Memorandum Circular No. 9.[29] The Commission on Audit received the letter on May 11, 2011, through petitioner's resident

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22 Id. at 1112.

23 750 Phil. 258 (2015) [Per J. Leonen, En Banc].

24 Id.

25 Republic Act No. 9136 (2001), sec. 49 states:
Section 49. Creation of Power Sector Assets and Liabilities Management Corporation. — There is hereby created a government-owned and -controlled corporation to be known as the "Power Sector Assets and Liabilities Management Corporation", hereinafter referred to as the "PSALM Corp.", which shall take ownership of all existing NPC generation assets, liabilities, IPP contracts, real estate and all other disposable assets. All outstanding obligations of the NPC arising from loans, issuances of bonds, securities and other instruments of indebtedness shall be transferred to and assumed by the PSALM Corp. within one hundred eighty (180) days from the approval of this Act.

26 *Polloso v. Gangan*, 390 Phil. 1101 (2000), [Per J. Kapunan, En Banc].

27 *Ponencia*, p. 2.

28 As amended by Commission on Audit Circular No. 95-011 dated December 4, 1995 and Commission on Audit Circular No. 98-002 dated June 9, 1998.

29 *Ponencia*, p. 2.

auditor, and on May 13, 2011, through Commission on Audit Corporate Sector Cluster B.[30]

Under Contract Review No. 161 dated May 31, 2011, the Office of the Government Corporate Counsel found the "contracts to be generally in order and the same may be given due course."[31] Yet, petitioner did not hear from the Commission on Audit by May 30, 2011, the date it requested for the Commission to act on its request.[32] Petitioner waited for the Commission's reply until August 29, 2011, and only then did it finally engage the private counsels without the concurrence. Three years later, on November 6, 2014, the Commission issued Legal Retainer Review No. 2014-174 denying petitioner's request for concurrence, because: (a) petitioner engaged the consultants without the Commission on Audit's prior approval; and (b) the Commission on Audit had also earlier denied a similar request involving the same legal advisors who were engaged back in 2010 for the same reason.[33]

It is undisputed that the necessary written concurrence from the Commission on Audit is absent when petitioner employed the legal services of the private counsels. However, it was *the Commission on Audit, the approving authority itself, that caused unreasonable delay that led to the required written concurrence not being obtained.*

Under the Constitution, the Commission on Audit "may promulgate its own rules concerning pleadings and practice before it or before any of its offices[,]" as long as these rules "shall not diminish, increase, or modify substantive rights."[34] Based on this wording, greater than the power (as gleaned from the permissive word "may") of the Commission on Audit to promulgate rules concerning pleadings and practice is its mandate (as gleaned from the mandatory word "shall") to promulgate rules which shall not diminish, increase, or modify substantive rights.

Therefore, the Commission on Audit shall hold it inviolable that "[a]ll persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies."[35] "This constitutional right is not only afforded to the accused in criminal proceedings but extends to all parties in all cases pending before judicial, quasi-judicial and administrative bodies — any party to a case can demand expeditious action from all officials who are tasked with the administration of justice."[36]

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30 Id. at 4.
31 Id.
32 Id.
33 Id.
34 CONST., art. IX-A, sec. 6.
35 CONST., art. III, sec. 16.
36 *Navarro v. Commission on Audit,* G.R. No. 238676, November 19, 2019, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65985> [Per J. J.C. Reyes, Jr., En Banc].

In determining if the right to speedy disposition of cases is violated, the following circumstances are considered and weighed: "(1) length of delay; (2) the reasons for the delay; (3) the assertion or failure to assert such right by the accused; and (4) the prejudice caused by the delay."[37]

In *Navarro v. Commission on Audit*,[38] this Court ruled that the petitioners suffered inordinate delay as the Commission on Audit resolved their case only after seven years and nine months had lapsed:

> In the present case, it is undisputed that it took more than seven years from the time AOM No. DepEdRO13-2009-003 was issued on February 17, 2009, until the COA promulgated its November 9, 2016 Decision against petitioners. Particularly, it took more than five years from the time the case was elevated to the COA for automatic review before a decision was rendered on November 9, 2016. Thus, the length of delay is not in doubt.
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> In responding to petitioners' claim of denial of the right to speedy disposition of cases, the COA merely brushed it aside and claimed that they failed to show that the delay was vexatious or oppressive. *It must be remembered, however, that it is incumbent upon the State to prove that the delay was reasonable, or that the delay was not attributable to it. In other words, it is not for the party to establish that the delay was capricious or oppressive as it is the government's burden to attest that the delay was reasonable under the circumstances or that the private party caused the delay.* Here, the COA miserably failed to establish that the delay of more than seven years was reasonable or that petitioners caused the same. It erroneously shifted the burden to petitioners.
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> In addition, *the right to speedy disposition of cases serves to ensure that citizens are free from anxiety and unnecessary expenses brought about by protracted litigations.* In the present case, the ND holds petitioners solidarily liable to refund the P18,298,789.50 covering the disallowed purchase of reference materials. Surely, the substantial amount involved is a Sword of Damocles hovering over petitioners' heads subjecting them to constant distress and worry. As such, the COA should have been more circumspect in observing petitioners' rights to speedy disposition of cases and not to set it aside trivially. It should have addressed the allegations of delay more concretely and assuage petitioners' concerns that the delay was not due to vexation, oppression or caprice, or that the cause of delay was not attributable to COA.[39] (Emphasis supplied, citations omitted)

