

**THE CITY OF CEBU, CITY COUNCIL OF THE CITY OF CEBU, CEBU CITY TREASURER, CEBU CITY AUDITOR AND MARIO D. ORTIZ, PETITIONERS VS. HON. JOSE M. MENDOZA, JUDGE OF THE COURT OF FIRST ...**

*G.R. No. L-26321. February 25, 1975*

Ponente: AQUINO, J.

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**AQUINO, J.:**

The petitioners, in these special civil actions of mandamus and certiorari, seek to compel the Court of First Instance of Cebu to give due course to their appeal in Civil Case No. R-8612. The factual milieu of the case is as follows:

Efren M. Arnejo used to be a police captain of Cebu City. On October 21, 1959 he was designated by President Carlos P. Garcia as Acting Assistant Chief of Police of Cebu City, vice Higinio Pacana who was designated Acting Chief of Police. Genaro L. Alforque was appointed to Arnejo's position of police captain. Four years later or on November 9, 1963 Alfonso Palencia was designated Chief of Police to take Pacana's place. On the following day, November 10th, Acting City Mayor Mario D. Ortiz terminated Arnejo's services as Assistant Chief of Police because Pacana was "automatically reverted" to that position. Ortiz asked the Municipal Board to create a new item of police captain for Arnejo. The Board did not take any action on his recommendation.

Arnejo was on terminal leave of absence for the period from November 10, 1963 to September 5, 1964. In connection with that leave he was paid the sum of P3,092.06. On April 27, 1964 Arnejo complained to the Civil Service Commission against his removal as Assistant Chief of Police. The Commission referred his complaint to the Mayor.

On November 2, 1964 he filed a mandamus suit against Ortiz, Sergio Osmena, Jr., the City of Cebu and its City Council, Auditor and Treasurer to compel his reinstatement as Assistant Chief of Police and for the recovery of his back salaries plus P5,000 as attorney's fees. He filed against Ortiz a claim for P30,000 as moral and exemplary damages.

After trial, Judge Jose M. Mendoza rendered a decision dated September 10, 1965, declaring that Arnejo's removal from the position of Assistant Chief of Police was void and ordering his reinstatement with the "right to receive the corresponding salaries from the time of his removal up to the actual reinstatement". The respondents were ordered to pay Arnejo P5,000 as exemplary damages, P500 as attorney's fees and the costs.

The decision was served on the respondents, now the petitioners, on October 18, 1965. Five days later, or on October 23, 1965, they filed a motion for reconsideration. Judge Mendoza denied the motion in his order of November 26, 1965. That order of denial was served in the law office of Ortiz on December 1, 1965. Ortiz says that he actually received a copy of the order from his wife on December 9, 1965 in Bacolod City where he was functioning as Judge of the Court of First Instance.

On December 14, 1965 Ortiz filed a novel, tripartite "Second Motion for Reconsideration or Motion for Leave to Amend Answer of Defendant Ortiz and/ or for Extension of Time to Perfect Appeal."

The other respondents in Civil Case No. R-8612 were served with the order of denial on December 16, 1965 through their counsel, the City Fiscal. On December 18, 1965 they filed a "Second Motion for Reconsideration or Motion for Leave to Amend Answer of Defendants". They adopted the motion of Ortiz.

Arnejo opposed the two second motions for reconsideration. He pointed out that the said motions were not based on grounds not existing when the first motion for reconsideration was filed.

Judge Mendoza, in his order of January 5, 1966, denied the motions "for lack of sufficient merits". That order was served upon the City Fiscal on January 7, 1966. The copy for Ortiz was served on January 10, 1966 upon Felisa Soco of the Montemayor Security Agency whose office adjoined the former law office of Ortiz.

On January 14, 1966 all the respondents (apparently including Ortiz) filed a notice of appeal signed by an Assistant City Fiscal. The next day, January 15th, they filed a record on appeal and deposited one hundred twenty pesos as appeal bond.

On February 4, 1966 Arnejo filed a motion to dismiss the appeal on the ground that it was not perfected within the reglementary period because the motions for reconsideration were pro forma and, therefore, the period for perfecting the appeal was not interrupted.

Judge Mendoza, in his order of February 18, 1966, dismissed the appeal. He ruled that his decision was already "final and executory". He said that respondents' first motions for reconsideration were pro forma because they merely restated "the contents of respondents Ortiz's memorandum". He regarded the second motions for reconsideration as pro forma also because they were intended "to set aside not the judgment but the order denying respondents' first motion for reconsideration".

He denied respondents' motions for reconsideration of the order dismissing their appeal. Ortiz filed a petition for relief from the order dismissing the appeal. His petition was ultimately denied.

On July 22, 1966 the respondents in Civil Case No. R-8612, now the petitioners (except Osmena, Jr.), filed these mandamus and certiorari actions.

