

SECOND DIVISION

[G.R. No. 111155, October 23, 1997]

**COSMOS BOTTLING CORPORATION, PETITIONER, VS. NATIONAL
LABOR RELATIONS COMMISSION, NATIONAL FEDERATION OF
LABOR UNION AND PEPITO M. DELA CRUZ, RESPONDENTS.
D E C I S I O N**

MENDOZA, J.:

Petitioner, Cosmos Bottling Corporation, is a softdrink manufacturer. In February 1982, it employed private respondent Pepito M. de la Cruz as a driver/salesman, paying him P100.00 a day plus commission based on his sales. De la Cruz was assigned to cover the Morning Breeze area in Caloocan City.

On August 3, 1989, De la Cruz was dismissed by the company for serious misconduct and loss of trust and confidence. It appears that as part of its promotional and marketing strategy, Cosmos Bottling offered customers, who purchased a specified minimum number of softdrink, so-called "trade deals" consisting of free softdrink. In the course of the promotion, however, Cosmos Bottling received reports that some of its salesmen had not been giving free softdrink to entitled customers but had been selling the softdrink and keeping the proceeds for themselves. Accordingly, sales supervisors were ordered to check the reports in order to determine who of the salesmen were not giving the so-called "trade deals" to customers. One of those investigated was private respondent Jose Pepito de la Cruz who admitted to Rene Gallego, personnel investigation clerk of Cosmos Bottling, that he had not issued receipts to Nathalia's Store; that he had not given the I.F.S. Store free softdrink to which it was entitled by reason of its purchases and that he had falsified Sales Invoice No. 093870 to make it appear that it covered only one case of Super Pop and one case of Super Cheers when the fact was that the sale consisted of five cases of Crista and five cases of Cheers.

Pepito de la Cruz challenged his dismissal, claiming that it had been made without due process. The Labor Arbiter found De la Cruz to have been dismissed for cause and accordingly dismissed his complaint. On appeal, however, the NLRC, with one member dissenting, set aside the Labor Arbiter's decision and ordered the reinstatement of De la Cruz to his former position, although denying his claim for backwages. Hence, this petition for certiorari by Cosmos Bottling. The Solicitor General filed a comment recommending the reversal of the decision of the NLRC. On the other hand, the NLRC, after much delay, filed a comment, in which it sought to dismiss Cosmos Bottling's petition on the ground that it was filed without first seeking a reconsideration of its decision. Private respondent failed to file a comment.

It will suffice to dispose of the preliminary question raised by the NLRC to say that the rule that before a petition for certiorari may be filed, the petitioner must file a motion for reconsideration in the court or agency which rendered the decision is not

an iron-clad rule. It is subject to a number of exceptions, one of which being that when the question raised before the superior court is the same one raised in the court below and passed upon by it, there is no need for the party concerned to ask for a reconsideration.^[1] In this case the question raised is the same one argued and submitted to the NLRC for decision, to wit: whether given the facts found by the Labor Arbiter and adopted by the NLRC, the dismissal of private respondent was for cause. We hold that the failure of petitioner to file a motion for reconsideration of the decision of the NLRC cannot bar the filing of the present petition for certiorari. Accordingly, we shall proceed to a consideration of the merit of the petition.

As already stated, private respondent admitted during the investigation conducted by the company on July 20, 1989 (1) that he had not issued receipts to a customer; (2) that he falsified a receipt issued to another customer, making it appear that he had sold less number of cases of softdrink than he had actually done to the customer; and (3) that he did not give free softdrink to a customer who was entitled to "trade deals" based on its purchases. All these, according to petitioner, were done by private respondent to conceal his misappropriation of the softdrink. Petitioner claims that private respondent falsified Sales Invoice No. 09380 by entering five cases of Cheers Crista and five cases of Cheers in the original invoice (for customer) but indicated only one case each of Super Pop and Super Cheers in the duplicate copy returned to petitioner to enable him to misappropriate the cash difference; that private respondent did not issue receipts to customers not entitled to "trade deals" (free softdrink) and instead added up their purchases and put them in a single receipt issued, possibly to a fictitious person, and by this means got the free softdrink for himself; and that he did not give the free softdrink to those entitled to them and instead sold them to other customers, pocketing the proceeds of the sales.

