Republic of the Philippines
Department of Finance
Securities and Exchange Commission
SEC Building, EDSA, Greenhills, Mandaluyong City

ROGELIO M. FLORETE,
Appellant,

- versus -

MARCELINO M. FLORETE, JR., et al.
Appellees.

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SEC Case No. 02-13-402
For: Calling of Annual Meeting

RESOLUTION

For the consideration of the Commission *En Banc* is the Memorandum on Appeal filed by appellant Rogelio M. Florete, Jr. against appellees Marcelino M. Florete, Jr. and Maria Elena Florete-Muyco on 5 May 2015 assailing the Decision[1] (Assailed Decision) dated 25 March 2015 issued by the Office of the General Counsel (OGC). The pertinent portion of the Assailed Decision reads as follows:

> "Petitioner MARCELINO M. FLORETE, JR. is hereby authorized to call the Annual Stockholders' Meeting of MARSAL & Co., Inc. for the purpose of electing the directors and officers of the corporation, among other things. For this purpose, MARCELINO M. FLORETE, JR. is ordered to send notices of said stockholders' meeting in accordance with the By-Laws of MARSAL & Co., Inc. He is likewise authorized to preside at such meeting until at least a majority of the stockholders present have chosen one of their number as presiding officer."

Per records of the Commission, MARSAL & Co., Inc. (MARSAL) was registered with the Commission on 27 September 1966 under Registry No. 30496.

On 15 February 2013, the appellees filed a Petition alleging that they are the incorporators and stockholders of MARSAL. They state that the incorporators and stockholders include their brother, appellant Rogelio M. Florete, their sister, Teresita Florete-Menchavez, and their parents, Marcelino Florete, Sr. and Salome M. Florete. After the demise of their sister and parents, the appellees allege that no stockholders' meetings and election of the officers of MARSAL were conducted. Thus, they pray that the Commission issue an order directing the calling of stockholders' meeting of MARSAL, and that appellee Marcelino M. Florete, Jr. be authorized to call such meeting.[2]

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[1] A copy of which was received by the appellant on 20 April 2015, Memorandum on Appeal, p. 1.
[2] Petition dated 14 February 2013, pp. 3, 5 and 7.

On 8 April 2013, the appellant filed his Answer alleging, among others, that he is the duly elected president and chairman of the Board of Directors of MARSAL. Moreover, he alleges that the meeting of the Board of Directors and the stockholders of MARSAL were held in abeyance due to the number of cases filed by the appellees against him with the special commercial court. He states that he interposes no objection if the Commission calls for and holds the meeting, and presides over the same. However, appellee Marcelino M. Florete, Jr. should not preside over the said meeting.[3]

After the conduct of the Preliminary Conference and the filing by appellees of their Memorandum,[4] the OGC issued the Assailed Decision directing appellee Marcelino M. Florete, Jr. to call and initially preside over the stockholders' meeting of MARSAL.

On 5 May 2015, the appellant filed his Memorandum on Appeal alleging, among others, that the Decision of the OGC directing appellee Marcelino M. Florete, Jr. to call and preside over the stockholders' meeting of MARSAL is improper. He claims he is the proper person to call and preside over such meeting since he is the chief executive officer and chairman of the board of the company.[5]

In response, the appellees filed their Motion to Dismiss and/or Reply Memorandum (Motion to Dismiss) stating, among others, that the appeal of the appellant did not include a notice of appeal, payment of docket fee and a certificate of non-forum shopping. Moreover, the decision of the OGC directing appellee, Marcelino M. Florete, Jr., who is the petitioning stockholder, to call and preside over the stockholders' meeting is in accordance with Section 50 of the Corporation Code. Thus, the appellees pray that the Commission dismiss the appeal.[6]

On 18 May 2015, the appellant filed an Opposition to Motion to Dismiss stating that the reason he failed to pay the docket fee is that he relied on the Rules of the Commission dated 1996 and 1999. Moreover, the appellant argues that there is no need to include the certificate of non-forum shopping since it is an appeal of the Decision of the OGC and such appeal is not an initiatory pleading. Further, the appellant requests that the Commission not strictly apply the Rules since there was no deliberate intent on his part to default in such payment. The appellant attached two (2) postal money orders in the total amount of Two Thousand Four Hundred pesos (Php 2,400.00) for the payment of the docket fees. Thus, the appellant prays that the Motion to Dismiss be denied, and the Commission accept the belated payment of docket fees.[7]

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[3] Answer dated 1 April 2013, pars. 2, 4 and 7.
[4] Memorandum filed on 29 May 2014 by the appellees pursuant to a Preliminary Conference Order dated 16 April 2014 directing both parties to submit the same.
[5] Memorandum on Appeal, p. 4.
[6] Motion to Dismiss and/or Reply Memorandum dated 12 May 2015 and filed on 14 May 2015, pp. 1, 6, 7 and 9.
[7] Opposition to Motion to Dismiss dated 19 May 2015, pp. 1, 2 and 4.

