Republic of the Philippines
Department of Trade and Industry
Securities and Exchange Commission
SEC Bldg. EDSA, Greenhills, Mandaluyong City

ESTER H. TANCO-GABALDON, ARSENIO TANCO & HEIRS OF KU TIONG LAM,
Complainants-Appellants,

-versus-

SEC En Banc Case No. 11-10-223
For: Review of EPD Ruling

CITIBANK N.A. and the CITIGROUP PRIVATE BANK, et al.,
Respondents-Appellees.

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DECISION

For consideration is the *Appeal* dated 12 November 2010 filed on even date by Ester H. Tanco-Gabaldon, Arsenio Tanco and the heirs of Ku Tiong Lam ("complainants-appellants", for brevity), praying for the annulment of the 26 October 2010 *Ruling* of Atty. Hubert B. Guevara ("Assailed Ruling"), in his capacity as Director of the Commission's Enforcement and Prosecution Department ("EPD"), which granted the 22 October 2010 *Omnibus Motion [To: (1) Defer Submission of Answer and [2] Suspend Proceedings]* ("Omnibus Motion") filed by Citibank N.A. and the Citigroup Private bank, et al. ("respondents-appellees").

Records of the Commission disclose the following relevant facts:

On 21 September 2007, complainants-appellants filed before the EPD a verified *Complaint* against respondents-appellees for selling unregistered securities and for acting as issuers, brokers, dealers, salesmen and agents without registration, in violation of the Revised Securities Act ("RSA")[1] and the Securities Regulation Code ("SRC")[2].

In an Order dated 8 December 2008, EPD dismissed the verified *Complaint* on the ground that the causes of action stated therein had already prescribed, pursuant to Section 62 of the SRC.

The Commission *En Banc*, in its Decision dated 15 October 2009 ("EB Decision"), reversed the 8 December 2008 Order of the EPD, finding that prescription had not yet set in. The dispositive portion of the EB Decision reads:

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[1]Batas Pambansa Blg. 178 (1982).
[2]Republic Act No. 8799 (2000).

"WHEREFORE, premises considered, the Commission *En Banc* hereby **GRANTS** the instant Appeal, **REINSTATES** Appellants' verified Complaint dated 20 September 2007 and **ORDERS an immediate investigation** to determine whether there is probable cause to file a criminal case against the Appellees with the Department of Justice, and whether administrative sanctions should be imposed upon the Appellees for the alleged violations of the Revised Securities Act and the Securities Regulation Code." (Emphasis ours).

Respondents-appellees filed a *Petition for Review* of the EB Decision before the Court of Appeals ("CA") docketed as *CA-G.R. SP No. 111501.*

On 19 May 2010, the CA promulgated a *Resolution* issuing a Writ of Preliminary Injunction preventing the Commission from effecting the enforcement and execution of the EB Decision pending the resolution of the *Petition for Review.*

In its *Decision* dated 5 October 2010 ("CA Decision"), the CA upheld the ruling of the Commission *En Banc* as to prescription. The dispositive portion of the CA Decision reads:

"**WHEREFORE**, the foregoing premises considered, the petition is partly **GRANTED. The writ of injunction is hereby DISSOLVED**. The Securities and Exchange Commission-**Enforcement and Prosecution Department is ordered to proceed with its investigation with dispatch** and with due regard to the parties' right to notice and hearing." (Emphasis ours).

In the process of investigation, EPD issued a *Notice* dated 12 October 2010 directing respondents-appellees to file their *Answer* to the *Complaint* of complainants-appellants.

On 22 October 2010, respondent-appellee Citibank N.A., through its Philippine branch, filed the Omnibus Motion, praying for the deferment of the deadline for the submission of its *Answer* and for the suspension of the investigation proceedings pending resolution by the CA of therein attached *Motion for Partial Reconsideration* ("MR"), which was to be simultaneously filed, of the CA Decision as to the issue on prescription. The Omnibus Motion was anchored on the principle of judicial courtesy.[3]

On 26 October 2010, EPD issued the Assailed Ruling, to wit:

"We refer to your Omnibus Motion To: (1) Defer Submission of an Answer and (2) Suspend Proceedings dated 22 October 2010, filed on the same day, including the Manifestation filed on 26 October 2010. In light of the pendency of the Motion for Partial Reconsideration (of the Decision dated 5 October 2010) filed by Citibank N.A. before the Court of Appeals

[3]See Omnibus Motion, Annex "D" of the Memorandum on Appeal.

and considering the issues raised therein, we deem it appropriate to defer enforcement of our Notice to file an Answer to the Complaint of Ester Tanco-Gabaldon. However, this deferment does not extend to the other respondent, Caroline Lim, as she is hereby directed to file her answer within the specified period."

