ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 66
(28 July 2004)

A. Maurice de Alwis
v.
Asian Development Bank
(No. 2)

Robert A. Gorman, President
Shinya Murase
Flerida Ruth P. Romero

1. This is an Application for the revision of de Alwis, ADBAT Decision No. 57 [2003] (hereinafter referred to as Decision No. 57). In the original Application, the Applicant challenged the decision by the Respondent of 25 May 2001 to recover rental subsidies paid to him in 1998-1999 and 1999-2000, as well as to forfeit his right to such subsidy for an additional three years (2000-2001, 2001-2002 and 2002-2003) on the ground that the Applicant had not been entitled to such subsidies. The Applicant asserted that the Respondent's decision constituted a breach of the Bank's relevant regulations and sought a reversal of the Respondent's decision.

Factual Background

2. In 1996 the Applicant set up the corporation, YGC Investments ("YGC"), to purchase a property (a condominium) in Manila. On 8 July 1997, the Applicant applied for rental subsidy from the Bank for the lease of the same property for his family. This led to payments by the Respondent Bank to the Applicant of rental subsidy for three years from 1997/1998 – 1999/2000. After the expiry of the first year of the lease, the Applicant agreed to an increase of his monthly rental for the period 1 July 1998 – 30 June 1999 and 1 July 1999 – 30 June 2000.

3. The involvement by the Applicant with the owner of the condominium, YGC, was substantial and continuing. The Applicant acted on behalf of YGC in purchasing the condominium, and in signing the loan agreement with the Philippine National Bank. He also became guarantor for the loan. The Condominium Certificate of Title identified the Applicant as "Director" of YGC and the mortgage document identified the Applicant as "Managing Director" of YGC. Although the Applicant and his wife transferred their shares to the Applicant's sister and nephew, who remained the sole shareholders in the company, most of the company's affairs continued to be taken charge of by the Applicant who continued to make mortgage payments in regard to the property.

4. This link between the owner of the condominium, YGC, and the Applicant raised the question of whether the rental subsidy paid to the Applicant had been in accordance with the Bank's regulations as provided under Administrative Order ("A.O.") No. 3.07, para. 2.3. According to that provision prior to its revision on 1 July 1998:

> Staff members are not eligible for housing assistance if they own residential property suitable for self accommodation within reasonable commuting distance from the Bank's Headquarters, whether such property is owned in their own name, in the name of the staff member's spouse or jointly by the staff members and his/her spouse.

5. The Tribunal concluded, in Decision No. 57, that A.O. No. 3.07 cannot be interpreted to cover cases it clearly does not (such as staff members with some type of substantial involvement or control in an entity owning the property where the staff member lives), as to do so would disregard the corporate form of the YGC and treat the Applicant as the true owner of the property in its stead. The use of the corporate form to avoid liabilities and complications of personal ownership is part of the very rationale of corporate ownership, so that "piercing the corporate veil" cannot be lightly undertaken.

6. Accordingly, on 22 June 2000, A.O. No. 3.07 was revised to cover a situation such as that of the Applicant. The current version now obligates the staff member to disclose information of his substantial financial interest in the property for which he is being paid rental subsidy. If such an interest exists, the staff member will not be eligible for rental subsidy as it is "at variance with the basic purpose of rental subsidy." (See Decision No. 57, para. 22).

7. In addition to his links with YGC, the Applicant was unable in Decision No. 57 to provide evidence that he had actually paid rent. The Applicant had produced receipts from YGC that he had paid the appropriate rental advance for years 1997, 1998 and 1999, but had been unable to provide bank statements, copies of checks or other evidence to the effect that such payment had actually been made, and the receipts provided on behalf of YGC did not, in fact, correspond to any transfers of funds made by him. In addition, many of the alleged payments were to relatives, some of whom were not even shareholders.

8. On 25 May 2001, the President of ADB decided to rescind the Applicant's entitlement to rental subsidy for the years 1998/1999 to 1999/2000 on the ground that the Applicant had not been entitled to such subsidies, and directed the Applicant to return them. In addition, the President found that because the Applicant had abused the rental subsidy scheme, he should forfeit his right to such entitlements for a further three years, i.e., for the period from 2000/2001 to 2002/2003. The Applicant appealed the President's decision, but on 3 May 2002 the Appeals Committee endorsed the President's conclusion.

9. The Applicant then applied to this Tribunal seeking a reversal of the 25 May 2001 decision of the Respondent on the ground that it constituted a breach of the Bank's relevant regulations. This led to the Tribunal's decision in Decision No. 57. In that decision, the Tribunal concluded that it is a precondition of granting rental subsidy that a staff member has actually paid rent and that in cases where reasonable doubt emerges as to the correctness of the statements made by a staff member, it is incumbent on that staff member to substantiate the basis of his claim and that the Bank "has a ‘duty of caution' when it examines the evidence put forward by a staff member as the basis for a claim of entitlement." (See Powell, Decision No. 50 [2000], V ADBAT Reports 64.) Therefore, the Tribunal held that the Respondent had acted within its rights when it made the decision to recover the rental subsidies paid to the Applicant in 1998 and 1999 as the Applicant was unable to demonstrate that he had actually paid rent, given that "even on the Applicant's own explanations, the payments were made at irregular intervals, to a disparate number of persons, and did not once match the amounts of rent due."

10. With respect to the forfeiture of the right to subsidy in 2000, 2001 and 2002, the Tribunal held that the Applicant's behavior had manifested a certain neglect of "prudence and economy", both because the Applicant had sought to receive subsidy for payments he had never made, and because he had agreed to the increase of his rent during the time of validity of his existing

contract. Therefore, the Tribunal deemed it not to be an abuse of the Bank's discretion to deny the Applicant the right to subsidy in 2000, 2001 and 2002.

