Republic of the Philippines
Supreme Court
Manila

**THIRD DIVISION**

**MZR INDUSTRIES, MARILOU R. QUIROZ and LEA TIMBAL,**
Petitioners,

- *versus* -

**MAJEN COLAMBOT,**
Respondent.

**G.R. No. 179001**

**Present:**

VELASCO, JR., *J.*, *Chairperson,*
PERALTA,
ABAD,
MENDOZA, and
LEONEN, *JJ.*

**Promulgated:**

AUG 28 2013

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# D E C I S I O N

**PERALTA, *J.*:**

This is a Petition for Review on *Certiorari* under Rule 45 of the Rules of Court seeking the reversal of the Decision[1] dated May 17, 2007 and Resolution[2] dated July 25, 2007 of the Court of Appeals in CA-G.R. SP No. 98445, reversing the Decision dated October 31, 2006[3] and Resolution[4] dated December 21, 2006 of the National Labor Relations Commission (NLRC) which set aside the Decision[5] dated April 28, 2006 of the Labor Arbiter.

The facts are as follows:

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1 *Rollo*, pp. 86-100.
2 *Id.* at 83-85.
3 *Id.* at 59-71.
4 CA *rollo*, pp. 118-119.
5 *Rollo*, pp. 31-36.

On February 8, 2000, petitioner Marilou Quiroz, Owner and Vice-President for Finance and Marketing of MZR, hired respondent Majen Colambot (Colambot) as messenger. Colambot's duties and responsibilities included field, messengerial and other liaison work.

However, beginning 2002, Colambot's work performance started to deteriorate. Petitioners issued several memoranda to Colambot for habitual tardiness, negligence, and violations of office policies.[6] He was also given written warnings for insubordination committed on August 27, 2003 and September 11-12, 2003;[7] on September 16, 2003 for negligence caused by careless handling of confidential office documents;[8] on September 22, 2004 for leaving his post without proper turnover;[9] and, on October 4, 2004 for insubordination.[10]

Petitioners claimed that despite written warnings for repeated tardiness and insubordination, Colambot failed to mend his ways. Hence, in a Memorandum[11] dated October 25, 2004 issued by petitioner Lea Timbal (Timbal), MZR's Administrative Manager, Colambot was given a notice of suspension for insubordination and negligence.

Again, in a Memorandum[12] dated November 25, 2004, Colambot was suspended from November 26, 2004 until December 6, 2004 for insubordination. Allegedly, Colambot disobeyed and left the office despite clear instructions to stay in the office because there was an important meeting in preparation for a very important activity the following day.

Petitioners claimed they waited for Colambot to report back for work on December 7, 2004, but they never heard from him anymore. Later, petitioners were surprised to find out that Colambot had filed a complaint for illegal suspension, underpayment of salaries, overtime pay, holiday pay, rest day, service incentive leave and 13$^{th}$ month pay. On December 16, 2004, the complaint was amended to illegal dismissal, illegal suspension, underpayment of salaries, holiday pay, service incentive pay, 13$^{th}$ month pay and separation pay.[13]

For his part, Colambot narrated that he worked as a messenger for petitioners since February 2000. That on November 2004, he was directed to

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6 CA *rollo*, pp. 54-57.
7 *Id*. at 58.
8 *Id*. at 59.
9 *Id*. at 60.
10 *Id*. at 61.
11 *Rollo*, p. 154.
12 *Id*. at 155.
13 CA *rollo*, pp. 26-27.

take care of the processing of a document in Roxas Boulevard, Pasay City. When he arrived at the office around 6 to 7 o'clock in the evening, he looked for petitioner Quiroz to give the documents. The latter told him to wait for her for a while. When respondent finally had the chance to talk to Quiroz, she allegedly told him that she is dissatisfied already with his work performance. Afterwards, Colambot claimed that he was made to choose between resigning from the company or the company will be the one to terminate his services. He said he refused to resign. Colambot alleged that Quiroz made him sign a memorandum for his suspension, from November 26 to December 6, 2004. After affixing his signature, Quiroz told him that effective December 7, 2004, he is already deemed terminated. Later, on December 2, 2004, respondent went back to the company to look for Timbal to get his salary. He claimed that Timbal asked him to turn over his company I.D.[14]

Petitioners, however, insisted that while Colambot was suspended due to insubordination and negligence, they maintained that they never terminated Colambot's employment. They added that Colambot's failure to report for work since December 7, 2004 without any approved vacation or sick leave constituted abandonment of his work, but they never terminated his employment. Petitioners further emphasized that even with Colambot's filing of the complaint against them, his employment with MZR has not been terminated.

