

IN THE SUPREME COURT OF GUAM

**PETER S. DUMALIANG, RUDOLPH DEVERA, RODULFO CALIMLIM,
CELY AQUINO, THELMA BARROZO, MYRNA RIVO, FEDERICO
FLORES, JAMIE MONTANO, JOSE CARRERA,
and EVELYN GALANG,
Petitioners-Appellees,**

vs.

**MERLINA SILAN, ANDRES PADILLA, JR., EFREN MARQUEZ, JOSIE
GATMEN, BELLA MARQUES, CLARITO VIRAY, LOLITA GAGAOIN,
DOMY FERNANDEZ, LUIS DEVERA, CARMELITA ORALLO, PETE
YANZA, LUDOVINA ANTOLIN, MEDY GLORIA, PEDRO MANDAPAT,
LILIA BASTO, ERNESTO MENDOZA, and CHRIS MENDOZA, as
Members of the Board of Directors of Pangasinan Community of Guam
(Int'l), Inc.,
Respondents-Appellants.**

OPINION

Filed: September 8, 2000

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Supreme Court Case No.: CVA99-050
Superior Court Case No.: SP0302-99

Appeal from the Superior Court of Guam
Submitted on the Briefs May 4, 2000

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BEFORE: BENJAMIN J.F. CRUZ, Chief Justice, PETER C. SIGUENZA, Associate Justice, and JOHN A. MANGLONA, Designated Justice

CRUZ, C.J.:

[1] Members of a nonprofit corporation filed a Petition for a Writ of Mandate in the trial court to compel the directors of the corporation to conduct a statutorily required annual election of the board of directors. The directors refused to conduct the election claiming an exemption from the statute. The trial court issued a Peremptory Writ of Mandate and the directors appealed. We hold that the corporation is required by law to conduct an annual election of directors and affirm the trial court's issuance of the Peremptory Writ of Mandate.

I.

[2] The Pangasinan Community of Guam (Int'l) Inc. (hereinafter "PCOG") is a non-stock, nonprofit corporation that was organized in Guam in 1984. The PCOG's Articles of Incorporation filed on October 2, 1984, and its Constitution and By-laws, require it to conduct an annual election of its Board of Directors in October at its general membership meeting. However, on October 13, 1998, the PCOG's Articles of Incorporation, Constitution and By-laws were amended in a referendum and the tenure of the Board of Directors was extended from one to two years. Appellees, members of the PCOG (hereinafter "Members"), who had opposed the tenure extension, submitted a written request, dated October 14, 1999, to the Appellants, the Board of Directors (hereinafter "Board"), to comply with the statutory requirement to conduct an annual election in October. The Board did not respond to the request and did not conduct the annual election. Thereafter, the Members filed a Petition for Writ of Mandate in the Superior Court

on October 21, 1999 to compel the Board to conduct the election. The trial court issued an Alternative Writ of Mandate commanding the Board to conduct the election or show cause why it should not do so. The Board refused to conduct the election and on November 8, 1999 the matter came before the trial court.

[3] In its Decision and Order of November 10, 1999, the trial court found that an annual election of directors was required by 18 GCA § 2202 and that the amended bylaw was inconsistent with this section. Pursuant to its Decision and Order, the trial court issued a Peremptory Writ of Mandate on November 17, 1999 ordering the Board to conduct the election. Again, the Board refused to conduct the election, and, on December 10, 1999, the trial court issued an Order for Appointment of Commissioners to Conduct Election (hereinafter “Order to Conduct Election”). However, on December 6, 1999, prior to the trial court’s Order to Conduct Election, the Board filed a Notice of Appeal.

II.

[4] This court has jurisdiction pursuant to Title 7 GCA §§ 3107, (1994).

[5] The trial court’s grant of mandamus relief is reviewed to determine if it is supported by substantial evidence. *Holmes v. Territorial Land Use Comm’n*, 1998 Guam 8, ¶ 6 (citation omitted). However, as in the present case, if the underlying facts are not in dispute, this court may review the trial court’s issuance of mandamus *de novo*. *Id.*

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III.

[6] In their appeal, the Board alleges that the PCOG, as a nonprofit corporation, is governed by Title 18 Guam Code Annotated Part 2, Chapter 10, entitled Religious & Nonprofit Corporations. The Board claims that since no provision in Chapter 10 requires an annual election of directors, the amended bylaw is valid. The Members take the position that the PCOG is governed by 18 GCA Part 1, The General Corporation Law; that Section 2202 of this part expressly requires an annual election of directors; and, therefore, that the amended bylaw is illegal.

