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The powers of the Ombudsman are **not merely recommendatory**. His office was given teeth to render this constitutional body not merely functional but also effective. Thus, we hold that under Republic Act No. 6770 and the 1987 Constitution, **the Ombudsman has the constitutional power to directly remove from government service an erring public official other than a member of Congress and the Judiciary.** (Emphasis supplied).

WHEREFORE, we *GRANT* the petition. The assailed Decision and Resolution of the Court of Appeals in CA-G.R. SP No. 66744 are *REVERSED*. The Decision dated May 22, 2001 of the Office of the Ombudsman is *AFFIRMED*.

SO ORDERED.

Puno, C.J.(Chairperson), Corona, Azcuna, and *Garcia, JJ.,* concur.

EN BANC

[G.R. No. 165272. September 13, 2007]

SERGIO R. OSMEÑA III, JUAN M. FLAVIER, RODOLFO G. BIAZON, ALFREDO S. LIM, JAMBY A.S. MADRIGAL, LUIS F. SISON, AND PATRICIA C. SISON, *petitioners, vs.* **SOCIAL SECURITY SYSTEM OF THE PHILIPPINES, SOCIAL SECURITY COMMISSION, CORAZON S. DELA PAZ, THELMO Y. CUNANAN, PATRICIA A. STO. TOMAS, FE TIBAYAN-PANLILEO, DONALD DEE, SERGIO R. ORTIZ-LUIS, JR., EFREN P. ARANZAMENDEZ, MARIANITA O. MENDOZA, and RAMON J. JABAR, in their capacities as Members of the Social Security Commission, and BDO CAPITAL & INVESTMENT CORPORATION,** *respondents.*

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SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; WHERE CASE IS MOOT AND ACADEMIC; ELUCIDATED.— A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner would be entitled to, and which would be negated by the dismissal of the petition. Courts generally decline jurisdiction over such case or dismiss it on the ground of mootness — save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.

2. CIVIL LAW; OBLIGATIONS AND CONTRACTS; CONDITIONAL OBLIGATIONS; IF THE THING IS LOST WITHOUT THE FAULT OF THE DEBTOR, THE OBLIGATION SHALL BE ESTINGUISHED; APPLICATION.— Under the law on obligations and contracts, the obligation to give a determinate thing is extinguished if the object is lost without the fault of the debtor. And per Art. 1192 (2) of the Civil Code, a thing is considered lost when it perishes or disappears in such a way that it cannot be recovered. When the service has become so difficult as to be manifestly beyond the contemplation of the parties, total or partial release from a prestation and from the counter-prestation is allowed. Under the theory of *robus sic stantibus*, the parties stipulate in the light of certain prevailing conditions, and once these conditions cease to exist, the contract also ceases to exist.

APPEARANCES OF COUNSEL

Bernas Law Offices for petitioners.

Martinez Vergara Gonzalez and Serrano and *Arthur Autea and Associates* for BDO Capital & Investment Corp.

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D E C I S I O N

GARCIA, *J.*:

Senator Sergio R. Osmeña III[1] and four (4) other members[2] of the Philippine Senate, joined by Social Security System (SSS) members Luis F. Sison and Patricia C. Sison, specifically seek in this original petition for *certiorari* and prohibition the nullification of the following issuances of respondent Social Security Commission (SSC):

1) **RESOLUTION No. 428**[3] dated **July 14, 2004;** and

2) **RESOLUTION No. 485**[4] dated **August 11, 2004**.

The first assailed resolution approved the proposed sale of the entire equity stake of the SSS in what was then the Equitable PCI Bank, Inc. (EPCIB or EPCI), consisting of 187,847,891 common shares, through the *Swiss Challenge* bidding procedure, and authorized SSS President Corazon S. Dela Paz (Dela Paz) to constitute a bidding committee that would formulate the terms of reference of the *Swiss Challenge* bidding mode. The second resolution approved the *Timetable and Instructions to Bidders.*

Petitioners[5] also ask that a prohibitive writ issue to permanently enjoin public respondents from implementing Res. Nos. 428 and 485 or otherwise proceeding with the sale of subject shares through the *Swiss Challenge* method.