This Court required respondents Arnejo and Judge Mendoza to answer the petition. It issued a writ of preliminary injunction restraining them from executing the judgment in Civil Case No. R-8612. In their answer they maintain that petitioners' appeal was not perfected within the reglementary "fifteen-day" period, a contention which they reiterated in their memorandum. The petitioners did not bother to file a memorandum.

This Court in its resolution of December 20, 1973 required the parties to manifest whether the case had become moot. The petitioners manifested that it "is extremely difficult" to withdraw the case because of the award for damages.

On the other hand, Arnejo, in his manifestation of January 22, 1974, said that the case had not become moot. He argued that its adjudication is necessary in order to determine whether the judgment in his favor for reinstatement and damages should be implemented. (Other supplemental facts are indicated in the note below).[\*]

The pivotal question is whether the petitioners seasonably perfected their appeal from the lower court's decision.

As the necessary majority could not be had on the resolution of that issue, the Court, in order to comply substantially with section 11, Rule 56 of the Rules of Court, directed the parties, in its resolution of March 12, 1974, to file within thirty (30) days from notice simultaneous memoranda on the legal issues involved in the

appeal.

In compliance with that resolution, respondent Arnejo submitted a memorandum dated April 30, 1974 and the petitioners filed a memorandum dated May 2, 1974.

After further deliberation, Chief Justice Makalintal, and Justices Castro, Teehankee, Munoz Palma and the writer voted for the dismissal of the petition for the following reasons:

Petitioner's appeal could have been easily accomplished by filing a notice of appeal and an appeal bond within the thirty-day period. A record on appeal was not necessary.

The trial court and respondent Arnejo erred in assuming that in a mandamus case, the appeal should be perfected within the fifteen-day period. That conclusion would be correct under section 17, Rule 41 of the 1940 Rules of Court.

The fifteen-day period was abolished. The phrase "but within fifteen days" found in the old rule is not reproduced in section 17, Rule 41 of the 1964 Rules of Court. The deletion of that phrase means that the appeal in mandamus, certiorari, quo warranto, prohibition and employers' liability cases should be perfected, like appeals in ordinary actions, within the thirty-day period fixed in section 3 of Rule 41 (*Enciso vs. Remo*, L-23670, September 30, 1969, 29 SCRA 580, 588).

The resolution of the issue as to the timeliness of petitioners' appeal hinges on the determination of whether their motions for reconsideration interrupted the thirty-day period.

As already noted, the trial court held that petitioners' first motions for reconsideration were pro forma because they were allegedly a rehash of the memorandum filed by Ortiz.

A motion for new trial may be predicated on fraud, accident, mistake, excusable negligence, newly discovered evidence, award of excessive damages, and "insufficiency of the evidence to justify the decision, or that the decision is against the law" (Sec. 1, Rule 37, Rules of Court).

A motion for reconsideration is treated as a motion for new trial "for it can have no basis other than the grounds for new trial" (2 Moran's Comments on the Rules of Court, 1970 edition, page 222). A motion for new trial based on the ground that excessive damages were awarded or that the decision is contrary to law or the evidence (Sec. 1[c], Rule 37) is not designated by pleaders as a motion for new trial because, actually, no new trial is sought. What is sought therein is the rendition of a new decision that, from the movant's viewpoint, would be conformable to the law or the evidence or that would not award excessive damages. Hence, pleaders designate such motion for new trial as a motion for reconsideration. (Note that section 3 of Rule 41 speaks of a "motion to set aside").

Petitioners' motion for reconsideration and their supplemental arguments in support thereof do not cite the grounds for new trial. But, on the face thereof, it can be gleaned that they were based on the grounds enumerated in paragraph (c), section 1 of Rule 37, which are that excessive damages have been awarded and that the decision is contrary to the law and the evidence. Those motions cannot be characterized as pro forma, or motions filed for the sake of form. They assail the legality of the decision on several counts. They point out that it is contrary to the evidence. They attack the award of exemplary damages and attorney's fees as "improper".

A motion based on paragraph (c) is pro forma if it does "not point out specifically the findings or conclusions in the judgment, which are not supported by the evidence or which are contrary to law, making express reference to the pertinent evidence or legal provisions" (*Alvero vs. De la Rosa*, 76 Phil. 428, 435). Petitioners' motions specified the trial court's conclusions which they regarded as erroneous.

Judge Mendoza, in the order of denial, noted that movants raised "one significant issue": that the appointment of

Arnejo as Assistant Chief of Police was "good only up to the close of session of Congress in 1960". That circumstance shows that the motions for reconsideration were not a mere echo of the memorandum of Ortiz. Therefore, the motions, not being pro forma, interrupted the thirty-day period for perfecting the appeal.