Hence, this *Appeal*. Complainants-appellant's challenge the Assailed Ruling on the grounds that: (1) the Omnibus Motion which it resolved is a prohibited pleading under the Commission's 2006 Rules of Procedure ("the SEC Rules"); (2) the filing of the Omnibus Motion, being a prohibited pleading, did not toll the running of the fifteen-day period to file an Answer, which had already lapsed, thereby warranting the consideration of respondents-appellees as in default; (3) the same Omnibus Motion was resolved without giving the complainants-appellants a chance to comment thereon; (4) the Assailed Ruling has already resolved issues raised in a pleading before the CA; and (5) the same Assailed Ruling is a manifest defiance and a patent disregard of the CA Decision.

On 23 December 2010, respondents-appellees Ctibank N.A. and CitiGroup Private Bank filed their *Reply-Memorandum*, arguing that: (1) the pendency of respondents-appellees' MR stayed the execution of the CA Decision, pursuant to Section 4, Rule 52 of the 1997 Revised Rules of Civil Procedure ("Rules of Court"); (2) the suspension of the proceedings was warranted by judicial courtesy; (3) the Omnibus Motion is not a prohibited pleading under the SEC Rules because it was not intended to delay the proceedings and has valid justifications in the Rules of Court and in jurisprudence; (4) the Omnibus Motion is a valid application for relief and hence, respondents-appellees cannot be deemed as in default; and (5) the Assailed Ruling is not a resolution of the issues raised in the MR pending with the CA.

On 28 December 2010, respondent-appellee Carol Lim filed her *Reply-Memorandum* dated 20 December 2010.

On 13 January 2011, complainants-appellants filed a *Motion to Admit* dated 10 January 2011, praying that, in the interest of justice, therein attached *Rejoinder* dated 12 January 2011 be admitted.

On 18 January 2011, complainants-appellants filed a *Motion to Admit Attached Rejoinder* dated 17 January 2011, in response to Carol Lim's *Reply-Memorandum*.

The ultimate issue to be resolved is whether the Assailed Ruling should be annulled and set aside.

Some procedural issues must be addressed first before we go into the merits.

First, Carol Lim is not a proper party, and has no real interest, in this *Appeal*. At the heart of this *Appeal* is the legality and/or propriety of the suspension of the investigation proceedings before the EPD. It is worthy to note, however, that the suspension decreed by the Omnibus Motion was not made to apply to Carol Lim. The Omnibus Motion clearly states that "*[the] deferment does not extend to the other respondent, Caroline Lim, as she is [thereby] directed to file her answer within the specified period.*" Hence, she does not stand to benefit from, or be prejudiced by, the outcome of this *Appeal*.

Second, the Omnibus Motion, indeed, partakes of the nature of a motion for extension of time to file pleadings and/or a motion for postponement, as its intent is to extend and/or postpone the filing of the *Answer*, and hence, the investigation. While the SEC Rules provides that such motions are prohibited pleadings[4], the same, however, may be permitted in the interest of justice, when there are compelling reasons therefor.[5] We find the same to be obtaining in the case at bar, respondents-appellees, in their Omnibus Motion, having interposed the significant issue of how to deal with the MR filed before the CA, a court that exercises the power of review over the Commission.

With these settled, we now go to the merits of the case.

We rule for complainants-appellants.

Complainants-appellants claim that:

> "On 26 October 2010, Counsels for the Complainants-Appellants and Respondents-Appellees attended the scheduled hearing on the Omnibus Motion. In said hearing, Atty. Jose Vermon Filio of SEC-EPD informed both counsels that the Omnibus Motion was not set for hearing on that day and that SEC-EPD Director Hubert Guevara was also not available. xxx. [C]ounsel for Complainants-Appellants manifested that they will file a comment to the said Omnibus Motion. Before leaving the SEC, the counsel for Complainants-Appellants was advised to call SEC-EPD in the afternoon to determine whether or not the hearing will push through."
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> "Later that day and before they could file a comment to Respondents-Appellees' Omnibus Motion, Complainants-Appellants counsel were informed (sic) through a follow-up telephone call to the SEC-EPD that Director Hubert Guevara of the SEC-EPD already issued an Order ("assailed Order") deferring the enforcement of the Notice to file an Answer to the Complaint. True enough, on 28 October 2010, Complainants-Appellants received the Order dated 26 October 2010 xxx."[6]

Notably, the foregoing was not addressed and disputed by the respondents-appellees in their *Reply-Memorandum*.