By Resolution[6] dated October 5, 2004, the Court *en banc* required the parties to observe the *status quo ante* the passage

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[1] His term as Senator expired on June 30, 2007.

[2] Senators Jamby A.S. Madrigal, Rodolfo G. Biazon , Alfredo S. Lim (now Manila Mayor) and Juan M. Flavier. Sen. Flavier's term has expired.

[3] *Rollo*, pp. 93-95.

[4] *Id.* at 97-98.

[5] Although there are several party-petitioners representing purportedly separate and distinct interests, all of them filed common pleadings, without any distinction whatsoever in the arguments for each of the petitioners.

[6] *Rollo*, p. 305.

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of the assailed resolutions. In the same resolution, the Court noted the motion of respondent BDO Capital and Investment Corporation (BDO Capital) to admit its *Opposition to the Petition.*

The relevant factual antecedents:

Sometime in 2003, SSS, a government financial institution (GFI) created pursuant to Republic Act (RA) No. 1161[7] and placed under the direction and control of SSC, took steps to liquefy its long-term investments and diversify them into higher-yielding and less volatile investment products. Among its assets determined as needing to be liquefied were its shareholdings in EPCIB. The principal reason behind the intended disposition, as explained by respondent Dela Paz during the February 4, 2004 hearing conducted by the Senate Committee on Banks, Financial Institutions and Currencies, is that the shares in question have substantially declined in value and the SSS could no longer afford to continue holding on to them at the present level of EPCIB's income.

Some excerpts of what respondent Dela Paz said in that hearing:

> The market value of Equitable-PCI Bank had actually hovered at ₱34.00 since July 2003. At some point after the price went down to ₱16 or ₱17 after the September 11 …, it went up to ₱42.00 but later on went down to ₱34.00. xxx. We looked at the prices in about March of 2001 and noted that the trade prices then ranged from ₱50 to ₱57.
>
> xxx xxx xxx
>
> I have to concede that [EPCIB] has started to recover, …
>
> Perhaps the fact that there had been this improved situation in the bank that attracted Banco de Oro … xxx. I wouldn't know whether the prices would eventually go up to 60 of (sic) 120. But on the basis of my being the vice-chair on the bank, I believe that this is the subject of a lot of conjecture. It can also go down …. So, in the present situation where the holdings of SSS in [EPCIB] consists of about 10 percent of the total reserve fund, we cannot afford to continue holding it at the present level of income … xxx. And therefore, on that basis, an exposure to certain form of assets whose

[7] As amended by RA 8282, or the Social Security Law of 1997.

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price can go down to 16 to 17 which is a little over 20 percent of what we have in our books, is not a very prudent way or conservative way of handling those funds. We need not continue experiencing opportunity losses but have an amount that will give us a fair return to that kind of value (Words in bracket added.)

Albeit there were other interested parties, only Banco de Oro Universal Bank (BDO) and its investment subsidiary, respondent BDO Capital,[8] appeared in earnest to acquire the shares in question. Following talks between them, BDO and SSS signed, on December 30, 2003, a Letter- Agreement,[9] for the sale and purchase of some 187.8 million EPCIB common shares (the Shares, hereinafter), at ₱43.50 per share, which represents a premium of 30% of the then market value of the EPCIB shares. At about this time, the Shares were trading at an average of ₱34.50 @ share.

In the same Letter-Agreement,[10] the parties agreed "to negotiate in good faith a mutually acceptable Share Sale and Purchase Agreement and execute the same not later than thirty (30) business days from [December 30, 2003]."

On April 19, 2004, the Commission on Audit (COA),[11] in response to respondent Dela Paz's letter-query on the applicability of the public bidding requirement under COA Circular No. 89-296[12] on the divestment by the SSS of its entire EPICB equity holdings, stated that the "*circular covers all assets of government agencies except those merchandize or inventory held for sale in the regular course of business.*" And while it expressed the opinion[13] that the sale of the subject Shares are "*subject to guidelines in the Circular*," the COA qualified its

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[8] See General Information Sheet of BDO Capital, *rollo*, pp. 2133 *et seq*.

