SUPREME COURT
FIRST DIVISION

NEW EVER MARKETING, INC.,
Petitioner,

-versus-

G.R. No. 140555
July 14, 2005

HON. COURT OF APPEALS, ESPIRITU YLANAN, CESAR FULO, and WILFREDO BILASA,
Respondents.
x----------x

DECISION

AZCUNA, *J.*:

Petitioner New Ever Marketing, Inc. hired respondents Espiritu Ylanan and Cesar Fulo as drivers and Wilfredo Bilasa as delivery man (pahinante) commencing in February 1987, November 1988, and June 1989, respectively. Respondents filed against petitioner and Marcelo Calacday, its General Manager, a complaint for illegal dismissal and sought the payment of overtime pay, premium pay for services rendered during holidays, service incentive leave, and 13th month pay for the year 1994. They also filed a separate case against petitioner with the Social Security System for alleged non-remittance of SSS premiums.

In their complaints, respondents alleged, as follows:

Respondent Ylanan: That a fine of P500.00 for a traffic violation he committed on September 12, 1994, supposedly for the account of the petitioner, was deducted from his salary for September 17, 1994; that for his October 15, 1994 salary, deductions were made for SSS premiums corresponding to the months of January and February 1993, but apparently, the same were not accordingly remitted; that from October 17-22, 1994, he did not report for work because he attended to an errand; that when he reported back for work on October 24, 1994 and October 25, 1994 (with respondents Fulo and Bilasa), he was barred from entering the premises and instructed to wait for a certain Ding who later arrived at noon time, after he had left the premises; that when he called the office the next day, October 26, 1994, Sally, the office secretary, told him to report for work on October 31, 1994; that when he reported for work on October 31, 1994, petitioner company was closed and the company guard told him to come back on November 2, 1994; that when he arrived on November 2, 1994, the company guard again told him to wait for Ding who arrived at noon time after he had left; and that on November 3, 1994, Calacday informed him and respondent Fulo that they were considered as "AWOL [absent without official leave]."

Respondent Fulo: That on October 15, 1994, petitioner asked him to secure a new Community Tax Certificate; that as October 16, 1994 was a Sunday, he did not report for work the following day, October 17, 1994, to be able to secure one; that when he reported for work on October 18, 1994, he was prevented by the company guard from entering the company premises and asked to wait for Ding who did not arrive until noon that day, so he went home; that from October 19 to November 2, 1994, he reported for work daily, but was made to wait for Ding; and that because of the foregoing, he and the two other respondents were constrained to file a complaint for illegal dismissal against the petitioner and Calacday.

Respondent Bilasa: That on October 17, 1994, he was sent home due to his allergies; that because of his condition, he informed Calacday that he may not be able to report for work the following day; that the next day, October 18, 1994, he was absent as his allergy had not subsided; that after seeking medical attention, the doctor advised him

to take a leave of absence for one week; that when he reported for work on October 24, 1994, he was denied entry to the premises until Ding arrived; and that he never received any letter from the petitioner informing him that he had abandoned his work.

For its part, as to respondents Fulo and Ylanan, petitioner countered: That starting October 17, 1994, they failed to report for work without filing a leave of absence; that on October 21, 1994, Calacday sent a letter requiring them to explain why no disciplinary action should be taken against them for violating company rules on absences and tardiness; that despite receipt of the said letter, respondents did not submit any written explanation; and that on November 4, 1994, petitioner sent another letter informing them that they were deemed to have abandoned their jobs.

As to respondent Bilasa, petitioner averred: That on October 19, 1994, respondent Bilasa was absent from work without filing a leave of absence; that on October 23, 1994, petitioner sent him a memorandum, directing him to explain why no disciplinary action should be taken against him for being absent, but he failed to do so; and that on November 4, 1994, petitioner gave another memorandum informing Bilasa that he was deemed to have abandoned his job for failure to explain his unexcused absences.

Petitioner also asserted that it validly terminated the services of respondents due to abandonment of work and that the matter had been reported to the Department of Labor and Employment. Calacday pointed out that he should be excluded from being a party to the case as petitioner has a separate and distinct personality.

On May 3, 1996, the Labor Arbiter (LA) rendered a decision dismissing the complaint for illegal dismissal on the ground that petitioner had a just cause to dismiss respondents, i.e., for abandonment of work, and that petitioner had complied with the notice requirement prior to terminating their employment. However, the labor arbiter ordered petitioner to pay the monetary claims of respondents for unpaid wages, 13th month pay, and service incentive leave pay for the year 1994 since there was no proof that the same had been paid.

Respondents interposed a partial appeal to the National Labor Relations Commission (NLRC) on the dismissal of the complaint for illegal dismissal and the other monetary claims against petitioner.