While the petitioners (respondents below) could file a motion for new trial or reconsideration as a matter of right, they were not invariably entitled to file a second motion for new trial that would suspend the remaining reglementary period for perfecting their appeal. Rule 37 provides:

"SEC. 4. Second motion for new trial. — A motion for new trial shall include all grounds then available and those not so included shall be deemed waived. A second motion for new trial, based on a ground not existing nor available when the first motion was made, may be filed within the time herein provided excluding the time during which the first motion had been pending."

Section 4 explicitly spells out that the first motion for reconsideration should include all the available ground and that those excluded are deemed waived. The evident intention is to prevent the filing of interminable motions for new trial that would subject to delay a case already decided.

"Razon de esta disposicion: evitar que se prolongue indebidamente el despacho de los asuntos. Las razones que tuviere una parte para pedir una nueva vista deben exponerse todas' enumerandolas en una mocion, y no en dosis separadas. Si se permitiese la teoria de que una parte que pierde un asunto puede presentar tantas mociones de nueva vista cuantos fundamentos encuentre, el pleito nunca se terminaria; podria presentar diez mociones de nueva vista y se puede calcular el tiempo que el juez perderia en la vista de cada mocion en vez de emplearlo en asunto mas importantes." (Ronquillo vs. Amparo, 97 Phil. 38).

Section 4 decrees that the second motion for new trial should be "based on a ground not existing nor available when the first motion was made". The obvious intendment is to discourage trifling with the court by the filing of a frivolous and repetitive second motion for new trial.

A second motion for new trial is an exceptional case. A litigant, who does not observe the requisites of a second motion for new trial, files it at his peril, the peril of losing his right to appeal due to the expiration of the remaining period within which to appeal.

"A second motion for new trial . . . will not be entertained and will not interrupt the period of appeal if it is a reiteration of the first (Rili vs. Chunaco, 87 Phil. 545; Vaswani vs. Tarachand Bros., 110 Phil. 521; Marquez vs. Panganiban, 109 Phil. 1121) or it is founded on a ground that was available at the time of the filing of the first motion. The court's time is valuable and to file two separate motions on the same ground or on grounds existing at the filing of the first is to trifle with the court." (Sawit vs. Rodas, 73 Phil. 310; Rafanan vs. Rafanan, 98 Phil. 162 cited in 2 Moran, Comments on the Rules of Court, 1970 Edition, page 229).

The second motion for reconsideration filed by Ortiz prays "for reconsideration of the order" denying the first motion for reconsideration and for the granting of the prayer in that first motion. The other petitioners, in their second motion for reconsideration, pray that the order denying the first motion for reconsideration be reconsidered and that Arnejo's petition for mandamus be dismissed.

It is incontrovertible that the second motions for reconsideration of the petitioners (respondents below) were not based on a ground not existing nor available when they filed their first motions. The trial court correctly noted that they were asking for the reconsideration of the order denying their first motion for reconsideration. They invoked the same grounds ventilated in their first motions.

Hence, petitioners' second motions for reconsideration, not being sanctioned by section 4, did not interrupt the remaining twenty-five day period within which to perfect their appeal. They could have easily perfected their appeal within that period after they received the order denying their first motions for reconsideration.

Ortiz received the order denying his first motion for reconsideration on December 1, 1965. December 26th was the last day for the perfection of his appeal. The City Fiscal, as counsel for the other respondents, received that same order on December 16, 1965. January 10, 1966 was the last day for the perfection of their appeal. The respondents (now the petitioners) filed their notice of appeal only on January 14, 1966 and deposited on January 15, 1966 their cash appeal bond. Their appeal was not perfected on time (See *Reyes vs. Court of Appeals*, 74 Phil. 235).

Inasmuch as the necessary eight votes for granting the petition could not be secured, the action in this case is dismissed (Sec. 11, Rule 56, Rules of Court). No costs.

### **SO ORDERED.**

Makalintal, C.J., and Castro, J., concur.

Fernando and Makasiar, JJ., took no part.

Makalintal, C. J., certifies that Justice Muñoz Palma voted for the dismissal of the petition and concurred in the opinion penned by Justice Aquino.

Teehankee, J., files a separate concurring opinion.

Fernandez and Esguerra, JJ., concur in the opinion of J. Teehankee.

Barredo, J., files a dissenting opinion.

Antonio, J., concurs in the dissenting opinion of J. Barredo.

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[\*] On February 22, 1966, or before the case reached this Court, Arnejo assumed the duties of Acting Chief of Police of Cebu City pursuant to a designation made by President Ferdinand E. Marcos. He served in that capacity up to June 15, 1966. He received the salaries of the position. His appointment was not confirmed. On August 1, 1968, he was designated Acting Chief of Police of Lapu-Lapu City. He has been occupying that position up to this time and receiving the corresponding compensation. On the other hand, on June 14, 1966 the City Treasurer recommended to the Mayor that the sum of P15,967.50 be appropriated for Arnejo's claim under the judgment. That amount consists of (a) P9,875 as Arnejo's back salaries from July 1, 1964 to February 21, 1966; (b) P592.50 as his insurance and retirement premiums; (c) P5,000 as exemplary damages and (d) P500 as attorney's fees. Arnejo's counsel apparently agreed with that recommendation. The Mayor referred the matter to the City Council which resolved on August 1, 1966 that the claim be held in abeyance pending the outcome of the case in this Court.