Colambot, meanwhile, argued that contrary to petitioners' claim that he abandoned his job, he claimed that he did not report back to work after the expiration of his suspension on December 6, 2004, because Quiroz told him that his employment was already terminated effective December 7, 2004.

On April 28, 2006, the Labor Arbiter rendered a Decision,[15] the dispositive portion of which reads:

> WHEREFORE, premises considered, respondents are hereby declared guilty of ILLEGAL DISMISSAL and hereby ORDERED to reinstate complainant to his former position with full backwages from date of dismissal until actual reinstatement and moral and exemplary damages in the sum of ₱100,000.00 and ₱50,000.00, respectively.
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> The computation of the judgment award marked as Annex "A" is part and parcel of this decision.
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> SO ORDERED.[16]

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14 *Id*. at 39-40.
15 *Rollo*, pp. 31-36.
16 *Id.* at 35.

The Labor Arbiter held that there was no abandonment as there was no deliberate intent on the part of Colambot to sever the employer-employee relationship. The Labor Arbiter likewise noted that Colambot should have been notified to return back to work, which petitioner failed to do.

Aggrieved, petitioners appealed the decision before the NLRC.

On October 31, 2006, the NLRC rendered a Decision,[17] the dispositive portion of which reads as follows:

> WHEREFORE, premises considered, the appeal filed by respondents is GRANTED. The judgment of the Labor Arbiter dated April 28, 2006 is hereby SET ASIDE and the Complaint is DISMISSED for lack of merit.
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> SO ORDERED.[18]

The NLRC pointed out that Colambot's complaint was unsupported by any evidence and was not even made under oath, thus, lacking in credibility and probative value. The NLRC further believed that Colambot abandoned his work due to his refusal to report for work after his suspension. The failure of MZR to notify Colambot to return back to work is not tantamount to actual dismissal.

Colambot filed a motion for reconsideration, but was denied. Thus, *via* a petition for *certiorari* under Rule 65 of the Rules of Court, raising grave abuse of discretion as a ground, Colambot appealed before the Court of Appeals and sought that the Decision dated October 31, 2006 and Resolution dated December 21, 2006 of the NLRC be reversed and set aside.

In the disputed Decision[19] dated May 17, 2007, the Court of Appeals granted the petition and reversed the assailed Decision dated October 31, 2006 and Resolution dated December 21, 2006 of the NLRC. The Decision dated April 28, 2006 of the Labor Arbiter was ordered reinstated with modification that in lieu of reinstatement, petitioners were ordered to pay respondent separation pay equivalent to one (1) month pay for every year of service in addition to full backwages.

The appellate court ruled that Colambot was illegally dismissed based on the grounds that: (1) MZR failed to prove abandonment on the part of

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17 *Id.* at 59-71
18 *Id.* at 70.
19 *Id*. at 86-100.

Colambot, and (2) MZR failed to serve Colambot with the required written notices of dismissal.

Petitioners appealed, but was denied in a Resolution[20] dated July 25, 2007.

Thus, *via* Rule 45 of the Rules of Court, before this Court, petitioners raised the following issues:

> I
> THE HONORABLE COURT OF APPEALS ERRED IN RULING THAT COMPLAINANT WAS ILLEGALLY DISMISSED FROM THE SERVICE.
>
> II
> THE HONORABLE COURT SERIOUSLY ERRED IN RULING THAT PETITIONER IS ENTITLED TO SEPARATION PAY AND BACKWAGES.

Petitioners argue that they did not terminate the employer-employee relationship with Colambot. Other than Colambot's self-serving and unverified narration of facts, he failed to present any document showing that he was terminated from work. Petitioners assert that Colambot abandoned his work when he failed to report back to work without an approved vacation or sick leave, thus, he is not entitled to an award of separation pay and backwages.

## RULING

While we recognize the rule that in illegal dismissal cases, the employer bears the burden of proving that the termination was for a valid or authorized cause, in the present case, however, the facts and the evidence do not establish a *prima facie* case that the employee was dismissed from employment. Before the employer must bear the burden of proving that the dismissal was legal, the employee must first establish by substantial evidence the fact of his dismissal from service. If there is no dismissal, then there can be no question as to the legality or illegality thereof.[21]

In the present case, other than Colambot's unsubstantiated allegation of having been verbally terminated from his work, there was no evidence presented to show that he was indeed dismissed from work or was

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[20] *Id*. at 83-85.