[9] *Rollo,* pp. 155-157.

[10] Referred to in some pleadings as "Letter-Intent" or "Letter of Intent."

[11] Through Chairman Guillermo Carague.

[12] *Audit Guidelines on the Divestment or Disposal of Property and Other Assets of National Government Units and [GOCCs] and their Subsidiaries*; *rollo*, pp. 159 *et seq*.

[13] *Rollo,* pp. 174 *et seq*.

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determination with a statement that such negotiated sale would partake of a stock exchange transaction and, therefore, would be adhering to the general policy of public auction. Wrote the COA:

> Nevertheless, since activities in the stock exchange which offer to the general public stocks listed therein, the proposed sale, although denominated as "negotiated sale" substantially complies with the general policy of public auction as a mode of divestment. This is so for shares of stocks are actually being auctioned to the general public every time that the stock exchanges are openly operating.

Following several drafting sessions, SSS and BDO Capital, the designated buyers of the Banco de Oro Group, agreed on a final draft version of the Share Purchase Agreement[14] (SPA). In it, the parties mutually agreed to the purchase by the BDO Capital and the sale by SSS of all the latter's EPCIB shares at the closing date at the specified price of ₱43.50 per share or a total of ₱8,171,383,258.50.

The proposed SPA, together with the Letter-Agreement, was then submitted to the Department of Justice (DOJ) which, in an Opinion[15] dated April 29, 2004, concurred with the COA's opinion adverted to and stated that it did not find anything objectionable with the terms of both documents.

On July 14, 2004, SSC passed Res. No. 428[16] approving, as earlier stated, the sale of the EPCIB shares through the *Swiss Challenge* method. A month later, the equally assailed Res. No. 485[17] was also passed.

On August 23, 24, and 25, 2004, SSS advertised an *Invitation to Bid*[18] for the block purchase of the Shares. The *Invitation to Bid* expressly provided that the "*result of the bidding is*

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[14] *Id*. at 174 *et seq*.

[15] *Id*. at 2157 *et seq*.

[16] *Supra* note 1.

[17] *Supra* note 2.

[18] *Rollo*, p. 1410, published in the Philippine Daily Inquirer, Philippine Star, and Manila Bulletin.

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subject to the right of BDO Capital … to match the highest bid." October 20, 2004 was the date set for determining the winning bid.

The records do not show whether or not any interested group/s submitted bids. The bottom line, however, is that even before the bid envelopes, if any, could be opened, the herein petitioners commenced the instant special civil action for *certiorari*, setting their sights primarily on the legality of the *Swiss Challenge* angle and a provision in the *Instruction to Bidders* under which the SSS undertakes to offer the Shares to BDO should no bidder or prospective bidder qualifies. And as earlier mentioned, the Court, *via* a *status quo* order,[19] effectively suspended the proceedings on the proposed sale.

Under the *Swiss Challenge* format, one of the bidders is given the option or preferential "*right to match*" the winning bid.

Petitioners assert, in gist, that a public bidding with a *Swiss Challenge* component is contrary to COA Circular No. 89-296 and public policy which requires adherence to competitive public bidding in a government-contract award to assure the best price possible for government assets. Accordingly, the petitioners urge that the planned disposition of the Shares through a *Swiss Challenge* method be scrapped. As argued, the *Swiss Challenge* feature tends to discourage would-be-bidders from undertaking the expense and effort of bidding if the chance of winning is diminished by the preferential "*right to match*" clause. Pushing the point, petitioners aver that the Shares are in the nature of long-term or non-current assets not regularly traded or held for sale in the regular course of business. As such, their disposition must be governed by the aforementioned COA circular which, subject to several exceptions, prescribes "public auction" as a primary mode of disposal of GFIs' assets. And obviously finding the proposed purchase price to be inadequate, the petitioners expressed the belief that "*if properly bidded out in accordance with [the] COA Circular …, the Shares could be sold at a price of at least Sixty Pesos (₱60.00) per share.*" Other supporting

[19] *Supra* note 6.

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arguments for allowing *certiorari* are set forth in some detail in the basic petition.