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### **DISSENTING OPINION**

#### **ANTONIO, J.:**

I concur in the dissenting opinion of Mr. Justice Barredo and in addition, I wish to state the view that the portion of the trial court's judgment requiring the reinstatement of respondents Efren M. Arnejo to his position as Acting Assistant Chief of Police of Cebu City can not now be legally done. Respondent Arnejo is deemed to have abandoned his office as such, when he assumed the duties of Acting Chief of Police of Cebu City, pursuant to a designation made by President Ferdinand E. Marcos, and received the salaries of the position from February 22 to June 15, 1966, but his appointment therefor was not confirmed; and (2) when he occupied the position of Acting

Chief of Police of Lapu-Lapu City, from August 1, 1968 and up to the present, and received the corresponding compensation.

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## DISSENTING OPINION

### BARREDO, J.:

Originally, I felt it was enough for me in voting on the disposition of this case to go along with the main opinion's view that the judgment in question is already final, because my impression was that the consensus of the Court was to somehow indicate in the judgment that notwithstanding such finality, the City of Cebu would be reserved the right to raise during the stage of execution the issue of whether or not, as a matter of law, the said judgment, read as a whole, is enforceable. In other words, inasmuch as I believe that after all there would be no way of executing the judgment, since under the facts found by the court a quo, the reinstatement of respondent Arnejo it had ordered is to a position that is lawfully occupied by another person and to which said respondent cannot by any stretch of the imagination be entitled, hence it is unenforceable, and, corrolarily, the order to the City to pay him "the corresponding salaries from the time of his removal up to actual reinstatement" would be completely devoid of consideration or basis, I was ready to agree to a strict application of the corresponding procedural rules relative to petitioners' right to appeal. But now that I see that the majority would rather limit the decision herein to simply deciding whether or not the impugned judgment is final, without any kind of reservation as to its enforceability, I am constrained to reconsider my position and to dissent instead. In this connection, I should like to point out that it has been the Court's consistent policy to view with a considerable degree of liberality and to overlook alleged flaws in the procedure adopted by a party pursuing an appeal which on its face appears to be meritorious. And I do not know of any member of the Court who would not be convinced that the judgment of the trial court in this case is far from being in accordance with law by merely reading the recital of the material facts in the decision itself.

These material and decisive facts are briefly stated in the main opinion thus:

"Efren M. Arnejo used to be a captain of the Cebu City police force. On October 21, 1959 he was designated by President Carlos P. Garcia as Acting Assistant Chief of Police of Cebu City, vice Higino Pacana who was designated Acting Chief of Police. Genaro L. Alforque was appointed to Arnejo's position of police captain. Four years later or on November 9, 1963 Alfonso Palencia was designated Chief of Police to take Pacana's place. The following day, November 10th, Acting City Mayor Mario D. Ortiz terminated Arnejo's services as Assistant Chief of Police because Pacana was "automatically reverted" to that position. Ortiz asked the Municipal Board to create a new item of police captain for Arnejo. The Board did not take any action on his recommendation.

"Arnejo was on terminal leave of absence for the period from November 10, 1963 to September 5, 1964. In connection with that leave he was paid the sum of P3,092.06. On April 27, 1964 Arnejo complained to the Civil Service Commission against his removal as Assistant Chief of Police. The Commission referred his complaint to the Mayor.

"On November 2, 1964 he filed a mandamus suit against Ortiz, Sergio Osmena, Jr., the City of Cebu and its City Council, Auditor and Treasurer to compel his reinstatement as Assistant Chief of Police and for the recovery of his back salaries plus P5,000 as attorney's fees. He filed against Ortiz a claim for P30,000 as moral and exemplary damages."

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"So that the case may be viewed in proper perspective, other relevant supervening facts may be stated.

"On February 22, 1966, or before the case reached this Court, Arnejo assumed the duties of Acting Chief of Police of Cebu City pursuant to a designation made by President Ferdinand E. Marcos. He served in that capacity up to June 15, 1966. He received the salaries of the position. His appointment was not confirmed.

"On August 1, 1968, he was designated Acting Chief of Police of Lapu-Lapu City. He has been occupying that position up to this time and receiving the corresponding compensation.

"On the other hand, on June 14, 1966 the City Treasurer recommended to the Mayor that the sum of P15,967.50 be appropriated for Arnejo's claim under the judgment. That amount consists of (a) P9,875 as Arnejo's back salaries from July 1, 1964 to February 21, 1966; (b) P592.50 as his insurance and retirement premiums; (c) P5,000 as exemplary damages and (d) P500 as attorney's fees. Arnejo's counsel apparently agreed with that recommendation.

