

G.R. Nos. 163356-57 – JOSE A. BERNAS, CECILE H. CHENG, VICTOR AFRICA, JESUS B. MARAMARA, JOSE T. FRONDOSO, IGNACIO T. MACROHON, JR., and PAULINO T. LIM, ACTING IN THEIR CAPACITY AS INDIVIDUAL DIRECTORS OF MAKATI SPORTS CLUB, INC., AND ON BEHALF OF THE BOARD OF DIRECTORS OF MAKATI SPORTS CLUB, INC., *Petitioners*, v. JOVENCIO F. CINCO, VICENTE R. AYLLON, RICARDO G. LIBREA, SAMUEL L. ESGUERRA, ROLANDO P. DELA CUESTA, RUBEN L. TORRES, ALEX Y. PARDO, MA. CRISTINA SIM, ROGER T. AGUILING, JOSE B. QUIMSON, CELESTINO L. ANG, ELISEO V. VILLAMOR, FELIPE L. GOZON, CLAUDIO B. ALTURA, ROGER G. VILLAROSA, MANUEL R. SANTIAGO, BENJAMIN A. CARANDANG, REGINA DE LEON-HERLIHY, CARLOS Y. RAMOS, JR., ALEJANDRO Z. BARIN, EFRENILO M. CAYANGA and JOHN DOES, *Respondents*.

G.R. Nos. 163368-69 – JOVENCIO F. CINCO, RICARDO G. LIBREA and ALEX Y. PARDO, *Petitioners*, v. JOSE A. BERNAS, CECILE H. CHENG and IGNACIO A. MACROHON, *Respondents*.

Promulgated:

JUL 01 2015

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SEPARATE CONCURRING OPINION

PERLAS-BERNABE, J.:

I.

I agree with the *ponencia* that the December 17, 1997 Special Stockholders' Meeting is void because it was improperly called. However, I find that a reliance<sup>1</sup> on Section 50 of the Corporation Code<sup>2</sup> or Section 10 of the by-laws is misplaced.

To recount, the December 17, 1997 Special Stockholders' Meeting was called by the Makati Sports Club, Inc. (MSC) Oversight Committee (MSCOC), at the instance of certain stockholders, to remove the members of the Bernas Group who were sitting as directors at that time. During the said meeting, the Bernas Group was removed from office and the Cinco Group was elected as directors of MSC.

<sup>1</sup> See *Ponencia*, pp. 13-15 and 9-10, respectively.

<sup>2</sup> Batas Pambansa Bilang 68.

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The correct provision to be applied is Section 28 of the Corporation Code as it specifically governs the procedure for removing directors or trustees, to wit:

**SEC. 28. Removal of directors or trustees.** – Any director or trustee of a corporation may be removed from office by a vote of the stockholders holding or representing at least two-thirds ( $\frac{2}{3}$ ) of the outstanding capital stock, or if the corporation be a non-stock corporation, by a vote of at least two-thirds ( $\frac{2}{3}$ ) of the members entitled to vote: *Provided*, That such removal shall take place either at a regular meeting of the corporation or at a special meeting called for the purpose, and in either case, after previous notice to stockholders or members of the corporation of the intention to propose such removal at the meeting. **A special meeting of the stockholders or members of a corporation for the purpose of removal of directors or trustees, or any of them, must be called by the secretary on order of the president or on the written demand of the stockholders representing or holding at least a majority of the outstanding capital stock, or, if it be a non-stock corporation, on the written demand of a majority of the members entitled to vote. Should the secretary fail or refuse to call the special meeting upon such demand or fail or refuse to give the notice, or if there is no secretary, the call for the meeting may be addressed directly to the stockholders or members by any stockholder or member of the corporation signing the demand.** Notice of the time and place of such meeting, as well as of the intention to propose such removal, must be given by publication or by written notice prescribed in this Code. Removal may be with or without cause: *Provided*, That removal without cause may not be used to deprive minority stockholders or members of the right of representation to which they may be entitled under Section 24 of this Code. (Emphases supplied)

Section 50 of the Corporation Code is inapplicable since it governs the conduct of special stockholders' meetings in general:

**SEC. 50. Regular and special meetings of stockholders or members.** – Regular meetings of stockholders or members shall be held annually on a date fixed in the by-laws, or if not so fixed, on any date in April of every year as determined by the board of directors or trustees: *Provided*, That written notice of regular meetings shall be sent to all stockholders or members of record at least two (2) weeks prior to the meeting, unless a different period is required by the by-laws.