Against the petitioners' stance, public respondents *inter alia* submit that the sale of subject Shares is exempt from the tedious public bidding requirement of COA. Obviously stressing the practical side of the matter, public respondents assert that if they are to hew to the bidding requirement in the disposition of SSS's Philippine Stock Exchange (PSE)-listed stocks, it would place the System at a disadvantage *vis-à-vis* other stock market players who certainly enjoy greater flexibility in reacting to the vagaries of the market and could sell their holdings at a moment's notice when the price is right. Public respondents hasten to add, however, that the bidding-exempt status of the Shares did not prevent the SSS from prudently proceeding with the bidding as contemplated in the assailed resolutions as a measure to validate the adequacy of the unit price BDO Capital offered therefor and to possibly obtain a higher price than its definitive offer of ₱43.50 per share.[20] Public respondents also advanced the legal argument, also shared by their co-respondent BDO Capital, in its *Comment*,[21] that the proposed sale is not covered by COA Circular No. 89-296 since the Shares partake of the nature of merchandise or inventory held for sale in the regular course of SSS's business.

Pending consideration of the petition, supervening events and corporate movements transpired that radically altered the factual complexion of the case. Some of these undisputed events are detailed in the petitioners' separate *Manifestation & Motion to Take Judicial Notice*[22] and their respective annexes. To cite the relevant ones:

1. In January 2006, BDO made public its intent to merge with EPCIB. Under what BDO termed as "Merger of Equals," EPCIB shareholders would get 1.6 BDO shares for every EPCIB share.[23]

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[20] Summarized from public respondent's Memorandum; *rollo*, pp. 1557-1613.

[21] Pages 32-37 of BDO's Comment; *rollo*, pp. 720-725.

[22] The first dated February 1, 2006, *rollo*, pp. 1912, *et seq*. and the other dated September 12, 2006, *rollo*, pp. 1937, *et seq.*

[23] *Rollo*, p. 1922.

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2. In early January 2006, the GSIS publicly announced receiving from an undisclosed entity an offer to buy its stake in EPCIB – 12% of the bank's outstanding capital stock – at P92.00 per share.[24]

3. On August 31, 2006, **SM Investments Corporation**, an affiliate of BDO and BDO Capital, in consortium with Shoemart, Inc. *et al.*, (collectively, the **SM Group**) commenced, through the facilities of the PSE and pursuant to R.A. No. 8799[25], a mandatory tender offer (Tender Offer) covering the purchase of the **entire outstanding capital stock of EPCIB** at **P92.00 per share**. Pursuant to the terms of the Tender Offer, which was to start on August 31, 2006 and end on September 28, 2006 – the Tender Offer Period – all shares validly tendered under it by EPCIB shareholders of record shall be deemed accepted for payment on closing date subject to certain conditions.[26] Among those who accepted the Tender Offer of the SM Group was EBC Investments, Inc., a subsidiary of EPCIB.

4. A day or two later, BDO filed a Tender Offer Report with the Securities and Exchange Commission (SEC) and the PSE.[27]

Owing to the foregoing developments, the Court, on October 3, 2006, issued a Resolution requiring the *'parties to CONFIRM news reports that price of subject shares has been agreed upon at ₱92; and if so, to MANIFEST whether this case has become moot."*

First to comply with the above were public respondents SSS *et al.*, by filing their *Compliance and Manifestation,*[28] therein essentially stating that the case is now moot in view of the SM-BDO Group's Tender Offer at ₱92.00 @ unit share, for the subject EPCIB common shares, inclusive of the SSS shares subject of the petition. They also stated the observation that the petitioners' *Manifestation and Motion to Take Judicial Notice,*[29] never questioned the Tender Offer, thus confirming

[24] *Id.* at 1915.

[25] The Securities Regulation Code.

[26] *Rollo,* pp. 1937-38; p.1950.

[27] *Ibid,* pp. 1951 *et seq.*

[28] *Ibid,* p.1983.

[29] *Supra* note 22.

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the dispensability of a competitive public bidding in the disposition of subject Shares.