"The Mayor referred the matter to the City Council which resolved on August 1, 1966 that the claim be held in abeyance pending the outcome of the case in this Court."

Thus, it can be readily seen that Arnejo was Acting Chief of Police of Cebu City only by virtue of a designation under Commonwealth Act 588, which as everyone knows expires automatically upon the filling of the position occupied by him in an acting capacity by another designee or by an appointee of the President. And to see more clearly the impossibility of Arnejo's reinstatement by the trial court, it may be stated here that had he asked for reinstatement to his permanent item or position as captain, now being occupied by Genaro L. Alforque without any color of legal right whatsoever, inasmuch as Arnejo never vacated the same, he would have been unquestionably entitled to have said position back. The trouble, however, is that he insisted on claiming to have a vested right to the position of Acting Chief of Police, which claim is manifestly unfounded in law.

In these circumstances, as I have already stated, I can see no way how the judgment to reinstate Arnejo can be enforced, whether as to the recovery of the office claimed or as to the payment to him of salaries to which he could not have been entitled precisely because he could not have been reinstated even if the respondents had wanted to do so. I am firmly of the conviction that the judgment here in question suffers not only from the error in the application of the law on the part of the trial judge but, more importantly, from complete lack of legal basis, according to its own recitals, which renders its enforcement impossible, in fact and in law.

Such being the situation that confronts Us, I reiterate I would be strict against the appeal sought by respondents, only if the Court would at least suggest that the City may raise during the stage of execution the unenforceability of the judgment sought to be appealed. Inasmuch, however, as my colleagues insist on saying nothing on this last point, thus leaving open the possibility that the City may be required by the trial court to comply strictly with the terms of its decision, I see no alternative but to revise my position as regards the appealability of the subject judgment. After all, this is a question which can be decided either way, considering that in the final analysis, the final result would be that the erroneous judgment of the trial court will not be enforced. Indeed, if the Court says nothing now relative to such unenforceability and the City of Cebu were to raise the point during the stage of execution, it is most likely that any resolution thereof of the trial court will ultimately reach this Court and its decision would just the same be in favor of the City. Moreover, whether or not a strict application of procedural rules which do not directly involve public policy is something that is addressed to the sound discretion of the Supreme Court as the last repository of justice, and in this particular case, I cannot perceive any injustice in allowing the petitioners to seek a reversal of the patently erroneous decision in question, specially when it is taken into account that respondent Arnejo has anyway succeeded in having himself appointed and has in fact served in positions higher than those in controversy here.

The main opinion holds that the trial court erred in considering petitioners' joint motion for reconsideration as pro-forma. In this, I fully agree. It may be true that most of the main points raised in said motion were somewhat

touched already in the memorandum filed by respondents before the decision was rendered, but to say that it merely "referred" to said points or issues or that the motion merely reiterated them is an exaggeration. The arguments were amplified and presented differently, with a view to being more comprehensive and convincing. And it is my position that inasmuch as I am convinced that the intention of the motion is really to persuade the court to correct possible errors and not merely to delay the final outcome of the case, I prefer to look at the respondents' efforts with more sympathetic consideration. Besides, as well pointed out in the main opinion, the trial judge himself ruled that there was something new in said motion for reconsideration.

Now, in regard to this "new" matter, I view the second motion for reconsideration differently from the main opinion. Perhaps there could be reason to hold as a general rule that a second motion attacking the order denying the first motion may not be looked with favor and should not suspend the period for appeal. But I also feel that such a general rule must recognize certain exceptions, such as, when the attack on the order of denial is such that it is in effect and in substance an attack on the basis of the judgment itself, or, as, in this case, when the court erroneously refuses to resolve an issue raised in the motion merely because it considers the same as new. In the latter case, I hold that the aggrieved party may either insist that the matter is not new, so that the Court should rule on it, or, ask, as was done by respondents, for an opportunity to amend its pleading to cure the defect imputed to it by the court to the effect that the new issue has not been raised in the pleadings nor tried by the court.

As correctly maintained by petitioners in their motions in the court below, what the trial judge deemed as new matter or a new issue, namely, the fact that Arnejo's designation as Acting Assistant Chief of Police had not been confirmed by the Commission on Appointments was not really new. Indeed, among the facts contained in the stipulation of the parties which served as basis for the decision, it is clearly stated that Arnejo had been merely designated (under Commonwealth Act 588 and not appointed ad interim) Acting Assistant Chief of Police to take the place of the permanent Assistant Chief of Police, Major Higinio Pacana, who had been in turn designated (under the same law) Acting Chief of Police. Not only that, in the answer of petitioners, the fourth special or affirmative defense of respondents is worded thus:

"That while it is true that petitioner was, on October 21, 1959, designated as Assistant Chief of Police for the City of Cebu, yet said designation was merely on a temporary or acting capacity, a kind of designation which is without any fixed tenure of office and can be revoked by the appointing power at the latter's pleasure and this revocation was unequivocally exercised by the appointing power when His Excellency, the President of the Philippines, appointed Col. Palencia as Chief of Police for the City vice Higinio Pacana, who, by operation of law, returned to his previous permanent position as Assistant Chief of Police displacing the petitioner.

