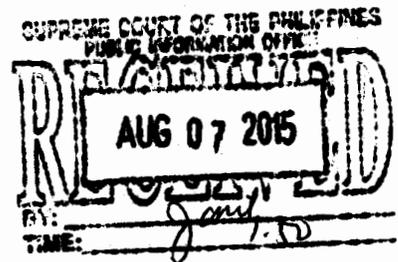




REPUBLIC OF THE PHILIPPINES
SUPREME COURT
Manila

SECOND DIVISION

NOTICE



Sirs/Mesdames:

Please take notice that the Court, Second Division, issued a Resolution dated **22 June 2015** which reads as follows:

G.R. No. 208780 – Lorenzana Food Corporation v. Voluntary Arbitrator Samuel D. Entuna, Edgar Borromeo and/or Lorenzana Food Corporation Workers Union (NLM-Katipunan).

This is a petition for review on *certiorari* seeking to reverse and set aside the November 21, 2012¹ Resolution and July 17, 2013² Resolution of the Court of Appeals (CA), in CA-G.R. SP No. 127245, which dismissed the petition for *certiorari* under Rule 65 filed by Lorenzana Food Corporation (*petitioner*) assailing the September 10, 2012 Decision³ and the October 4, 2012 Resolution⁴ of Voluntary Arbitrator (*VA*) Ava Samuel D. Entuna.

Petitioner employed Edgar Borromeo (*Borromeo*) as Operator of Bottling Machine on October 2, 1991. Borromeo worked for petitioner until the latter terminated his services on February 6, 2012. He was also a member of respondent Lorenzana Food Corporation –Workers Union (*respondent union*), an affiliate of the National Labor Federation *Nagkakaisang Lakas ng Manggagawa - KATIPUNAN*.

On December 16, 2011, at around 5:00 o'clock in the afternoon, Borromeo, together with his co-employees, Ricky Fedelis (*Fedelis*) and Reynaldo Morinda (*Morinda*), brought down scrap plastics from the 2nd floor of the bottling warehouse to the staging area near the gate of petitioner's processing plant. In the meantime, someone called 7x7 Junkshop and informed it that scrap plastics were up for collection at petitioner's premises. The junkshop, however, was not able to haul the scrap plastics for lack of the necessary permit.

Borromeo, in his Sinumpaang Salaysay,⁵ dated May 18, 2012, stated that on December 27, 2011, he received an inter-office memo from the Human Resource Department of petitioner giving him, Fedelis and Morinda 48 hours to explain why they moved the scrap plastics near the gate without the necessary permission and attempted to sell them to 7x7 Junkshop. The

¹ Penned by Associate Justice Eduardo B. Peralta Jr. with Associate Justice Vicente S.E. Veloso and Associate Justice Jane Aurora C. Lantion, concurring; *rollo*, pp. 146-149.

² Id. at 151-152.

³ Id. at 53-62.

⁴ Id. at 77-78.

⁵ Id. at 105-107.

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memo also warned them that failure to satisfactorily explain the incident would compel management to file the necessary charges against them.

Borromeo admitted that he brought the scrap plastics to the staging area, but denied attempting to sell them for his own benefit. He explained that it was his regular duty to transfer the scrap plastics from the 2nd floor storage to the staging area.

In a letter, dated February 3, 2012, petitioner terminated the services of Borromeo effective February 6, 2012 due to the attempted theft which violated Article XV, Section 6, and Rule VI, Section 1.1 of the Employee Handbook and Article 282⁶ (a) – Serious Misconduct – of the Labor Code of the Philippines.

The dismissal of Borromeo was submitted by respondent union for a grievance conference. Petitioner insisted that the dismissal was valid; hence, it was referred to the National Conciliation and Mediation Board (*NCMB*) for mediation. On March 23, 2012, mediation failed to agree on a settlement at the NCMB, but the parties agreed to submit the issue of the validity of his dismissal to the VA.

Before the VA, petitioner argued that Borromeo, despite his knowledge of the policies on the disposition of scrap plastics, did not seek permission from his supervisor or identify who authorized him to do it. Petitioner averred that the intention to steal the scrap plastics was shown by the fact that it was hauled after office hours and that Borromeo was the one who called the junkshop according to the shop owner.