For perspective, a "tender offer" is a publicly announced intention by a person acting alone or in concert with other persons to acquire equity securities of a public company, *i.e.*, one listed on an exchange, among others.[30] The term is also defined as "*an offer by the acquiring person to stockholders of a public company for them to tender their shares therein on the terms specified in the offer*"[31] Tender offer is in place to protect the interests of minority stockholders of a target company against any scheme that dilutes the share value of their investments. It affords such minority shareholders the opportunity to withdraw or exit from the company under reasonable terms, a chance to sell their shares at the same price as those of the majority stockholders.[32]

Next to comply with the same Resolution of the Court was respondent BDO Capital *via* its *Compliance*,[33] thereunder practically reiterating public respondents' position on the question of mootness and the need, under the premises, to go into public bidding. It added the arguments that the BDO-SM Group's Tender Offer, involving as it did a general offer to buy **all** EPCIB common shares at the stated price and terms, were inconsistent with the idea of public bidding; and that the Tender Offer rules actually provide for an opportunity for competing groups to top the Tender Offer price.

On the other hand, petitioners, in their *Manifestation*,[34] concede the huge gap between the unit price stated in the Tender Offer and the floor price of ₱43.50 per share stated in the *Invitation to Bid*. It is their posture, however, that unless SSS withdraws the sale of the subject shares by way of the *Swiss*

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[30] Par. 1.1 of Rule 19, IRR of the Securities Regulation Code.

[31] Morales, ***The Philippine Securities Regulation Code***, *2005 ed., p. 153.*

[32] *Cemco Holdings, Inc. v. National Life Insurance Co. of the Philippines*, G.R. No. 171815, August 7, 2007.

[33] *Rollo*, pp. 2056 *et seq.*

[34] *Ibid.*, pp. 2068, *et seq.*

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Challenge, the offer price of ₱92 per share cannot render the case moot and academic.

Meanwhile, the positive response to the Tender Offer enabled the SM-BDO Group to acquire controlling interests over EPCIB and paved the way for a BDO-EPCIB merger. The merger was formalized by subsequent submission of the necessary merger documents[35] to the SEC.

On May 25, 2007, the SEC issued a *Certificate of Filing of the Article and Plan of Merger*[36] approving the merger between BDO and EPCIB, relevant portions of which are reproduced hereunder:

THIS IS TO CERTIFY that the Plan and Articles of Merger executed on December 28, 2006 by and between:

BANCO DE ORO UNIVERSAL BANK,
Now BANCO DE ORO-EPCI, INC.
(Surviving Corporation)
and

EQUITABLE PCI BANK, INC.
(Absorbed Corporation)

… approved by a majority of the Board of Directors on November 06, 2006 and by a vote of the stockholders owning or representing at least two-thirds of the outstanding capital stock of constituent corporations on December 27, 2006, signed by the Presidents, certified by their respective Corporate Secretaries, whereby the entire assets of **[EPCI]** Inc. will be transferred to and absorbed by **[BDO] UNIVERSAL BANK *now* BANCO DE ORO-EPCI, INC.** was approved by this Office on this date but which approval shall be **effective on May 31, 2007** pursuant to the provisions of … (Word in bracket added; emphasis in the original)

In line with Section 80 of the Corporation Code and as explicitly set forth in Article 1.3 of the *Plan of Merger* adverted to, among the effects of the BDO-EPCIB merger are the following:

a. BDO and EPCI shall become a single corporation, with BDO as the surviving corporation. [EPCIB] shall cease to exist…;

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[35] Plan of Merger and Articles of Merger between BDO and EPCIB.

[36] *Rollo*, p. 2156.

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xxx xxx xxx

c. All the rights, privileges, immunities, franchises and powers of EPCI shall be deemed transferred to and possessed by the merged Bank…; and

d. All the properties of EPCI, real or personal, tangible or intangible … shall be deemed transferred to the Merged Bank without further act or deed.