[7] A writ of mandate is an extraordinary remedy that may be issued by a court to compel the performance of an act which the law specifically enjoins, only if the party seeking the writ has no plain, speedy or adequate remedy in the ordinary course of law. Title 7 GCA §§ 31202 - 31203, (1993); *Holmes*, 1998 Guam 8 at ¶ 11. At oral argument in the trial court, the Board argued that the Members' mandamus action was in actuality a derivative action and that the Members failed to comply with the Guam Rules of Civil Procedure. We find the Board's argument unpersuasive. A derivative action is brought by a shareholder to "enforce a **right** of a corporation." Guam R. Civ. P. 23.1 (emphasis added). In the present case, the Members brought legal action not to enforce a right held by the PCOG, but to enforce a legal obligation imposed upon the PCOG by express law, which is precisely what 7 GCA § 31202 contemplates and permits. Thus, we find that a Petition for Writ of Mandate was the only adequate remedy available to the Members.

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[8] With regard to whether the PCOG is enjoined to conduct an annual election, the laws applicable to corporations are contained in Guam's corporate laws, codified in Parts 1 and 2 of Division 1 of Title 18 of the Guam Code Annotated. Part 1 is known as "The General Corporation Law," Title 18 GCA § 1101, (1992), and governs the formation of private corporations. Part 2 addresses "Special Corporate Forms" and regulates "religious and nonprofit" corporations. *See* Title 18 GCA §§ 10101- 10102, (1992).

[9] Of particular importance is 18 GCA § 1103 which provides in part:

The provisions of this Part [18 GCA Part 1] are applicable to every private corporation, profit or **nonprofit**, stock or nonstock, now existing or hereafter formed, and the outstanding or future securities thereof, unless such corporation be expressly excepted from the operation thereof, or there be a special provision, in relation to any class thereof inconsistent with some provision of this Part, in which case the special provision prevails.

Title 18 GCA § 1103, (1992) (emphasis added). Therefore, unless there is an express exemption or inconsistent special provision, the PCOG is subject to 18 GCA Part 1, The General Corporation Law.

[10] Turning to the Board's argument, it claims that, notwithstanding its secular status, the PCOG falls under the purview of Chapter 10 *via* Section 10101. This section, referring to nonprofit corporations, states: "[a]ny number of persons, associated together for any lawful purpose other than pecuniary profit, may incorporate their said association, as provided in this Chapter." Title 18 GCA § 10101, (1992). While Section 10101 makes no mention of its application solely to religious corporations, it cannot be interpreted in a vacuum. All the other sections within Chapter 10 refer explicitly to and are applicable only to religious corporations or corporations sole and Section 10101 must be read within this context.

[11] Further, the Board does not dispute that the PCOG, is not a corporation sole.

We do not aver that PCOG is a corporation sole but what we believe is that once an association is incorporated as a Non-Profit, it is treated as a Special Corporation and governed by Chapter 10 of the Guam Code Annotated and is not submit to the annual election restriction applicable to ordinary corporation for profit.

Appellants' Reply Brief at 3 (emphasis added). Since the PCOG is neither a religious corporation nor corporation sole, none of the sections within Chapter 10 are applicable to it. Thus, Chapter 10 does not expressly exempt the PCOG from the operation of The General Corporation Law. Moreover, the Board does not allege nor could this court find any inconsistent special provision exempting the PCOG from the annual election requirement.

[12] The court notes that the Board also claims, for the first time on appeal, that the PCOG is governed by the Code of Federal Regulations because of its status as a nonprofit corporation under Section 501(c)(3) of the Internal Revenue Code. As a general rule, this court will not address arguments raised for the first time on appeal. *See Guam v. Villacrusis*, Crim. No. 91-00089A, 1992 WL 97217, at *1 (D. Guam Ap. Div. Apr. 16, 1992) (citations omitted); *Fisherman's Tavern, Inc. v. Compass Int'l. Inc.*, CVA99-002 (Order Nov. 1, 1999). While this court recognizes exceptions to this rule,¹ this argument conflicts with the Board's primary issue that the PCOG is governed by Part 2 of 18 GCA and is entirely unpersuasive. Thus, the Board's argument herein will not be considered.

¹ This rule is discretionary, and an appellate court may recognize such exceptions as: (1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law. *Villacrusis*, Crim. No. 91-00089A, 1992 WL 97217, at * 1.

[13] It is painfully obvious to this court that the PCOG is a nonprofit organized under Part 1 of Title 18 GCA, The General Corporation Law, and not under Part 2 of Title 18 GCA, which pertains to religious corporations. Section 2202 of The General Corporation Law states: “[T]he directors of the corporation shall be elected annually by the stockholders if it be a stock corporation or by the members if it be a nonstock corporation.” Title 18 GCA § 2202, (1992). Further, section 4101 provides in part: “Corporate Powers enumerated. Every corporation has the power: . . . (g) To make bylaws, not inconsistent with any existing law, for the fixing or changing of the number of its officers and directors within the limits prescribed by law” Title 18 GCA § 4101(g), (1992). Pursuant to the aforementioned statutes, we find that the amended bylaw is inconsistent with law and was beyond the power of the corporation to make. Finally, we note that the Board seems to ignore its own Articles of Incorporation that directly indicate the law under which the PCOG was organized. Section 4.01 of the Articles of Incorporation states: “[t]his corporation is organized pursuant to the **General Corporation Law of Guam**” Record on Appeal at Tab 1, Petition for Writ of Mandate, Exh. 1, Articles of Incorporation § 4.01 (emphasis added). Section 2202 specifically enjoins the PCOG to conduct the annual election and the Members are entitled to the Writ of Mandate. 7 GCA § 31202.