The authority of the appointing power to terminate employments which are acting or temporary in nature has been sustained by the Supreme Court of the Philippines in a line of decisions, among which are:

"One who holds a temporary appointment has no fixed tenure of office and as such his employment can be terminated at the pleasure of the appointing power, there being no need to show that the termination is for cause. (Mendez vs. Ganson, G. R. No. L-10483, April 12, 1957, O.G. Vol. 53, No. 15, p. 4835.)

If a policeman of a chartered city with a first class patrolman civil service eligibility accepts a promotion to the rank of captain in a temporary or acting capacity, he is not entitled to the protection afforded to members of provincial guards, city police and municipal police by Republic Act No. 557. (Hortillosa vs. Ganson, 56 O.G., No. 34, Aug. 22, 1960).

We agree to the foregoing finding, it appearing that the appointment of petitioner is merely temporary and as such is terminable at the pleasure of the appointing power with or without cause. It is true that petitioner was acquitted of the charge; nevertheless, such acquittal is immaterial for even without it, his employment could be terminated at a moment's notice. (Reyes vs. Donis, L-11427, May 28, 1958; Tolentino vs. Torres, L-6787, Jan. 31, 1955; Brauda, et al., vs. Del Rosario, L-10552, April 28, 1958.)"

But even assuming that the said issue was in any sense new, under Section 5 of Rule 10, it is very clear that, as contended by petitioners even in their motions in the court below, they had the right to either be allowed to amend their pleading to make it conform with the stipulated facts and to make their affirmative defense as categorical as probably the trial judge thought it should be, or, to insist that the court resolve the issue without any amendment. The said section provides:

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects, as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at anytime, even after judgment; but failure so to amend does not affect the result of the trial of these issues. . . ." (Italics supplied)

In the light of these considerations, I cannot share the view expressed in the main opinion that the two respective separate second motions for reconsideration of petitioner Ortiz and the other petitioners were pro-forma or otherwise ineffective, on the ground that they attack the order of denial of the first joint motion for reconsideration rather than the judgment itself. It appears plain to me that in reasoning as they did in their second motions for reconsideration, respondents were in effect arguing against both the order of denial and the judgment. For instance, I, for one, would consider the following discussion in petitioners' (other than Ortiz) second motion for reconsideration as sufficiently convincing, if not altogether basically sound:

"4. That in addition to the arguments advanced in the motion herein-above referred to and made part hereof by reference, herein defendants most respectfully submit additional arguments in support of this Second Motion for Reconsideration, to wit:

Want of cause of action can be raised at any time. — It is submitted that this Honorable Court erred in denying defendants' Motion for Reconsideration on the ground that 'respondents are barred from putting forth this new matter or defense at this stage of the proceeding. Respondents are bound by the allegations of their answers and defenses not pleaded therein are deemed waived.'

It will be recalled that, even though the pleadings bind the parties to their respective theories, under the New Rules of Court on pre-trial (Rule 20) the parties may simplify the issues, introduce the necessary and desirable amendments to the pleadings and, finally, may consider 'such other matters as may aid in the prompt disposition of the action.' The criterion in our procedural laws is no longer strict adherence to pleadings, rather, the 'prompt disposition of the action'.

It is submitted that even if we assume for the sake of argument that the non-confirmation of the appointment of the plaintiff was never raised in the defendants' answer, nevertheless, it cannot be denied that such a matter is a vital issue which will tend to a 'prompt disposition of the case' if met head-on at this stage of the proceedings — rather, than be the subject of another action between the same parties and for the same office.

A reading of the Stipulation of Facts will reveal that while it is true that there is no mention that the appointment of the plaintiff to the position of Assistant Chief of Police was not confirmed by the Commission on Appointments, it is submitted that there is no need to make a statement of a negative circumstance. It is sufficient that in the pleadings, the fact that the appointment of the plaintiff was not approved by the Commission on Appointments is an admitted fact from the mere failure to incorporate such a negative averment.

It is elementary that a person who seeks reinstatement must show a right to the office and, more particularly in the case at bar, the plaintiff has to satisfy the Court that he has a legal right thereto from his appointment down to confirmation by the Commission on Appointments — and wanting this, it is submitted that the plaintiff suffers from a want of a cause of action; a circumstance, similar to want of jurisdiction which can be raised at any stage of the proceedings. In this particular case it would be against public policy to allow a person to occupy a position directed by the Constitution to be filled by presidential appointment with the consent of the

Commission on Appointments — to be at a mercy of a technicality; or, at the expense of an oversight in the pleadings.' Surely, it cannot be denied nor could it be argued otherwise, that an official holding a position without the formalities required by law — approval of the Commission on Appointments — does not have a cause of action for reinstatement to that position to which he had been incompletely appointed.