[21] See *Philippine Rural Reconstruction Movement v. Pulgar*, G.R. No. 169227, July 5, 2010, 623 SCRA 244, 256.

prevented from returning to his work. In the absence of any showing of an overt or positive act proving that petitioners had dismissed respondent, the latter's claim of illegal dismissal cannot be sustained[22] – as the same would be self-serving, conjectural and of no probative value.

A review of the Notice of Suspension[23] dated November 25, 2004 shows that respondent was merely suspended from work for 6 days, there was, however, no evidence that Colambot was terminated from work. For clarification, we quote:

TO : MAJEN COLAMBOT
MZR MESSENGER

FROM : HUMAN RESOURCE DEPT

DATE : NOV. 25, 2004

RE : SUSPENSION DUE TO INSUBORDINATION

x x x x

Cases of insubordination and violations have been filed against you many times. We kept on reminding that you should have changed and improved your working attitudes because it greatly affects not only your working performance but the company's productivity as well.

Your attitude only shows HARD HEADEDNESS AND LACK OF RESPECT TO YOUR SUPERIORS which in any company cannot tolerate.

***With these, you are suspended for 6 working days effective November 26, 2004, you will only report on December 7, 2004***.

THIS IS OUR LAST WARNING FOR YOU TO IMPROVE, FAILURE TO DO SO MAY MEAN TERMINATION OF YOUR EMPLOYMENT CONTRACT.

x x x x[24]

While the same appeared to contain a warning of termination should Colambot fail to improve his behavior, it is likewise apparent that there was also a specific instruction for him to report back to work, on December 7, 2004, upon serving his suspension. The subject of the Letter, *i.e.*, "Suspension due to Insubordination," the wordings and content of the letter is a clear-cut notice of suspension, and not a notice of termination. The notice of suspension may have contained warnings of termination, but it

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22 *Exodus International Construction Corporation v. Biscocho*, G.R. No. 166109, February 23, 2011, 644 SCRA 76, 88; *Security & Credit Investigation, Inc. v. NLRC*, 403 Phil. 264, 273 (2001).

23 *Rollo*, p. 155.

24 *Id.* (Emphasis and italics ours.)

must be noted that such was conditioned on the ground that – Colambot would fail to improve his attitude/behavior. There were no wordings whatsoever implying actual or constructive dismissal. Thus, Colambot's general allegation of having been orally dismissed from the service as against the clear wordings and intent of the notice of suspension which he signed, we are then inclined to believe that there was no dismissal.

In *Machica v. Roosevelt Services Center, Inc.*,[25] this Court sustained the employer's denial as against the employees' categorical assertion of illegal dismissal. In so ruling, this Court held that:

> The rule is that one who alleges a fact has the burden of proving it; thus, petitioners were burdened to prove their allegation that respondents dismissed them from their employment. It must be stressed that the evidence to prove this fact must be clear, positive and convincing. The rule that the employer bears the burden of proof in illegal dismissal cases finds no application here because the respondents deny having dismissed the petitioners.[26]
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> Hence, as between respondents' general allegation of having been orally dismissed from the service vis-a-vis those of petitioners which were found to be substantiated by the sworn statement of foreman Wenifredo, we are persuaded by the latter. Absent any showing of an overt or positive act proving that petitioners had dismissed respondents, the latter's claim of illegal dismissal cannot be sustained. Indeed, a cursory examination of the records reveal no illegal dismissal to speak of.[27]

Moreover, in *Abad v. Roselle Cinema,*[28] we ruled that the substantial evidence proffered by the employer that it had not terminated the employee should not be ignored on the pretext that the employee would not have filed the complaint for illegal dismissal if he had not really been dismissed. We held that such *non sequitur* reasoning cannot take the place of the evidence of both the employer and the employee.

Neither could the petitioners be blamed for failing to order respondent to return back to` work. Records show that Colambot immediately filed the complaint for illegal dismissal on December 16, 2004,[29] or just a few days when he was supposed to report back to work on December 7, 2004. For petitioners to order respondent to report back to work, after the latter had already filed a case for illegal dismissal, would be unsound.