[14] Lastly, we note the Board’s argument that the trial court was divested of jurisdiction upon the filing of the Notice of Appeal and that the trial court’s subsequent Order Appointing Commissioners is void. The so-called divestiture rule holds that a trial court is divested of jurisdiction once a notice of appeal is timely filed. *See, e.g., Bitanga v. Angoco*, 2000 Guam 5, ¶¶ 8 and 9; *United States v. Powell*, 24 F.3d 28, 31 (9th Cir. 1994). It is a judge-made rule designed to avoid confusion or waste of time from having two

courts considering the same issues at the same time. *Powell*, 24 F.3d at 31. However, given the rule's purposes, it should not be used to defeat its purpose or to induce needless paper shuffling. *Id.* Thus, appellate courts have recognized exceptions such as post-appeal motions to the trial court that are in furtherance of the appeal. See *Travelers Ins. Co. v. Liljeberg Ent. Inc.*, 38 F.3d 1404, 1408 (5th Cir. 1994).

[15] We note the Ninth Circuit Court of Appeal's decision in *Lara v. Secretary of the Interior*, 820 F.2d 1535 (9th Cir. 1987). In *Lara*, which involved a dispute of mining and mineral claims, the district court ruled against the plaintiff, Lara, and ordered him to vacate his claims. *Id.* at 1538. Shortly after this order was issued, Lara filed a notice of appeal. *Id.* Judgment was not entered until after Lara filed his appeal. *Id.* This judgment also authorized the issuance of a writ of assistance. *Id.* Part of Lara's claim on appeal was that the district court lacked jurisdiction to issue the writ of assistance because the notice of appeal had already been filed. *Id.* at 1542-1543. The Ninth Circuit Court of Appeals found that "[e]ven if Lara's prejudgment notice of appeal divested the district court of jurisdiction, its authorization was proper," and held that the district court may issue orders pending appeal to enforce its judgment. *Id.* at 1543 (citations omitted).

[16] While there is no mistaking that the Board made a correct observation as to the divestiture rule, both Guam Rule of Civil Procedure 62(d) and Guam Rule of Appellate Procedure 12 require an appellant to make an application to the trial court for a stay of judgment pending appeal. We note the Board's *Ex Parte* Urgent Motion to Stay the Order to Conduct Election. However, this motion was denied by the trial court and the Board subsequently failed to move this court for a stay of judgment pursuant to GRAP 12.

Thus, the trial court's judgment has never been stayed.

[17] In the trial court's Decision and Order, the Members' Petition for a Writ of Mandate was granted. Shortly thereafter, the trial court enforced this decision by issuing the Peremptory Writ. When the Board refused to comply with the Peremptory Writ, and after the Notice of Appeal was filed, the trial court enforced the Peremptory Writ with the Order to Conduct Election. Such an order is authorized by 7 GCA § 31214.² Thus, the trial court, in ordering the appointment of commissioners to conduct the election was doing nothing more than enforcing its judgment.

[18] Consistent with *Lara*, we find that the Order for Appointment of Commissioners to Conduct Election was issued by the trial court to enforce its judgment and hold that the trial court did not err in issuing this order after the Board filed its Notice of Appeal.³

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² This section provides:

Writ of Mandate: Penalty. When a **peremptory mandate** has been issued and directed to any inferior tribunal, corporation, board or person, if it appears to the court that any member of such tribunal, corporation, or board, or such person upon whom the writ has been personally served, has without just excuse refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding One Hundred Dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and **may make any orders** necessary and proper for the complete enforcement of the writ.

Title 7 GCA § 31214, (1993) (emphasis added).

³ This holding is not inconsistent with our holdings in *Bitanga v. Angoco*, 2000 Guam 5. The distinction between *Bitanga* and the present case is clear. *Bitanga* involved the application of a statute expressly prohibiting the trial court from acting after the filing of an appeal from a *habeas corpus* proceeding. In the present case, there exists no such statutory prohibition against the issuance of an order to enforce a judgment in a civil case.

IV.

[19] The Pangasinan Community of Guam Int'l., Inc. is a nonprofit corporation organized under the General Corporation Law of Guam and is thereunder required to conduct an annual election of its Board of Directors. The Members of the PCOG are therefore entitled to a Peremptory Writ of Mandate compelling the PCOG to conduct the election. The trial court's decision to grant a Peremptory Writ of Mandate is hereby **AFFIRMED**.

PETER C. SIGUENZA
Associate Justice

JOHN A. MANGLONA
Designated Justice

BENJAMIN J.F. CRUZ
Chief Justice