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Whenever, for any cause, there is **no person authorized to call a meeting**, the Securities and Exchange Commission, upon petition of a stockholder or member on a showing of good cause therefor, may issue an order to the petitioning stockholder or member directing him to call a meeting of the corporation by giving proper notice required by this Code or by the by-laws. The petitioning stockholder or member shall preside thereat until at least a majority of the stockholders or members present have chosen one of their number as presiding officer. (Emphasis supplied)

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Neither would Section 10 of MSC's by-laws apply since, similar to Section 50 of the Corporation Code, it applies to special stockholders' meetings in general:

SEC. 10. Special Meetings. Special meetings of stockholders shall be held at the Clubhouse when called by the President or by the Board of Directors or upon written request of stockholders representing not less than one hundred (100) shares. Only matters specified in the notice and call will be taken up at special meetings.<sup>3</sup>

Following the doctrine that specific provisions must prevail over general ones,<sup>4</sup> the procedure, as prescribed in Section 28 of the Corporation Code, should have therefore governed the conduct of the December 17, 1997 Meeting which was particularly intended for the removal of the Bernas Group from the MSC's Board of Directors, *viz.*:

- (a) the special meeting must have been called by the secretary; and
- (b) the same should have been made upon the order of the president or on written demand of the stockholders representing at least a majority of the outstanding capital stock; and
- (c) in case the secretary failed or refused to give such notice, or if there was no secretary, the call may have been made directly by any stockholder signing the demand.

Alternatively, an MSC stockholder could have filed a petition before the Securities and Exchange Commission (SEC) to compel either the president or a majority of the stockholders of the corporation to order the call, or the corporate secretary to make such call, for good cause shown, in view of the SEC's broad regulatory powers<sup>5</sup> under Presidential Decree No. (PD) 902-A.<sup>6</sup>

In these cases, the procedure outlined in Section 28 of the Corporation Code was not complied with. Neither was a petition to the SEC, as above-mentioned, filed by an MSC stockholder. The records show that certain MSC stockholders – who were not shown to constitute a majority of the outstanding capital stock of the corporation at that – unduly caused the MSCOC to make the call for the December 17, 1997 Meeting despite the latter's lack of authority to do so under the Corporation Code and/or the MSC by-laws. Thus, the December 17, 1997 Meeting, which suffers from a substantive and not a mere formal defect given that its improper call goes against the mandated statutory authority to effectuate such corporate action, is contrary to law and, therefore, void *ab initio*.

<sup>3</sup> *Rollo* (G.R. No. 163368-69), p. 112.

<sup>4</sup> *Metropolitan Bank & Trust Company v. Absolute Management Corporation*, G.R. No. 170498, January 9, 2013, 638 SCRA 225, 232.

<sup>5</sup> See Section 6 of PD 902-A.

<sup>6</sup> Entitled "REORGANIZATION OF THE SECURITIES AND EXCHANGE COMMISSION WITH ADDITIONAL POWER AND PLACING THE SAID AGENCY UNDER THE ADMINISTRATIVE SUPERVISION OF THE OFFICE OF THE PRESIDENT" (March 11, 1976).

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## II.

In *Pirovano v. De la Rama Steamship Co. (Pirovano)*,<sup>7</sup> the Court held that corporate acts which are illegal for being contrary to law are incapable of ratification, as opposed to acts which are merely *ultra vires*, *i.e.*, acts which are not within the powers of the corporation, to wit:

x x x [A] distinction should be made between corporate acts or contracts which are illegal and those which are merely *ultra vires*. The former contemplates the doing of an act which is contrary to law, morals, or public policy or public duty, and are, like similar transactions between public order, or contravene some rules of individuals, void. They cannot serve as basis of a court action, nor acquire validity by performance, ratification, or *estoppel*. Mere *ultra vires* acts, on the other hand, or those which are not illegal and void *ab initio*, but are not merely within the scope of the articles of incorporation, are merely voidable and may become binding and enforceable when ratified by the stockholders.<sup>8</sup>

As earlier mentioned, the December 17, 1997 Meeting is void *ab initio* for contravening Section 28 of the Corporation Code. Hence, while I agree with the *ponencia* that the April 20, 1998 and April 19, 1999 Meetings were called in compliance with the MSC by-laws,<sup>9</sup> I differ in that the removal of the Bernas Group and election of the Cinco Group – which are mere incidents resulting from the void December 17, 1997 Meeting – could not have been ratified, notwithstanding the fact that the latter April 19, 1999 Meeting was held under the supervision of the SEC. The SEC, being a mere regulatory body, cannot lend validity to otherwise invalid acts. Further, the presumption of regularity<sup>10</sup> cannot apply for the purpose of validating an internal action of a private corporation.

