Republic of the Philippines
Office of the City Prosecutor
Makati

URIEL G. BORJA,
Complainant,

versus

NPS No. XV-05-INV-18A-0044
For: Syndicated Estafa

RALPH B. CASIÑO,
MILTON U. ALONG,
MARCELINO B. AGANA,
LORIMER T. ABEJUELA and
ANDREW C. HARVEY,
Respondents.
x----------x

AUG 14 2018

RESOLUTION

This resolves the complaint for syndicated estafa filed by Uriel G. Borja against Ralph B. Casiño, Milton U. Along, Marcelino B. Agana, IV, Lorimer T. Abejuela and Andrew C. Harvey.

Culled from record, complainant is a stockholder or Iligan Light and Power, Inc. (ILPI) and formerly a director of Mapalad Energy Generating Corporation (MEGC), which is partly owned by ILPI.

Casiño, on the other hand is the president of ILPI whereas Along is the treasurer of both ILPI and MEGC and the representative of Mindanao Energy Systems, Inc. (MINERGY). In turn, Agana is formerly a director and president of MEGC with Abejuela as vice-president thereof. Finally, Harvey is the representative of Chase Power Ltd. (CPL)/Chase Power Management, Inc. (CPMI).

In March 2010, ILPI engaged the services of Along for the latter to conduct feasibility study and make recommendation on other sources of power to augment the requirement of ILPI. Thereafter on October 12, 2010, CPMI wrote a letter to ILPI quoting the price for two (2) generators together with technical inspection and accessory equipments valued at US$2.880 million plus Php86.480 million.

On February 22, 2011, ILPI, represented by Casiño, entered into a Power Supply Agreement with MEGC, represented by Agana, which provides that the latter shall build, own and operate a 2x7.5MW diesel power plant in Iligan City. Then on May 4, 2011, MEGC through Agana, entered into a contract with CPL through Harvey, for the Procurement, Supply, Engineering, Construction and Commissioning of a 2x7.5MW Sulzer 12ZA40S Diesel Power Plant at a cost of US$3.450 million plus Php89 million. However, on June 6, 2013, MEGC terminated its contract with CPL due to delays incurred by the latter.

Complainant now claims that respondents conspired to acquire the power plants at an excessive price to the detriment of ILPI. He asserts that at the time, he brought to the attention of MECG that the Iligan City Government is offering for sale the Iligan Diesel Power Plants (IDPP) 1 and 2 with 104MW capacity for Php300 million only. He pointed out that on May 27, 2010, Along, representing MINERGY, entered into a Non-disclosure Agreement with Harvey of CPL. He also emphasized that as per Deed of Absolute Sale CPL acquired the power plants for only US900,000 and only on September 20, 2011 after the contract with MEGC has been secured. In addition, he stressed that as of September 7, 2010, Casiño was already aware that the City Government of Iligan was then offering for sale diesel power plants that can very well supply the 15MW shortfall of ILPI.

Respondents denied the allegations against them.

Agana, in particular asserts that the Office has no jurisdiction over the complaint because all the approvals, consents and authority were passed upon during board meetings conducted in Iligan City and/or Cagayan De Oro City, not Makati City. He added that Harvey holds office in Parañaque as apparent in the contracts, and that the address in Makati is merely his residence. Anent his alleged admission that MEGC already decided to acquire the power plant from CPL even before he joined MEGC, he denied the same. He pointed out the lack of evidence to prove said allegation of complainant, not to mention that he was not privy to the business of MEGC prior to him joining it. Further, he emphasized that the decision reached collectively by the board was merely to buy a 15MW power plant, not necessarily from Sumitomo.

On the other hand, Casino alleges that indeed other sources of power were considered as declared by Along. He also claims that the allegation of complainant that IDPP 1 and 2 were being sold for only Php300 million is misleading because complainant himself made an offer to acquire the same for Php500 million in a letter dated April 15, 2011. He also pointed out that record shows that the letter of intent to buy IDPP 1 and 2 was made ahead of the offer to sell made by CPL. Thus he asserts that since there was no offer yet from CPL then, it cannot be said that there was no intention to buy IDPP 1 and 2 in the first place. With regard to the disparity in price in the October 12, 2010 offer and the contract dated May 4, 2011, he explains that the reason is that the former does not include two (2) brand new crankshafts, a vital component of the engine, whereas the latter included the same. Finally, he emphasized that the fact that the contract with CPL was subsequently terminated is evidence that there was no conspiracy with the latter. Finally, he maintains that complainant has no personality to file the instant complaint because he is not a stockholder of MEGC whereas ILPI has not given him authority to file the complaint in its behalf, neither did the private owners of stocks of ILPI and MEGC.