De jure office held by a de facto officer. — The Office of the Assistant Chief of Police of the City of Cebu is a de jure office created by the Revised City Charter of the City of Cebu to be filled up by Presidential appointment with the consent of the Commission on Appointments.

From the Stipulation of Facts there is no doubt whatsoever that the plaintiff held and exercised the functions of this de jure office; but, he himself was not a de jure officer because, as adverted to hereinabove, the confirmation from the Commission on Appointments, a formality required by the Constitution, had not been extended him. Plaintiff was no more than a de facto officer, holding a de jure office.

It is submitted that a de facto officer can be removed from a de jure office at any time when a de jure officer is placed in that office; and, in this particular case, the de jure officer was Assistant Chief Higinio Pacana who had to return to his former de jure office when his de facto status as Chief of Police was revoked by the President of the Philippines.

The conclusion of the Court that a designation by the President of the Philippines does not need a confirmation by the Commission on Appointments, is untenable, from the Constitutional Law point of view, for while a presidential ad interim appointment itself lasts only until rejected by the Commission on Appointments or until the end of the congressional sessions if bypassed — the effect of this ruling would be to place a mere designation on a much better footing and tenure than a formal presidential appointment. With due difference the opinion of this Court, we however maintain the view that designation is no different from appointment." (No. 4, Second Motion for Reconsideration, pp. 134-137, Record.)

Petitioner Ortiz was served copy of the decision on October 18, 1965; he filed on October 23, 1965 a motion for reconsideration jointly with the other petitioners, who were also served with it on the same date as Ortiz; this joint motion was denied, and Ortiz received his copy of the order of denial on December 1, 1965; on December 14, 1965, he filed his "Second Motion for Reconsideration or Motion for Leave to Amend Answer of Defendant and/or for Extension of Time to Perfect Appeal"; after this second motion was denied and he received copy of the order of denial on January 10, 1966, he filed a notice of appeal on January 14, and an appeal bond on January 15, 1966. On their part, the other petitioners were served the order of denial of the joint motion for reconsideration on December 16, 1965, and they filed their "Second Motion for Reconsideration or Motion for Leave to Amend Answer of Defendants" on December 18, 1965; and after this second motion was denied, of which denial they were notified on January 7, 1966, on January 14, 1966, they also filed their notice of appeal and on January 15, 1966 their appeal bond. In other words, without counting the periods during which the first joint motion and the two separate second motions for reconsideration of respondents were pending, it is obvious that their projected appeal was well within the thirty day period provided by the New Rule for appeals in mandamus cases, since, on that basis, it appears that Ortiz spent only 5 days from October 18 to 23, plus 13 days from December 1 to December 14, 1965 and 5 days from January 10 to January 15, 1966 or a total of only 22 days, and the other petitioners only 5 days from October 18 to 23, 1965, plus 2 days from December 16 to 18, 1965 and 8 days from January 7 to 15, 1966 or a total of 15 days. (Respondent Arnejo's counsel's computation in his Answer to the petition (pp. 6 to 7) as to the appeal of the petitioners other than Ortiz is erroneous. He claims that the total period consumed is 17 days, when, as can be seen above it is only 15 days, and so, even under his own theory that the period of appeal is only 15 days, the said appeal was on time.)

At this juncture, it is important to note that neither in its order of November 26, 1965, denying the first joint motion for reconsideration, nor in that of January 5, 1966, denying the two separate motions for reconsideration,

did the respondent court rule whether expressly or impliedly that the denial was being based on the ground that the said motions were pro-forma. Particularly, the later order was more explicit in that the ground for denial is for "lack of merit". It was thus more of a second thought that in its order of February 18, 1966, the respondent court categorized the said motions as pro-forma. The least that can be said of such procedure is that by it, the petitioners were misled into believing that they still had time to appeal. For instance, the court knew that petitioners were served copy of its decision on October 18 and that they filed their motion for reconsideration on October 23, barely five days later, which is unusually quick by standards of ordinary practice. If it were really convinced at the time of the hearing of said motion that it was pro-forma, its sense of fairness and justice should have made it realize that it had to act immediately on said motion, so that petitioners could still have time to appeal. But no, the court itself delayed the resolution up to November 26, 1965, more than thirty days after October 18, 1965. Again, assuming it felt the first motion suspended the period for appeal and only the second motions were the ones that were pro-forma, since the second motion of Ortiz was filed on December 14, 1965, he had only up to December 26, 1965 within which to appeal. Under the circumstances, the respondent court should not have waited until January 5, 1966 to act on said motions, for by then Ortiz would have had no more chance to appeal. As far as the other petitioners are concerned, they were more or less in the same predicament.