On June 16, 1997, the NLRC modified the decision of the LA. It found petitioner guilty of constructively dismissing respondents. The NLRC ordered petitioner to reinstate respondents to their positions without loss of seniority rights and other privileges appurtenant thereto, with the payment of full backwages from the time they were illegally dismissed until actual reinstatement. The pertinent portions of the NLRC's decision state:

> In his Decision, however, the Labor Arbiter a quo gave undue credence to respondents' claims that complainants herein abandoned their jobs after memoranda were allegedly sent to them directing them to explain why no disciplinary action should be taken against them for having been absent without the necessary leave application (Annexes "1," "3" and "7," Respondent's Position Paper).

A close examination of the aforesaid memos, however, readily reveals the absence of proof that they were indeed sent to, much less received by, the herein complainants. Certainly, such absence is fatal, more so under complainants' vehement denial that they ever received such memos. Clearly, under this fact, such memos cannot take the place of notice to comply with the requisite of a valid notice in administrative due process.

Moreover, in cases of abandonment, the absence of "animus revertendi" must be clearly proven. Respondent, We find, failed to discharge this burden. It failed to show that complainants indeed no longer intended to return to their jobs inspite of due notice afforded to them to do so.

On the contrary, We are convinced that the proximity of the filing of their complaint with what they perceive to be the unreasonable arrival of "Ding" as they were instructed to wait for, is concrete proof sufficient to show that they have the least intention to give up their job, much less abandon the same.

It is not amiss to state at this juncture that during the period they were waiting for the said "Ding" to arrive, they were not allowed to work and their daily time records would show no attendance, but such cannot be taken against them.

Suffice it to state that We are far from convinced of respondents' claims that complainants' services were terminated for cause. Conversely, we are convinced that complainants were indeed instructed to wait for a certain "Ding" as a condition precedent for their resumption of work. The waiting for the said "Ding" for an unreasonable length of time certainly cannot prevent, much less preclude, herein complainants from filing the instant case. They were undoubtedly constructively dismissed at the time of the filing of their complaint.

> WHEREFORE, the decision appealed from is hereby MODIFIED in that Respondents are hereby declared guilty of illegally and constructively terminating the services of complainants Espiritu Ylanan, Cesar Fulo and Wilfredo Bilasa. Further, respondents are ordered to reinstate them to their former position[s] without loss of seniority rights and other privileges appurtenant thereto with full backwages from the time of their dismissal until actually reinstated. The other dispositions in the appealed decision are deemed final and executory.
>
> SO ORDERED.[1]

On petition for review, the Court of Appeals (CA) dismissed petitioner's action and later denied its motions for reconsideration.

Petitioner seeks to annul the Resolution of the Court of Appeals dismissing its petition, dated March 16, 1999, and the Resolutions denying reconsiderations, dated September 24, 1999 and October 27, 1999, by "invoking the power of the Court under Rule 65 of the 1997 Rules of Civil Procedure because there is no appeal or any plain, speedy and adequate remedy in the ordinary course of law" and stating that "this petition is not in any way intended to delay the decision of the NLRC dated June 16, 1997, but the undersigned new

counsel for the petitioner is exhausting all legal remedies available to the petitioner."

A perusal of the antecedents shows that petitioner's petition for certiorari (with prayer for the issuance of a writ of preliminary injunction) filed with the CA was dismissed outright in a Resolution dated March 16, 1999 on two grounds, namely, failure to attach an affidavit of service as proof that a copy of its petition had been duly served upon the NLRC and the respondents, and lack of allegations as to material dates to show the timeliness of the filing of the petition pursuant to Section 3, Rule 46 in relation to Section 4, Rule 65 of the Rules of Civil Procedure.

After receiving a copy of the Resolution dated March 16, 1999 on March 26, 1999, petitioner, on April 7, 1999 (through its former counsel), filed a motion for reconsideration and supplement to the motion for reconsideration. Petitioner's motion alleged that its failure to furnish the NLRC and the respondents with copies of the petition was due to "an honest but excusable mistake in the interpretation and application of Section 6, Rule 65 of the Rules of Court." It insisted that its interpretation of the provision was that the copies of the petition would be furnished to the NLRC and the respondents only after the Court of Appeals finds its petition to be sufficient in form and substance.