Here, the Commission on Audit states in its Memorandum that its written concurrence is mandated in recognition of exceptional circumstances in the hiring of private lawyers primarily to determine the reasonableness of rates.[40] It says that it "will not deny such request when it is submitted within reasonable time from engagement" or if the agency has first sought the

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37 Id.
38 Id.
39 Id.
40 *Ponencia*, p. 7 citing COA Memorandum.

Solicitor General's or the Government Corporate Counsel's concurrence.[41] It accounts for exceptional circumstances such as urgency,[42] and it claims to observe the periods within which to act on requests as provided under Republic Act No. 6713, Presidential Decree No. 1445, and its own 2009 Revised Rules of Procedure. It says that its noncompliance may be justified due to the sheer volume of the requests for concurrence it receives from numerous government agencies or due to the other audit transactions it ought to act on.[43]

Contrary to its own statement, the Commission on Audit denied petitioner's request for written concurrence despite petitioner having submitted the request "within reasonable time from engagement when said engagement was compelled due to urgent considerations,"[44] and having obtained the concurrence of Office of the Government Corporate Counsel. Petitioner even specifically informed the Commission that its concurrence was needed on or before May 30, 2011 because of the strict timelines imposed under the EPIRA:

> As we are reviving the bidding processes for the Naga Complex IPPA and preparing the process for the selection and appointment of IPPAs for Casecnan Power Plant to reach the 70% privatization requirements for open access, as well as preparing the privatization of Power Barges 101, 102, 103 and 104[,] **we hope that you will grant our request for concurrence on or before 30 May 2011 inasmuch as the hiring of the said advisors are urgently needed for the abovementioned activities.**[45] (Emphasis in the original)

Moreover, inconsistent with its statement in its Memorandum, the Commission on Audit failed to comply with Republic Act No. 6713, Presidential Decree No. 1445, and its own Revised Rules of Procedure as to the period within which to act on the request for written concurrence. It denied the request for concurrence three years after it had been sought, without even determining the reasonableness of the proposed rates.

The Commission on Audit is constitutionally mandated to "decide by a majority vote of all its Members any case or matter brought before it within sixty days from the date of its submission for decision or resolution."[46] Section 49 of Presidential Decree No. 1445 states: "[t]he Commission shall decide any case brought before it within sixty days from the date of its submission for resolution." The Commission on Audit's 2009 Revised Rules of Procedure further provides:

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41 Id.
42 Id.
43 Id.
44 Id.
45 Id. at 20 citing *rollo*, p. 41-A.
46 CONST., art. IX-A, sec. 7.

RULE III

> SECTION 4. Quorum and Voting. — The Commission Proper shall decide by a majority vote of all its members any case or matter brought before it within sixty (60) days from the date of its submission for decision or resolution. A case or matter is deemed submitted for decision or resolution upon the filing of the last pleading, brief or memorandum required by these Rules or by the Commission Proper.
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> . . . .

RULE X

> SECTION 4. Period for Rendering Decision. — Any case brought to the Commission Proper shall be decided within sixty (60) days from the date it is submitted for decision or resolution, in accordance with Section 4, Rule III hereof.

As the Commission on Audit has been given complete discretion in the exercise of its constitutional duty, this Court generally sustains its decisions. Only when it acts with grave abuse of discretion amounting to lack or excess of jurisdiction will we grant a petition assailing its actions.[47] "There is grave abuse of discretion when there is an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law or to act in contemplation of law as when the judgment rendered is not based on law and evidence but on caprice, whim and despotism."[48]

For its unjustified delay in resolving petitioner's request for written concurrence to engage private counsels, and then later denying petitioner's request to engage the private counsels for its own lack of written concurrence, the Commission on Audit committed grave abuse of discretion amounting to lack or excess of jurisdiction.

ACCORDINGLY, I vote to **GRANT** the Petition.

MARVIC M.V.F. LEONEN
Associate Justice

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47 *Technical Education and Skills Development Authority v. Commission on Audit*, 729 Phil. 60 (2014) [Per J. Carpio, En Banc].

48 Id. at 72–73.