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25 523 Phil. 199 (2006).
26 *Id*. at 209-210. (Citations omitted)
27 *Exodus International Construction Corporation v. Biscocho, supra* note 22, at 88.
28 520 Phil. 135, 146 (2006).
29 *Rollo*, p. 30.

However, while the Court concurs with the conclusion of the NLRC that there was no illegal dismissal, no dismissal having actually taken place, the Court does not agree with its findings that Colambot committed abandonment of work.

In a number of cases,[30] this Court consistently held that to constitute abandonment of work, two elements must be present: *first*, the employee must have failed to report for work or must have been absent without valid or justifiable reason; and *second*, there must have been a clear intention on the part of the employee to sever the employer-employee relationship manifested by some overt act.

In the instant case, other than Colambot's failure to report back to work after suspension, petitioners failed to present any evidence which tend to show his intent to abandon his work. It is a settled rule that mere absence or failure to report for work is not enough to amount to abandonment of work. There must be a concurrence of the intention to abandon and some overt acts from which an employee may be deduced as having no more intention to work.[31] On this point, the CA was correct when it held that:

> Mere absence or failure to report for work, even after notice to return, is not tantamount to abandonment. The burden of proof to show that there was unjustified refusal to go back to work rests on the employer. Abandonment is a matter of intention and cannot lightly be presumed from certain equivocal acts. To constitute abandonment, there must be clear proof of deliberate and unjustified intent to sever the employer-employee relationship. Clearly, the operative act is still the employee's ultimate act of putting an end to his employment. Furthermore, it is a settled doctrine that the filing of a complaint for illegal dismissal is inconsistent with abandonment of employment. An employee who takes steps to protest his dismissal cannot logically be said to have abandoned his work. the filing of such complaint is proof enough of his desire to return to work, thus negating any suggestion of abandonment.[32]

Suffice it to say that, it is the employer who has the burden of proof to show a deliberate and unjustified refusal of the employee to resume his employment without any intention of returning. It is therefore incumbent upon petitioners to ascertain the respondents' interest or non-interest in the continuance of their employment. This, petitioners failed to do so.

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[30] *Samarca v. Arc-Men Industries, Inc.*, 459 Phil. 506, 515 (2003), citing *MSMG-UWP v. Hon. Ramos*, 383 Phil. 329, 371-372 (2000); *Icawat v. NLRC*, 389 Phil. 441, 445 (2000); *Standard Electric Manufacturing Corporation v. Standard Electric Employees Union*-NAFLU-KMU, 418 Phil. 418, 427 (2005); *Seven Star Textile Company v. Dy*, G.R. No. 166846, January 24, 2007, 512 SCRA 486, 499.

[31] *Aliten v. U-Need Lumber & Hardware*, G.R. No. 168931, September 12, 2006, 501 SCRA 577, 586.

[32] *Rollo*, p. 95.

These circumstances, taken together, the lack of evidence of dismissal and the lack of intent on the part of the respondent to abandon his work, the remedy is reinstatement but without backwages.[33] However, considering that reinstatement is no longer applicable due to the strained relationship between the parties and that Colambot already found another employment, each party must bear his or her own loss, thus, placing them on equal footing.

Verily, in a case where the employee's failure to work was occasioned neither by his abandonment nor by a termination, the burden of economic loss is not rightfully shifted to the employer; each party must bear his own loss.[34]

**WHEREFORE**, premises considered and subject to the above disquisitions, the Decision dated May 17, 2007 of the Court of Appeals is hereby **REVERSED and SET ASIDE**. The Resolution dated October 31, 2006 of the National Labor Relations Commission in NLRC NCR CASE No. 00-11-12189-04/ CA No. 049533-06 is hereby **REINSTATED.**

**SO ORDERED.**

**DIOSDADO M. PERALTA**
Associate Justice

**WE CONCUR:**

**PRESBITERO J. VELASCO, JR.**
Associate Justice
Chairperson

**ROBERTO A. ABAD**
Associate Justice

**JOSE CATRAL MENDOZA**
Associate Justice

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33 See *Exodus International Construction Corporation v. Biscocho*, *supra* note 22, at 92.

34 *Id.* at 93, citing *Leonardo v. NLRC*, 389 Phil. 118, 128 (2000).

**MARVIC MARIO VICTOR F. LEONEN**
Associate Justice

## ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

**PRESBITERO J. VELASCO, JR.**
Associate Justice
Chairperson, Third Division

## CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

**MARIA LOURDES P. A. SERENO**
Chief Justice