In turn, Along alleges that the non-disclosure agreement pertains to an agreement with respect to the Sulzer 12ZA40S generating sets that CPL offered for sale to MINERGY, not the Sumitomo power plants it offered for sale to ILPI. He also argued that he did submit his feasibility report where various sources of power were considered, prior to the offer of CPL. He also denied having recommended to ILPI the purchase of the Sumitomo power plants.

As regards Abejuela, he denied having concealed that the power plants were second hand. He pointed out that it was clearly emphasized that said units require rehabilitation. With respect to the checks he signed, he argues that they were made in 2012 whereas the procurement was made on May 4, 2011. He asserts that said act was not made prior to or simultaneously with the alleged fraud, an element of estafa.

Thereafter, complainant filed his consolidated reply-affidavit whereas Agana, Casino and Along filed their respective rejoinder-affidavit basically reiterating their respective allegations and arguments.

We resolve.

First and foremost, the Office posits the view that it has jurisdiction over the complaint. Notably, the contract between MEGC and CPL was notarized in Makati. While it may be true that the board approved the contract in Iligan City, it is humbly opined that the execution of the contract with CPL is the operative act that puts in effect the desire of MEGC or the board. The alleged crime of estafa being a continuing offense, it may be prosecuted in the place where any ingredient thereof took place.

As regards the alleged lack of authority of complainant, it bears stressing that "xxx... the public offenses of qualified theft (and estafa) can be prosecuted *de officio* (*People vs. Judge Fernandez*, G.R. No. 149403, March 4, 2005). Anyone who has personal knowledge of the incident may initiate the same in contradistinction to private offenses such as seduction and acts of lasciviousness, which may only be initiated by the private offended party. Undisputedly, complainant is not only a stockholder of ILPI but also a former member of the board of directors of MEGC, hence, the knowledge of the alleged incident, and legal personality, to initiate the instant complaint.

Nonetheless, the Office is not also convinced that estafa has been committed.

Basically, the contention of complainant is that respondents conspired to deceive the corporation which ultimately prejudiced MEGC, ILPI and the power consumers. He claimed that Along recommended the purchase of Sumitomo Power Plants at an excessive price whereas Casiño made it appear that other power supply options were considered with the Sumitomo Power Plants as the most cost efficient. In turn, Agana kept quiet despite knowledge of the false pretenses of the others while Abejuela concealed the true condition of the Sumitomo Power Plants.

With respect to the alleged false representation that other sources of power was considered and the Sumitomo Power Plant was the most cost-efficient, complainant declared that the letter of intent made by Casiño regarding IDPP 1 and 2 was merely a subterfuge because the intention all along was to acquire the Sumitomo Power Plants.

It would appear then that indeed other sources of power were considered prior to the acquisition of the Sumitomo Power Plants on May 4, 2011 but that the latter was found to be most cost efficient. Notably, the letter of intent was dated September 10, 2010. While it is possible that respondents were not serious in considering IDPP 1 and 2 as alleged by complainant, it is equally possible that respondents seriously considered the same. As pointed out by Casiño, it is not true that IDPP 1 and 2 was being sold for Php300 million only because complainant himself *via* a letter dated April 15, 2011 made an offer to acquire the same for Php500 million. It appears then that the acquisition price of the Sumitomo Power Plants at US$3.45 million plus Php89 million is still much lower than Php500 million.

With regard to the alleged false representation that the Sumitomo Power Plants was almost brand new, as pointed out by Abejuela, it was made very clear that the Power Plants requires rehabilitation and only after that that it shall be almost brand new. Apparently, it was never concealed that the Power Plants were second hand and in a depreciated condition.

On these scores, it would appear that there were no false representations to begin with.

Complainant also alleged that respondents did not conduct test run of the Power Plants before acquiring the same, paid without securing a bill of lading to protect the corporation and continued to pay CPL despite the cancellation of contract. Anent the failure to conduct a test run, Casino averred in his Rejoinder-Affidavit that as per Minutes of the meeting held on 25 March 2011, it was complainant himself who provided for an alternative in case a test run is not feasible, that is, to simply secure a copy of the maintenance record of the power plant.