For its part, respondent union claimed that Borromeo's act of hauling the scrap plastics had been his customary duty in the company even before the company was still operating in Navotas and this was with the knowledge and consent of Vilma Camama. Respondent union also alleged that, in the past, the junkshop transacted with the accounting department of petitioner and made the payments thereto. Also, any person could have called the junkshop and dropped the name of Borromeo.

VA Ruling

In his September 10, 2012 Decision, the VA ruled that the dismissal was illegal. He stated that petitioner failed to prove that there was just cause for Borromeo's dismissal. Attempted theft, as a serious misconduct charge,

⁶ Presently Article 288.

was not established because the elements of unlawful taking and intent to gain were not clearly shown. Unlawful taking was absent because considering the nature of the scrap plastics, they were not placed under his control and in such situation as he could dispose them at once.

Intent to gain was not also proven because petitioner did not dispute the allegation that hauling down of scrap plastics was Borromeo's customary duty. Moreover, the circumstances show that the alleged procedure violated by him was only recently implemented and unknown to him. In any case, the only violation committed by him was his failure to comply with the procedure which was a minor misconduct and not a valid ground for dismissal. The VA likewise noted that the penalty of dismissal was too harsh for the first offense of an employee of 20 years.

Petitioner moved for reconsideration but its motion was denied in the October 4, 2012 Resolution of the VA.

Dissatisfied, petitioner filed a petition⁷ for *certiorari* under Rule 65 with prayer for the issuance of a temporary restraining order and/or writ of preliminary injunction before the CA, imputing grave abuse of discretion amounting to lack or excess of jurisdiction to the VA in ruling that petitioner failed to prove that it had just cause to dismiss Borromeo.

CA Ruling

In a Resolution, dated November 21, 2012, the CA denied the petition by reason of formal defects, to wit: 1] No proper service of the petition to respondent because petitioner failed to justify its resort to ordinary mail; 2] No Board Resolution authorizing David H. Lorenzana (*Lorenzana*) to sign the Verification and Certification against forum shopping on behalf of petitioner; 3] No competent evidence pertaining to the identity of Lorenzana, as petitioner's representative on the Verification and Certification of non-forum shopping; 4] Failure to indicate on the Notarial Certificate of the Verification and Certification of non-forum shopping the province or city where the notary public was commissioned; and 5] The appended Decision and Resolution of the VA were mere photocopies.

Petitioner moved for reconsideration but the CA denied its motion in a Resolution, dated July 17, 2013. The CA ruled that there was no compliance with regard to the Board Resolution which is different from a Secretary's Certificate.

⁷ *Rollo*, pp. 31-50.

Hence, this petition.

ISSUES:

1. Whether the CA correctly dismissed the petition by reason of its procedural infirmities.
2. Whether Borromeo was illegally dismissed.

Petitioner explained that it had substantially complied with the procedural requirements and invoked exceptions where the court disregarded the aforementioned procedural defects. In addition, petitioner insisted that the VA failed to appreciate the facts in finding that it was not able to prove its allegations of unlawful taking with intent to gain.

In its Comment,⁸ respondent union remarked that the procedural infirmities were subject to the discretion of the Court and that the findings of the VA were supported by substantial evidence.

Despite proper notice,⁹ petitioner failed to submit its reply.

The Court's Ruling:

The Court denies giving due course to the petition for failure of petitioner to show any reversible error in the challenged decision as to warrant the exercise of the Court's discretionary appellate jurisdiction.

At the outset, petitioner has admitted that it has not faithfully complied with all the requirements of a petition for *certiorari* under Rule 65. "A writ of *certiorari* is a prerogative writ, never demandable as a matter of right, and never issued except in the exercise of judicial discretion. Hence, he who seeks a writ of *certiorari* must apply for it *only in the manner and strictly in accordance with the provisions of the law and the Rules.*"¹⁰ While there are exceptions to the rigid application of the rule, none of them applies to the case at bench. In the cases cited by petitioner, each of the petitions involved had only one procedural infirmity which was subsequently complied with. The present petition, however, is completely littered with numerous procedural infirmities. Thus, the CA correctly denied the petition outright.