On September 24, 1999, the appeals court denied petitioner's motion for reconsideration for lack of merit, stating that it was bound by the negligence and mistake of its counsel and, likewise, denied its prayer for the issuance of a temporary restraining order for being moot and academic. Petitioner received a copy of the said Resolution on October 13, 1999. On October 21, 1999, petitioner's former counsel filed a notice of withdrawal of appearance. On the same day, October 21, 1999, petitioner's new counsel filed an entry of appearance and sought another reconsideration invoking substantial justice and its subsequent compliance with the procedural rules. On October 27, 1999, the CA denied the second motion for reconsideration for being a prohibited pleading under Section 2, Rule 52 of the Rules of Court. Petitioner received a copy of the Resolution on November 8, 1999. On November 17, 1999, petitioner filed with this Court its petition for certiorari under Rule 65 of the Rules of Court.

The petition is based on a misapprehension of procedural rules. It bears stressing that when petitioner, on October 13, 1999, received a copy of the CA Resolution dated September 24, 1999 denying its motion for reconsideration, it had fifteen (15) days from receipt thereof within which to file a petition for review on certiorari under Sections 1 and 2, Rule 45 of the Rules of Court. Section 2 thereof also allows petitioner to file, within the 15-day period, a motion for extension of time of thirty (30) days within which to file such petition. This is because the CA Resolution dated March 16, 1999 which outrightly dismissed its petition for non-compliance with the procedural rules, and the Resolution dated September 24, 1999, which denied its motion for reconsideration, partake of the nature of a final disposition of the case. Hence, the appropriate remedy to this Court is a petition for review on certiorari under Rule 45, not a petition for certiorari under Rule 65. In this case, petitioner filed a second motion for reconsideration which the CA correctly denied for being a prohibited motion. The filing of a prohibited motion did not interrupt the running of the 15-day reglementary period[2] within which petitioner should have filed the petition under Rule 45.

This petition for certiorari under Rule 65 should, therefore, be dismissed for being the wrong remedy. The rule is that the special civil action of certiorari under Rule 65 is not, and cannot be, a substitute for a lost remedy of appeal, especially if the loss is occasioned by the petitioner's own neglect or error in the choice of remedies.[3]

Petitioner, however, invokes substantial justice on the reasoning that the failure of its former counsel to furnish copies of the petition to the NLRC and the private respondents was not due to an error of law, but to an error in the interpretation of the provision of Section 6, Rule 65 of the Rules of Court which should be considered as an excusable mistake.

The submission is untenable. Section 1, Rule 65 in relation to Section 3, Rule 46 of the Rules of Court, clearly states that in a petition filed originally in the Court of Appeals, the petitioner is required to serve copies of the petition, together with the annexes thereto, on the lower court or tribunal concerned, in this case, the NLRC, and on the

adverse parties, the herein respondents, before the filing of said petition. The clear import of the provisions does not reasonably admit of any other interpretation.

Finally, even if this Court were to treat the present petition as a petition for review on certiorari under Rule 45 and overlook its procedural infirmity, the same would still be denied for lack of merit.

First. Petitioner asserts that through its General Manager, Marcelo Calacday, it had sent a letter requiring the respondents to explain why it should not take disciplinary actions against them for violation of company rules on absences and tardiness; that despite receipt of the said letter, respondents did not submit any written explanation thereto; and that, thereafter, it sent another letter informing them that they were deemed to have abandoned their jobs.

These allegations have not been sufficiently proven. Under the Labor Code, there are twin requirements to justify a valid dismissal from employment: (a) the dismissal must be for any of the causes provided in Article 282 of the Labor Code (substantive aspect) and (b) the employee must be given an opportunity to be heard and defend himself (procedural aspect).[4] As to procedural aspect, two notices are required: (a) written notice containing a statement of the cause for termination, to afford the employee an opportunity to be heard and defend himself with the assistance of his representative, if he desires; and (b) if the employer decides to terminate the services of the employee, written notice must be given to the employee stating clearly the reason therefor.[5] The records reveal that petitioner did not adduce evidence that it had served the respondents with copies of the memoranda (re explanation for their unauthorized absences) and the subsequent memoranda (re its decision to terminate their employment due to abandonment) and that the same were actually received by each of the respondents. Petitioner's bare assertion failed to overcome the declarations of the respondents that they never received copies of the memoranda.

Second. Petitioner maintains that it had validly dismissed the respondents for incurring absences without filing the application for leave which was tantamount to an abandonment of work and that the

respondents did not report for work after the two memoranda had been sent to them individually.