Private respondent denies the charge and claims that all he did was to divert the softdrink in question to customers whose purchases did not entitle them to the "trade deals" to make them buy private respondent's stocks. In that way, it is claimed, private respondent was able to sell all his stocks. Private respondent claims that he "had no bad intention" and that he did not cause any damage or injury to the company because he accounted for the proceeds of his sales and in fact private respondent's sales supervisor certified that private respondent had no accountability. To the contrary, it is asserted, what private respondent did was for "the benefit and advantage of the company."

The NLRC sustained private respondent's contention, holding that "there is no concrete evidence on record that private respondent has appropriated for his personal benefit the proceeds of the sale nor has he caused any damage nor injury to petitioner."^[2]

We do not agree.

First. There is no question that private respondent did not issue receipts to one store, gave no free softdrink to another despite the fact that the latter was entitled to "trade deals" by reason of its purchases, and falsified a receipt making it appear that he had sold less number of cases of softdrink to a customer than he had actually done. Nor is there any question that by means of those manipulations private respondent was able to conceal the fact that he did not give free softdrink to

customers who would otherwise be entitled to it. What he claims is that he gave the "trade deals" to customers not otherwise entitled to them to make them buy the stocks he had and that in this way he actually did the company a favor by being able to sell all the stocks given to him to sell.

There is no evidence, however, to support private respondent's claim. Private respondent did not present before the Labor Arbiter the customers to whom he allegedly gave the free softdrink even though they were not entitled to them just so they would buy from private respondent. Nor did private respondent present the receipt or receipts in which he reflected the sales he made to customers whose duplicate receipts, he admitted, did not reflect the true amount of purchases. Having admitted that he did not give free softdrink to those entitled to them, it is to be presumed, in the absence of proof to the contrary, that private respondent appropriated the softdrink.

Second. Regardless of what private respondent did with the softdrink which he should have given to customers entitled to the "trade deals" ^¾ whether he really gave them to customers whose purchases did not entitle them to have the "trade deals," or whether he misappropriated them ^¾ the fact is that damage was caused to the company. Private respondent made a mockery of the petitioner's promotional campaign,^[3] and exposed the company to complaints by those victimized by private respondent. At the very least, the company's good will and business reputation were ruined.

Nor is it true that private respondent did not materially benefit from what he had done. Even if it is true that he did not appropriate the softdrink which he should have given to those entitled to "trade deals" and that instead he gave these to other customers who were not entitled to receive the "trade deals" as incentive for them to buy, there would still be material benefit to private respondent because he was a commission agent and the more he sold the bigger was his commission. At all events, private respondent had no authority to change the rules of the promotional campaign and by changing them he committed serious misconduct. Indeed, his allegation that he resorted to this scheme to be able to sell all his products is a mere afterthought which he put forward only when he filed a reply in the NLRC. The allegation in his complaint before the Labor Arbiter was simply that he had been dismissed without notice and hearing, in violation of his right to due process ^¾ a claim that of course is without basis because he was in fact investigated and heard in his defense.

Third. Private respondent claims that for his infractions of company rules he was already suspended and that for the company to dismiss him for the same act would be to expose him to "risk of double jeopardy."^[4]

This contention has no basis. The record shows that private respondent was suspended in the past, but this was for entirely separate and distinct violations of company rules. His dismissal is for acts specified in the memorandum, dated July 29, 1989, of Cosmos Bottling.

The private respondent cites the case of *Philippine Air Lines, Inc. v. Philippine Air Lines Employees Association*,^[5] in which this Court sustained the decision of the then Court of Industrial Relations, reinstating an employee who was caught stealing.