By and large, there is, in my considered opinion, ample ground to hold that petitioners' appeals were filed on time. This conviction is fortified by the consideration that petitioners are public officers and the fault being attributed to them or to the fiscal who handled the case for them relates to legal points that cannot be considered as very clear, much less definitely settled, for, as explained earlier, there are peculiar circumstances here that make the application of the rules and jurisprudence relied upon in the main opinion rather controversial. In many instances in the past, this Court has held that as a rule, mistakes of public officials do not result in loss to the government.<sup>[1]</sup> In the particular case of *Lewin vs. Galang*, 109 Phil. 1041, the Solicitor General's failure to allege the waivable defense of *res adjudicata* was overlooked, the Court quoting approvingly authority to the effect that "as a general rule, the government is not bound by the action of its officers, where, by misconstruction of the law under which they have assumed to act, unauthorized payments are made." (at p. 1052) In the case at bar, to bind the City of Cebu to the mistake of the Fiscal or the Mayor would result in having the City pay over P15,000.00 to which respondent Arnejo is not entitled.

What is more, according to the main opinion, while the appealability of the trial court's decision was still being debated in said court, or four days after the trial judge issued his order dismissing petitioners' appeal, and while motions for reconsideration of and relief from said order of dismissal were still pending resolution by that Court, respondent Arnejo accepted and assumed on February 22, 1966, the position of Acting Chief of Police of the same City. In other words, he was already Chief, while he was still asking to be reinstated as Acting Assistant Chief. And on August 1, 1968, he accepted and assumed the position of Acting Chief of Police of Lapu-Lapu City. Under these circumstances, I agree with Justice Antonio that Arnejo has waived whatever rights he might have to claim reinstatement to the position here in question. That waiver, I maintain, carries with it also the waiver of the right to claim any salaries corresponding to said position whether past or future.

For the above reasons, I dissent and vote to declare as legally unauthorized and without force and effect the orders of respondent judge here in question, dismissing the appeal of petitioners.

Fernandez and Esguerra, JJ., concur.

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[1] *Pineda vs. Court of First Instance of Tayabas*, 52 Phil., 803; *Canlubang Sugar Estate vs. Standard Alcohol Co. [Phil.], Inc.*, G.R. No. L-10887. April 16, 1958; *Philippine American Drug Co. vs. Collector of Internal Revenue and Court of Tax Appeals*, 106 Phil., 161; 57 Off. Gaz. [21] 3915. See also *Zamora vs. CTA*, L-23272. Nov. 26,

1970, 36 SCRA 77, and cases therein cited.

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## CONCURRING OPINION

**TEEHANKEE, J.:**

I concur with the main opinion of Mr. Justice Aquino stressing that under the provisions of Rule 37, section 4[1] a second motion for new trial or reconsideration that is not "based on a ground not existing nor available when the first motion was made" will be deemed a pro forma motion that the movant files at his peril and at the risk of losing his right of appeal since it will not suspend the running of the reglementary period therefor.

Experience has shown that such second motions for reconsideration are frequently filed in the appellate courts notwithstanding the express mandate of Rule 52, section 1 that "No more than one motion for rehearing or reconsideration shall be filed without express leave of court" in the appellate courts. Leave for the granting of such second motions for reconsideration should be sparingly granted. And where leave has been granted but the second motion for reconsideration has raised no new grounds or special circumstances not available at the time of the filing of the first motion for reconsideration but is merely "a reiteration of reasons and arguments"[2] or amplification thereof which have already been considered, weighed and resolved adversely and which serve no apparent purpose but to gain time and therewith possible changes in the courts' composition, such second motions are clearly pro forma "based on grounds already existing at the time of the first motion." [3] As such pro forma motions although leave to file them may have been granted, such second motions for reconsideration deserve no further, consideration and should be denied outright in consonance with the Court's consistent stand against multiplicity of motions in the interest of avoiding further delay in the implementation or execution of a case already decided and to avoid needless slowdowns in the appellate courts' disposition of the other cases in their full dockets.

I also concur with the separate opinion of Mr. Justice Antonio that the reinstatement of respondent Arnejo to the position of Acting Assistant Chief of Police of Cebu City can no longer be validly done for the reasons therein stated, aside from the fact that his designation thereto which was merely in an acting capacity has long lapsed.

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[1] Rule 15, section 8 also provides to the same effect that "SEC. 8. Omnibus motion. — A motion attacking a pleading or a proceeding shall include all objections then available, and all objections not so included shall be deemed waived." (Rule 15).

[2] See *Estrada vs. Sto. Domingo*, 28 SCRA 891 (1969); *Dacanay vs. Alvendia*, 30 SCRA 31 (1969).

[3] *Lonaria vs. de Guzman*, 21 SCRA 349 (1967).

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