On the other hand, the alleged failure to secure a bill of lading and continuous payment despite cancellation of contract, if at all, while these may constitute lack of prudence, they do not necessarily equate with conspiracy to profit from and prejudiced MEGC and ILPI. In this regard, the ruling of the Court in *People v. Mancao, et al.*, (G.R. No. 97495, October 30, 1992), may find relevance, to quote:

> If the inculpatory facts and circumstances are capable of two or more explanations, one of which is consistent with his guilt, then the evidence does not fulfill the test of moral certainty and is not sufficient to support a conviction. Every circumstance favoring accused's innocence must be taken in to account. Proof against him must survive the test of reason, and the strongest suspicion must not be permitted to sway judgment.

Finally, with regard to the disparity in the acquisition cost of CPL of the Sumitomo Power Plants and the acquisition cost of MEGC from CPL, as explained by Casiño, the higher price included added parts and services. At any rate, with regard to Harvey, while the contract with CPL was subsequently cancelled, the Office opines that there is also no estafa. The ruling of the Court in *People vs. Wilson Yee* (C.A. 55 O.G. 1223) though not exactly at four with the facts of the instant case may nonetheless find relevance, to quote:

> From the fact of non-compliance by appellant with his part of the supposed agreement, the trial court concluded that his representation (that he possessed influence) is actually false. The premises do not justify the conclusion. Not a scintilla of evidence was adduced to prove that appellant's pretense (of influence) was not true and therefore fraudulent. In the absence of proof that his representation was actually false, criminal intent to deceive cannot be inferred. There is nothing in the record from which we can infer that when he received the advance payment, the appellant had no intention of rendering the service contracted by him, and since it was not shown that he in fact possessed no influence, he cannot justifiably held guilty of deliberate misrepresentation, and his failure and inability to render the service could have been due to a change of mind, if not to a lawful cause. Non performance on his part and his failure to return the money give rise only to civil liability. (Reyes, THE REVISED PENAL CODE, 15th ed., 2001, Book II, pp. 771-772)

Considering that there is no estafa to begin with, with more reason that there can be no syndicated estafa, the former being an element of the latter.

WHEREFORE, premises considered, the complaint for syndicated estafa against Milton U. Along, Ralph B. Casiño, Marcelino B. Agana, IV, Lorimer T. Abejuela and Andrew C. Harvey, is respectfully recommended to be, as upon approval it is hereby dismissed for insufficiency of evidence.

BILLY C. EVANGELISTA
Senior Assistant City Prosecutor

Approved:

FOR THE CITY PROSECUTOR:

EDMUND H. SEÑA
Senior Assistant City Prosecutor
(Per Office Order No. 18-003 03 August 2018)

Copy Furnished:

URIEL G. BORJA
Penthouse 8, BSA Towers
108 Legaspi St., 1229 Makati

MARCELINO B. AGANA
Gamboa St., Legaspi Village
1229 Makati

ANDREW C. HARVEY
1544 Caussa A. Dasmariñas Village
1221 Makati

RALPH B. CASIÑO
MILTON U. ALONG
IUPI Office, Bro. Raymund Jeffrey Rd
Pala o, 9200 Iligan City

LORIMER T. ABEJUELA
MILTON U. ALONG
Tablon, 9000 Cagayan de Oro

Atty. VALERIO M. SALAZAR
SALAZAR & SIAO LAW OFFICE
(Counsel for Respondents, except Harvey)
Purok 1, Zone Moonstone
Hinaplanon, Iligan City

Republic of the Philippines
Department of Justice
CITY PROSECUTION OFFICE
MAKATI

21-21

NATIONAL PROSECUTION SERVICE

REGISTERED
MAKATI CITY HALL P.O.
AUG 24 18

RALPH B. CASIÑO
MILTON U. ALONG
ILPI Office, Bro. Raymund Jeffrey Rd.
Pala-o, 9200 Iligan City

R DOMESTIC REGISTERED PHLPOST
RD 975 921 546 ZZ

017968
IM-18A-0044

SEP 17 2018

AUG 3 0 2018

PHLPOST
RECEIVED
05 SEP 2018
9200 ILIGAN CITY