This contention has no merit. The substantive aspect for a valid dismissal provides that to constitute abandonment of work, two (2) requisites must concur: (a) the employee must have failed to report for work or must have been absent without justifiable reason; and (b) there must have been a clear intention on the part of the employee to sever the employer-employee relationship as manifested by overt acts. Abandonment as a just ground for dismissal requires deliberate, unjustified refusal of the employee to resume his employment. Mere absence or failure to report for work, after notice to return, is not enough to amount to abandonment. Moreover, abandonment is a matter of intention; it cannot be inferred or presumed from equivocal acts.[6] In this case, respondents had sought permission and had informed petitioner of their reasons for being absent and had reported back to petitioner's office the following day. It cannot be said that respondents had abandoned their work during the period the absences in question were incurred. It became a strange scenario for them to be reporting for work early in the morning only to be told to wait for Ding who would arrive at noon time. In the meantime, they were not even allowed to enter the premises or do their assigned tasks. This being so, respondents sought recourse by filing an illegal dismissal case against petitioner. Clearly, respondents never intended to sever the employer-employee relation and abandon their work. On the contrary, they clearly showed their desire to continue their employment with petitioner and to be reinstated to their former positions. Indeed, an employee who loses no time in protesting his layoff cannot by any reasoning be said to have abandoned his work, for it is well-settled that the filing by an employee of a complaint for illegal dismissal with a prayer for reinstatement is proof enough of his desire to return to work, thus, negating the employer's charge of abandonment.[7]

All the antecedents show that petitioner had constructively dismissed the respondents. Constructive dismissal is defined as quitting when continued employment is rendered impossible, unreasonable or unlikely as the offer of employment involves a demotion in rank and diminution of pay.[8] In this case, respondents were deemed constructively dismissed because whenever they would report for

work in the morning, they were barred, without any justifiable reason, by petitioner's guard from entering the premises and were made to wait for Ding who would arrive in the office at around noon, after they had waited for a long time and had left.

Petitioner, therefore, failed to prove by clear and convincing evidence that there was just cause for terminating the employment of respondents and that there was compliance with the two-notice rule. Article 277(b) of the Labor Code places the burden of proving that the termination of employment was for a valid or authorized cause on the employer. The employer's failure to discharge this burden means that the dismissal is not justified and the employee is entitled to reinstatement. In this case, petitioner failed to establish that respondents deliberately and unjustifiably refused to resume their employment without any intention of returning thereto.

Under Article 279 of the Labor Code, an employee who is unjustly dismissed is entitled to reinstatement, without loss of seniority rights and other privileges, and to the payment of his full backwages, inclusive of allowances, and other benefits or their monetary equivalent, computed from the time his compensation was withheld up to the time of his actual reinstatement.[9] Thus, respondents are entitled to reinstatement with the payment of full backwages from the time their compensations were withheld, i.e., from the time of their illegal dismissal, up to the time of their actual reinstatement.

WHEREFORE, the petition is **DISMISSED**, without costs.

SO ORDERED.

DAVIDE, JR., *C.J.* (*Chairman),* QUISUMBING, YNARES-SANTIAGO, and CARPIO, *JJ.*, concur.

---

[1] Rollo, pp. 26-29.
[2] See Hongria vs. Hongria-Juarde, G.R. No. 155086, March 15, 2004, 425 SCRA 504.
[3] Land Bank of the Philippines vs. Court of Appeals, G.R. No. 129368, August 25, 2003, 409 SCRA 455; Fajardo vs. Baustista, G.R. Nos. 102193-97, May 10, 1994, 232 SCRA 291.

[4] Colegio de San Juan de Letran-Calamba vs. Villas, G.R. No. 137795, March 26, 2003, 399 SCRA 550.
[5] Id.; Rodriguez, Jr. vs. National Labor Relations Commission, G.R. No. 153947, December 5, 2002, 393 SCRA 511; C & A Construction Co., Inc. vs. NLRC, G.R. No. 122279, November 22, 1999, 318 SCRA 784.
[6] R.P. Dinglasan Construction, Inc. vs. Atienza, G.R. No. 156104, June 29, 2004, 433 SCRA 263; Hantex Trading Co. vs. CA, G.R. No. 148241, September 27, 2002, 390 SCRA 181; Lambo vs. National Labor Relations Commission, G.R. No. 111042, October 26, 1999, 317 SCRA 420; Metro Transit Organization, Inc. vs. NLRC, G.R. No. 119724, May 31, 1999, 307 SCRA 747.
[7] Samarca vs. Arc-Men Industries, Inc., G.R. No. 146118, October 8, 2003, 413 SCRA 162; Lambo vs. National Labor Relations Commission, supra, note 6.
[8] R.P. Dinglasan Construction, Inc. vs. Atienza, supra, note 6.
[9] Bustamante vs. National Labor Relations Commission, G.R. No. 111651, November 28, 1996, 265 SCRA 61 cited in the cases of Rodriguez, Jr. vs. National Labor Relations Commission, supra, note 5; Metro Transit Organization, Inc. vs. NLRC, supra, note 6.