[4]Section 3-6, SEC Rules.
[5]Ibid, last paragraph.
[6]Memorandum on Appeal, par. 128, p. 23.

Given that the Omnibus Motion raised substantial issues, complainants-appellants should have been afforded the chance to comment thereon. It is now settled that a litigious motion should be set for hearing.[7] As the records disclose, however, the Assailed Ruling was indeed issued on the day of the scheduled hearing itself, which hearing, to stress, did not even materialize. Thus, complainants-appellants were not given the opportunity to be heard on the Omnibus Motion, either through another hearing or by way of a written opposition thereto, in violation of their right to due process. On this ground alone, the Assailed Ruling should be annulled and set aside.

In *Purisimo Buyco vs. Nelson Baraquia*[8], the Supreme Court ("SC") held:

> "It is well-settled that the sole object of a preliminary injunction, whether prohibitory or mandatory, is **to preserve the *status quo* <u>until the merits of the case can be heard</u>**. It is usually granted when it is made to appear that there is a substantial controversy between the parties and one of them is committing an act or threatening the immediate commission of an act that will cause irreparable injury or destroy the *status quo* of the controversy **before a full hearing can be had on the merits of the case.**
>
> Indubitably, in the case at bar, the writ of preliminary injunction was granted by the lower court upon respondent's showing that he and his poultry business would be injured by the closure of the subject road. After trial, however, the lower court found that respondent was not entitled to the easement of right of way prayed for, having failed to prove the essential requisites for such entitlement, hence, the writ was lifted.
>
> The present case having been heard and found dismissible as it was in fact dismissed, the writ of preliminary injunction is deemed lifted, its purpose as a *provisional* remedy having been served, the appeal therefrom notwithstanding.

Unionbank v. Court of Appeals[9] enlightens:

> 'x x x **a dismissal,** discontinuance or non-suit of an action **in which a restraining order or temporary injunction has been granted <u>operates as a dissolution of the restraining order or temporary injunction,</u>' regardless of whether the period for filing a motion for reconsideration of the order dismissing the case or appeal therefrom has expired**. The rationale therefor is that **even in cases where an appeal is taken from a judgment dismissing an action on the merits, <u>the appeal does not suspend the judgment, hence the general rule applies that a temporary injunction terminates automatically on the *dismissal* of the action</u>**.'

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[7] Section 4, Rule 15, Rules of Court.
[8] G.R. No. 177486, 21 December 2009.
[9] 370 Phil. 837 (1999).

(italics, emphasis and underscoring supplied)

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There being no indication that the appellate court issued an injunction in respondent's favor, the writ of preliminary injunction issued on December 1, 1999 by the trial court was automatically dissolved upon the dismissal of Civil Case No. 26015."

Thus, when the CA, through the CA Decision, dismissed the Petition for Review of the EB Decision insofar as the issue of prescription is concerned, there was no more legal impediment to proceed with the investigation. With such dismissal, the writ of preliminary injunction enjoining the investigation was automatically dissolved or terminated, regardless of whether the period for filing of a MR has expired. This is the reason why the EPD already proceeded to continue with the investigation, directing respondents-appellees to file their *Answer*.

Respondents-appellees argue that the MR filed on 22 October 2010 before the CA necessarily stayed the CA Decision, invoking Section 4, Rule 52 of the Rules of Court, which provides:

> "Sec. 4. *Stay of execution*. – The pendency of a motion for reconsideration filed on time and by the proper party shall stay the execution of the judgment or final resolution sought to be reconsidered unless the court, for good reasons, shall direct otherwise."

We are not persuaded.