Per Article 2 of the *Plan of Merger* on the exchange of shares mechanism, *"all the issued and outstanding common stock of [EPCIB] ('EPCI shares') shall be converted into fully-paid and non assessable common stock of BDO ('BDO common shares') at the ratio of* ***1.80 BDO Common shares*** *for each issued* ***[EPCIB] share*** *('the Exchange Ratio')."* And under the exchange procedure, *"BDO shall issue BDO Common Shares to EPCI stockholders corresponding to each EPCI Share held by them in accordance with the aforesaid Exchange Ratio."*

It appears that BDO, or BDO-EPCI, Inc. to be precise, has since issued BDO common shares to respondent SSS corresponding to the number of its former EPCIB shareholdings under the ratio and exchange procedure prescribed in the *Plan of Merger*. In net effect, SSS, once the owner of a block of EPCIB shares, is now a large stockholder of BDO-EPCI, Inc.

On the postulate that the instant petition has now become moot and academic, BDO Capital supplemented its earlier *Compliance and Manifestation*[37] with a formal *Motion to Dismiss*.[38]

By Resolution dated July 10, 2007, the Court required petitioners and respondent SSS to comment on BDO Capital's motion to dismiss "within ten (10) days from notice."

To date, petitioners have not submitted their compliance. On the other hand, SSS, by way of comment, reiterated its position articulated in respondents' *Compliance and Motion*[39]

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[37] *Supra* note 30.

[38] *Rollo*, pp. 2104, *et seq.*

[39] *Supra* note 28.

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that the SM-BDO Group Tender Offer at the price therein stated had rendered this case moot and academic. And respondent SSS confirmed the following: a) its status as BDO-EPCIB stockholder; b) the Tender Offer made by the SM Group to EPCIB stockholders, including SSS, for their shares at ₱92.00 per share; and c) SSS' acceptance of the Tender Offer thus made.

A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, [40] so that an adjudication of the case or a declaration on the issue would be of no practical value or use.[41] In such instance, there is no actual substantial relief which a petitioner would be entitled to, and which would be negated by the dismissal of the petition.[42] Courts generally decline jurisdiction over such case or dismiss it on the ground of mootness — save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.[43]

The case, with the view we take of it, has indeed become moot and academic for interrelated reasons.

We start off with the core subject of this case. As may be noted, the Letter-Agreement,[44] the SPA,[45] the SSC resolutions assailed in this recourse, and the *Invitation to Bid* sent out to implement said resolutions, all have a common subject: the Shares – the 187.84 Million EPCIB common shares. It cannot

[40] *Province of Batangas v. Romulo,* G.R. No. 152774, May 27, 2004, 429 SCRA 736.

[41] *Paloma v. CA,* G.R. No. 145431, November 11, 2003, 415 SCRA 590.

[42] *Olanolan v. Comelec,* G.R. No. 165491, March 31, 2005, 807 SCRA 454, citing cases.

[43] *Acop v. Guingona, Jr.,* G.R. No. 134855, July 2, 2002, 383 SCRA 577; *Sanlakas v. Executive Secretary,* G.R. No. 159085, February 3, 2004, 421 SCRA 656.

[44] *Supra* note 10.

[45] *Supra* note 14.

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be overemphasized, however, that the Shares, as a necessary consequence of the BDO-EPCIB merger[46] which saw EPCIB being absorbed by the surviving BDO, have been **transferred** to BDO and **converted** into **BDO** common **shares** under the exchange ratio set forth in the BDO-EPCIB Plan of Merger. As thus converted, the subject Shares are no longer equity security issuances of the now defunct EPCIB, but those of BDO-EPCI, which, needless to stress, is a totally separate and distinct entity from what used to be EPCIB. In net effect, therefore, the 187.84 Million EPCIB common shares are now lost or inexistent. And in this regard, the Court takes judicial notice of the disappearance of EPCIB stocks from the local bourse listing. Instead, BDO-EPCI Stocks are presently listed and being traded in the PSE.

Under the law on obligations and contracts, the obligation to give a determinate thing is extinguished if the object is lost without the fault of the debtor.[47] And per Art. 1192 (2) of the Civil Code, a thing is considered lost when it perishes or disappears in such a way that it cannot be recovered.[48] In a very real sense, the interplay of the ensuing factors: a) the BDO-EPCIB merger; and b) the cancellation of subject Shares and their replacement by totally new common shares of BDO, has rendered the erstwhile 187.84 million EPCIB shares of SSS "unrecoverable" in the contemplation of the adverted Civil Code provision.