⁸ Id. at 185-207.

⁹ Id. at 214.

¹⁰ *Vinuya v. Romulo*, G.R. No. 162230, August 12, 2014, 732 SCRA 595.

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Nonetheless, even if the abovementioned procedural defects cited by the CA would be set aside, still, the petition must fail because the decision of the VA has already become final and executory because petitioner availed of the wrong remedy. In assailing the decision of the VA, petitioner resorted a petition for *certiorari* under Rule 65. It is settled, however, that the proper remedy to assail the decision of the VA should have been an appeal under Rule 43.¹¹

As borne by the records, petitioner received the VA decision on September 12, 2012. A motion for reconsideration was timely filed and its denial was received by petitioner on October 8, 2012. Thus, by the time petitioner filed its petition for *certiorari* on November 6, 2012, the ten (10)-day period to appeal¹² the decision of the VA under Rule 43 had already lapsed, rendering the VA judgment final and executory.

Considering that a petition for *certiorari* is an extraordinary remedy, it may be filed only when an appeal is not available. When an appeal is available, it should be taken on the ground of grave abuse of discretion.¹³ In sum, the use of the wrong remedy is fatal to petitioner's case.

Even granting *arguendo* that the proper remedy was used, the petition must still be denied on its merits. Petitioner disputes the finding of the VA that there was no valid ground for dismissal. It is, however, the rule that the findings of fact of the court or agency concerned, when supported by substantial evidence, shall be binding on the CA.¹⁴ The petition raises a question of fact which is beyond the scope of a petition for review on *certiorari* before this Court.¹⁵ The merits of the case do not warrant the relaxation of these well settled rules.

Also, in illegal dismissal cases, the burden of proof is on the employer, that he must prove that he has just cause to dismiss the employee.¹⁶ In order to constitute serious misconduct, it is not sufficient that the act or conduct complained of has violated some established rules or policies – it is equally important and required that the act or conduct has been performed with wrongful intent.¹⁷

¹¹ *Samahan ng mga Manggagawa sa Hyatt (SAMASAH-NUWHRAIN) v. Magsalin*, G.R. No. 164939, June 6, 2011, 650 SCRA 445, 455.

¹² Article 268-A, Labor Code of the Philippines.

¹³ *Philec v. Court of Appeals*, G.R. No. 168612, December 10, 2014.

¹⁴ Sec. 10, Rule 43, Rules of Court.

¹⁵ Sec. 1, Rule 45, Rules of Court.

¹⁶ *Marival Trading, Inc. v. NLRC*, 552 Phil. 762, 781 (2007).

¹⁷ *Gurango v. Best Chemicals and Plastics Inc. v. G.R. No. 174593*, August 25, 2010, 629 SCRA 311, 323.

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Here, petitioner, as employer of Borrromeo, miserably failed to prove by substantive evidence that his dismissal was just and lawful. *First*, petitioner did not dispute that it was his customary duty to haul the scrap plastics from the storage warehouse. *Second*, it failed to present as evidence the new memorandum allegedly prohibiting him from doing his customary duty. *Third*, petitioner failed to establish that Vilma Camama, the coordinator in the hauling of scrap plastics, disallowed him to continue such job. *Fourth*, petitioner did not present a scintilla of evidence to establish that he had the intention to sell the scrap plastics and personally benefit from the sale. It is clear that petitioner failed to discharge its burden of proving the serious misconduct allegedly committed by Borrromeo. Hence, the dismissal is illegal.

WHEREFORE, the petition is **DENIED**. (*Leonen, J., on official leave; Jardeleza, J., designated Acting Member, per Special Order No. 2056, dated June 10, 2015; Brion, J., on leave; Perez, J., designated Acting Member, per Special Order No. 2067, dated June 22, 2015*)

SO ORDERED."

Very truly yours,


MA. LOURDES C. PERFECTO
Division Clerk of Court *jde*
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-PAGE 7-

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