Request by Applicant for Revision of Tribunal's Decision

11. The Applicant now asks the Tribunal to revise its previous decision in light of subsequently-acquired documentation as well as the Tribunal's failure to apply the legal principle provided for in Article 1241 of the Civil Code of the Philippines, which the Applicant argues proves that he did pay rent for the property and is therefore entitled to claim rental subsidy from the Bank. The Applicant prays for the revision and setting aside of Decision No. 57 and for the issuance of a new judgment declaring null and void the decisions of the President dated 25 May 2001 and of the Appeals Committee dated 7 May 2002; reinstating the Applicant's entitlement to rental subsidy effective 1998; and directing the ADB to (a) reimburse the Applicant in the amounts deducted from his salary for the rental subsidy with interest; (b) withdraw all adverse documents relating to the case from his personal file; (c) withdraw A.O. 3.07 which was amended in 1999 and 2000; (d) make a public apology; and (e) pay the Applicant a total of at least US$523,000 by way of compensatory damages, actual damages and attorney's fees.

12. A request for the revision of the Tribunal's Decision is made possible pursuant to Article XI of the ADB Administrative Tribunal's Statute (the "Statute") which lays down three conditions for the admission of a request for revision of a prior judgment, namely:

a. the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal;

b. the showing that at the time the judgment was delivered that fact was unknown both to the Tribunal and to that party; and

c. the submission of a request for revision within a period of six months after the party acquired knowledge of that fact.

13. The Applicant puts forward three arguments in support of his request for revision of Decision No. 57:

a. He has now discovered certain key documents which he "could not... have discovered and produced during the pendency of his Application" and which show that he duly made his rental payments after year 2000;

b. He has now discovered "new evidence" which was previously not disclosed by the Respondent to him and confirms the transfer of shares in YGC; and

c. One important legal principle provided for in Article 1241 of the Civil Code of the Philippines was not considered by the Tribunal in reaching its previous decision.

14. The Tribunal rejects the first two arguments on the ground that the alleged after-acquired facts put forward by the Applicant are neither new nor of decisive influence. Instead they appear to be contentions that the Tribunal erred in its conclusions which neither Article XI nor any other provision of the Statute allows. (See Samuel (No. 3), ADBAT Decision No. 37 [1997], III ADBAT Reports 121.) What the Applicant claims is "new evidence" that shows he duly made his rental payments after year 2000 and confirms the transfer of shares in YGC Investment were clearly

known to the Applicant even during the pendency of his initial Application. The "new discovery" of receipts, bank transfers, lease agreements, and checks paid to Pearl de Alwis during 2000, 2001 and 2002 are checks issued by the Applicant himself and his own bank statements. Obviously, this information was fully known to him and it was incumbent on him to introduce it to the extent he deemed necessary in his original pleadings to the Administrative Tribunal. Likewise, the exchange of memoranda between the Bank's Anti-Corruption Unit and the Review Committee in November 2000 concerning the transfer of shares of YGC had already been submitted as Annexes 57A and 57B of his original Application and thus these facts were before the Tribunal when it considered and rendered Decision No. 57. (See Wilkinson (No. 2), Decision No. 34 [1997], III ADBAT Reports 68, para. 5.)

15. Further, even if the Tribunal were to assume that these were new facts of which it was unaware when it delivered its judgment, it cannot be said that they might have had a decisive influence on Decision No. 57. (See Alan Berg (No. 2), Decision No. 87 [1990], WBAT Reports para. 17.) In the case of the "new" evidence of receipts, bank transfers, lease agreements and checks paid to Pearl de Alwis during 2000, 2001 and 2002, these documents are clearly entirely irrelevant and could have no influence whatsoever, let alone a decisive influence, on the judgment of the Tribunal as its findings were based on the Applicant's failure to substantiate rental payments for years 1997, 1998 and 1999 which constitute the basis for disciplinary measures imposed on him. Therefore, the fact that the Applicant allegedly paid his rents for the three subsequent years, after the imposition of disciplinary measures upon him for the earlier years, is totally irrelevant to the Tribunal's judgment.

16. Finally, the Tribunal rejects the Applicant's allegation that the Tribunal "ignored an important legal principle like Art. 1241 with nary an explanation," as this merely represents an attempt by the Applicant to revisit the same facts, evidence and legal arguments that were before the Tribunal when it deliberated upon and rendered its judgment in Decision No. 57. This contention of the Applicant cannot be considered since it is not based on new facts but, again, merely constitutes a criticism of the Tribunal's decision, which cannot be entertained as a matter of law. The Applicant essentially repeats the same arguments already contained in his initial Application, which is not a permissible ground for review under Article XI of the Statute and is at variance with the principle of res judicata. Article IX of the Statute provides that the decisions of the Tribunal shall be final and binding, so that there is no appeal against them. The principles of finality and of res judicata of Tribunal judgments are well established through the language of that provision and by the previous decisions of this Tribunal, as well as by the judgments of other administrative tribunals under comparable provisions. (See Haider (No. 2), Decision No. 48 [2000], V ADBAT Reports 1, para. 2.)

Conclusion

17. The Tribunal holds that the Applicant has failed to satisfy the conditions laid down in Article XI of the Statute. What the Applicant is asking the Tribunal to do is to review its decision with which he is not satisfied, on the basis of the same facts and arguments, by alleging mistakes of law and mistakes in the appraisal of facts, which are not permissible grounds of review. (See In re Villegas (No. 4), ILOAT Judgment No. 442 (1981).)

Decision

For the above reasons, the Tribunal unanimously denies the Applicant's request for revision of its judgment in de Alwis, ADBAT Decision No. 57 [2003].