With the above consideration, respondent SSS or SSC cannot, under any circumstance, cause the implementation of the assailed resolutions, let alone proceed with the planned disposition of the Shares, be it *via* the traditional competitive bidding or the challenged public bidding with a *Swiss Challenge* feature.

At any rate, the moot-and-academic angle would still hold sway even if it were to be assumed hypothetically that the subject

[46] Under Section 80 of the Corporate Code, a merger or consolidation has the following effects, among others: "The separate existence of the constituent corporations shall cease, except that of the surviving or the consolidated corporation."

[47] Art. 1189 of the Civil Code.

[48] *Ibid*., par. 2.

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Shares are still existing. This is so, for the supervening BDO-EPCIB merger has so effected changes in the circumstances of SSS and BDO/BDO Capital as to render the fulfillment of any of the obligations that each may have agreed to undertake under either the Letter-Agreement, the SPA or the *Swiss Challenge* package legally impossible. When the service has become so difficult as to be manifestly beyond the contemplation of the parties,[49] total or partial release from a prestation and from the counter-prestation is allowed.

Under the theory of *rebus sic stantibus*,[50] the parties stipulate in the light of certain prevailing conditions, and once these conditions cease to exist, the contract also ceases to exist.[51] Upon the facts obtaining in this case, it is abundantly clear that the conditions in which SSS and BDO Capital and/or BDO executed the Letter-Agreement upon which the pricing component – at ₱43.50 per share – of the *Invitation to Bid* was predicated, have ceased to exist. Accordingly, the implementation of the Letter- Agreement or of the challenged Res. Nos. 428 and 485 cannot plausibly push through, even if the central figures in this case are so minded.

Lest it be overlooked, BDO-EPCI, in a manner of speaking, stands now as the issuer[52] of what were once the subject Shares. Consequently, should SSS opt to exit from BDO and BDO Capital, or BDO Capital, in turn, opt to pursue SSS's shareholdings in EPCIB, as thus converted into BDO shares, the sale-purchase ought to be *via* an Issuer Tender Offer — a phrase which means a publicly announced intention by an issuer to acquire any of its own class of equity securities or by an

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[49] Art. 1267 of the Civil Code.

[50] At this point of affairs; in these circumstances.

[51] *Phil. National Construction Corp. v. CA*, G.R. No. 116896, May 5, 1997, 272 SCRA 183, citing *Naga Telephone Co. v. CA*, G.R. No. 107112, February 24, 1994, 230 SCRA 351.

[52] Issuer is defined in Sec 3 (2) of RA 8799 as the originator, maker, obligor or creator of shares of stock or other securities.

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affiliate of such issuer to acquire such securities.[53] In that eventuality, BDO or BDO Capital cannot possibly exercise the "right to match" under the *Swiss Challenge* procedure, a tender offer being wholly inconsistent with public bidding. The offeror or buyer in an issue tender offer transaction proposes to buy or acquire, at the stated price and given terms, its own shares of stocks held by its own stockholder who in turn simply have to accept the tender to effect the sale. No bidding is involved in the process.

While the Court ends up dismissing this petition because the facts and legal situation call for this kind of disposition, petitioners have to be commended for their efforts in initiating this proceeding. For, in the final analysis, it was their petition which initially blocked implementation of the assailed SSC resolutions, and, in the process, enabled the SSS and necessarily their members to realize very much more for their investments.

WHEREFORE, the instant petition is *DISMISSED*.

No costs.

SO ORDERED.

Puno, C.J., Quisumbing, Ynares-Santiago, Sandoval-Gutierrez, Carpio, Austria-Martinez, Corona, Carpio Morales, Azcuna, Tinga, Chico-Nazario, Velasco, Jr., Nachura, and *Reyes, JJ.,* concur.

[53] Rule 19.1.F, Amended Implementing Rules and Regulation of the Securities Regulation Code.