Section 4, Rule 52 of the Rules of Court is pursuant to, and consistent with, the rule that judgments and final orders can only be executed as a general rule when they become final and executory.[10] The exception is when said judgment or final order is made immediately executory.[11]

Section 11, Rule 51 of the Rules of Court, which is as much a part of the procedure before the CA as Rule 52, provides:

> "Sec. 11. *Execution of judgment*. – Except where the judgment or final order or resolution, or a portion thereof, **is ordered to be immediately executory**, the motion for its execution may only be filed in the proper court **after its entry**.
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> xxx xxx xxx." (Emphasis supplied).

A careful reading of the CA Decision reveals that its directive for the conduct of the investigation against respondents-appellees was ordered to be immediately executory. In no uncertain terms, the CA directed the Commission, through the EPD,

[10]Section 1, Rule 39, Rules of Court.
[11]For example, see Section 4, Rule 39, Rules of Court.

"*to proceed with its investigation* ***with dispatch***". This is but an affirmation of the directive in the EB Decision for EPD to conduct "***an immediate investigation***" against the respondents-appellees.

That such a directive to conduct an investigation was ordered immediately executory is not without compelling reasons. As borne out by the records, the case against respondents-appellees was initiated as early as 24 October 2005, when it was filed before the Mandaluyong Prosecutor's Office.[12] The said charges for violation of the RSA and SRC were referred by the Mandaluyong Prosecutor's Office to the Commission, following the ruling of the SC in *Baviera vs. Paglinawan, et al.* (G.R. No. 168380/G.R. No. 170602, February 8, 2007).[13] Since 21 September 2007, when the verified *Complaint* was filed with the EPD, the case has, to date, been pending. We need not belabor the fact that the passage of considerable time increases the possibility of loss of material information and the unavailability of witnesses, not to mention the possible expiration of the prescriptive period. Moreover, any further delay would now unreasonably encroach on the mandate and power of the Commission to investigate complaints for alleged violations of the RSA and SRC.[14]

Respondents-appellees' invocation of the principle of judicial courtesy is likewise unavailing.

First, the principle of judicial courtesy does not apply in the case at bar, considering that: (1) the CA itself intended its directive for the Commission to conduct an investigation to be immediately executed; and (2) the pending incident, the MR, is with the CA itself, and not with the SC.

Second, the doctrine of judicial courtesy should not be applied indiscriminately and haphazardly and should only come in operation when: (1) there is no standing temporary restraining order or writ of preliminary injunction; **AND** (2) there is a strong probability that the issues before the higher court would be rendered moot and moribund as a result of the continuation of the proceedings in the lower court.[15] We find that the second requisite is not complied with in the case at bar. To begin with, respondents-appellees' assertion that the investigation would become futile should the MR be decided in their favor is speculative, resting as it is on the supposition that the CA would reverse itself. At any rate, the investigation is still at its early stage, respondents-appellees having been just directed to file their *Answer*. Surely, the mere act of ordering them to file their *Answer* would not have the effect of rendering the MR moot and academic. The ill effects of such a directive, if any, would be remedied by not using the information obtained thereby, should respondents-appellees' MR be granted. Verily, the need to preserve material and vital information and evidence, and to minimize the possibility of loss thereof, far

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[12]EB Decision, p. 8; Memorandum on Appeal, p. 15.
[13]Ibid.
[14]Section 53,, SRC.
[15]*Republic vs. Sandiganbayan*, G.R. No. 166859, 26 June 2006.

outweighs any cost or inconvenience, if any, resulting from the continuation of the investigation.

Accordingly, the writ of preliminary injunction having been dissolved by the CA Decision, and there being no other injunctive writ, the investigation should proceed.

WHEREFORE, premises considered, the instant *Appeal* is hereby **GRANTED**. The 26 October 2010 *Ruling* issued by Atty. Hubert B. Guevara, in his capacity as Director of the Commission's Enforcement and Prosecution Department, is hereby **ANNULLED and SET ASIDE**. The said Department is hereby **DIRECTED TO CONTINUE** with the investigation mandated by the *Decision* of the Commission *En Banc* dated 15 October 2009 and by the *Decision* of the Court of Appeals dated 5 October 2010.

SO ORDERED.

Mandaluyong City, 20 January 2011.

FE B. BARIN
Chairperson

MA. JUANITA E. CUETO
Commissioner

RAUL J. PALABRICA
Commissioner

MANUEL HUBERTO B. GAITE
Commissioner

ELADIO M. JALA
Commissioner