While Section 51 of the Corporation Code states that a meeting shall be valid even if improperly called if all the stockholders are present or duly represented at the meeting, it has not been shown that this is the case here.

Neither can the ratifications done during the April 20, 1998 and April 19, 1999 Meetings be equated to the valid election of the Cinco Group, enough to accord them with *de jure* status.<sup>11</sup> Clearly, these meetings were specifically called for the ratification of acts taken during the void December 17, 1997 Meeting, and not for the actual election of directors anew; to reiterate, the ratification of void acts is strictly prohibited under the doctrine enunciated in *Pirovano*. Besides, the procedure in ratifying acts approved or taken during prior meetings is different from the procedure in electing directors,<sup>12</sup> which was not shown to have been complied with in any of those meetings.

<sup>7</sup> 96 Phil. 335 (1954).

<sup>8</sup> *Id.* at 360.

<sup>9</sup> *Rollo* (G.R. Nos. 163368-69), pp. 111-119.

<sup>10</sup> As argued in the *ponencia*, p. 17.

<sup>11</sup> *Id.*

<sup>12</sup> See Section 24 of the Corporation Code.

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Ultimately, however, it should be pointed out that the issue of directorship has been rendered moot and academic by the lapse of the three (3)-year staggered term prescribed by the MSC's by-laws.<sup>13</sup> In fact, the MSC's own website<sup>14</sup> states that the corporation has a new set of directors which does not include any of the herein parties. Thus, the only actual issue left to be resolved is the validity of the expulsion of Bernas from MSC and the subsequent sale of his shares, all effected in the February 27, 1998 Meeting. On this score, I join the *ponencia* in ruling that both actions are void and without legal effect.<sup>15</sup>

### III.

Under the MSC by-laws,<sup>16</sup> a member may be suspended or expelled with the two-thirds ( $\frac{2}{3}$ ) vote of the Board of Directors.

As aptly observed by the *ponencia*, the Cinco Group cannot invoke the *de facto* officership doctrine to justify its actions after their invalid election in the December 17, 1997 Meeting, particularly, the expulsion of Bernas from MSC and the sale of his shares. A *de facto* officer is one who acts as such under color of an election or appointment, but fails being a *de jure* officer by some irregularity or failure to qualify as required by law.<sup>17</sup> Having ruled out the validity of their election either through the December 17, 1997 Meeting or through the ratifications in the April 20, 1998 and April 19, 1999 Meetings, the Cinco Group cannot be considered as *de facto* directors of MSC. As such, they could not have validly expelled Bernas from MSC and sold his shares of stock. More significantly, since the *de facto* doctrine rests on public policy and justice, the official dealings of directors *de facto* with third persons being sustained as rightful and valid on the ground of the corporation's continuous acquiescence to the officers holding themselves out as having such authority, it is only available to third persons dealing with corporations.<sup>18</sup> No such third person invoked the doctrine here.

**ACCORDINGLY**, subject to the qualifications herein made, I vote to **DENY** the consolidated petitions.

  
**ESTELA M. PERLAS-BERNABE**  
Associate Justice

<sup>13</sup> MSC's directors each have a term of three (3) years only, expiring on a staggered basis. See Section 14 of the MSC by-laws; *rollo*, (G.R. Nos. 163368-69), p. 113.

<sup>14</sup> Makati Sports Club, Inc. Board of Directors, 2015 <[www.makatisportsclub.com/AboutUs/BOD.html](http://www.makatisportsclub.com/AboutUs/BOD.html)> (visited June 25, 2015).

<sup>15</sup> See *Ponencia*, p. 18.

<sup>16</sup> See Section 34 (a) of the MSC by-laws; *rollo* (G.R. No. 163368-69), p. 118.

<sup>17</sup> Villanueva, *Philippine Corporate Law*, 2010 Edition, p. 316. See also *The General Manager, Phil. Ports Authority v. Monserate*, 430 Phil. 832, 846 (2002).

<sup>18</sup> *Id.*