Thereafter, the appellees filed an additional pleading[8] and motions,[9] including a Motion to Authorize [Appellee] Marcelino M. Florete, Jr. To Appoint an Interim or Acting Corporate Secretary (Motion to Appoint) filed by the appellees. In the Motion to Appoint, the appellees pray that the Commission issue an order authorizing appellee Marcelino M. Florete, Jr. to appoint an interim or acting corporate secretary of MARSAL.

Before proceeding to the substantial issue in this appeal, the preliminary issue to be resolved is whether or not the Memorandum of Appeal should be dismissed since the appellant failed to include the payment of docket fee and certificate of non-forum shopping therein.

Section 11-2 of the 2006 Rules of Procedure (Rules) provides the procedure of an appeal of a decision of the OGC, to wit:

> "Appeal may be taken upon the adverse party and filing with the Commission En Banc within fifteen (15) days from notice of Decision x x x, a **NOTICE OF APPEAL** and a Memorandum on Appeal and **PAYING THE CORRESPONDING DOCKET** therefor. Provided, no appeal shall be given due course unless it includes a **CERTIFICATE OF NON-FILING OF MULTIPLE PETITIONS AND COMPLAINTS** provided for in Section 3-5 hereof."

Section 11-3 of the Rules provides for procedure for the perfection of an appeal, to wit:

> "The appeal shall be deemed perfected upon filing of the Memorandum on Appeal and **PAYMENT OF THE REQUIRED DOCKET FEE** within the period provided for in these Rules."

In the case of *Gipa, et al. v. Southern Luzon Institute*, the Supreme Court stated that the payment of the docket fee within the prescribed period is both mandatory and jurisdictional. Moreover, the court stated that an appeal is not a right, but a mere statutory privilege. Without such payment, the appeal is not perfected. The payment of the full amount of the docket fee is an indispensable step for the perfection of an appeal.[10]

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[8] Reply (to Opposition to Motion to Dismiss) dated 22 May 2015 and filed on 27 May 2015.
[9] *Ex Parte* Motion for Early Resolution of Motion to Dismiss Appeal dated 26 May 2015 and filed on 29 May 2015; *Ex Parte* Motion for Early Resolution dated 22 June 2015 and filed on 25 June 2015; Third (3rd) Ex-Parte Motion for Early Resolution dated 21 July 2015 and filed on 24 July 2015; Fourth (4th) Ex-Parte Motion for Early Resolution dated 10 August 2015 and filed on 20 August 2015; and Fifth (5th) Ex-Parte Motion for Early Resolution dated 9 September 2015 and filed on 15 September 2015.
[10] G.R. No. 177425, 18 June 2014.

In fact, in another Supreme Court case, the court stated that the certificate of non-forum shopping is a requisite for the perfection of an appeal.[11]

In the case at bar, the appeal has not been perfected since the appellant failed to include the payment of docket fees and the certificate of non-forum shopping therein. Without the payment of docket fees, the Commission cannot assume jurisdiction over the appeal. It is of no moment that the appellant belatedly submitted the postal money orders for such payment since the said money orders were submitted beyond the reglementary period for filing an appeal, or only on 18 May 2015.

Next, the appellant requests that the Commission refrain from applying the Rules strictly, as to the requirements for the perfection of appeal since there is no deliberate intent on his part to default in the payment of docket fees considering he relied on the old Rules. However, in the case of *Gipa,* the Court stated that the liberal interpretation of the rules of procedure should be based on an effort on the part of the party invoking liberality to adequately explain his failure to abide by the rules. Those who seek exemption from the application of the rule have the burden of proving the existence of exceptionally meritorious reason warranting such departure. Clearly, the appellant has not established an exceptionally meritorious reason to warrant such departure considering that his alleged inadvertent reliance of the old Rules cannot constitute an exceptionally meritorious reason.

Further, even if the appellant perfected his appeal by including the payment of docket fees and certificate of non-forum shopping, the appeal still is without merit. Section 50 of the Corporation Code explicitly provides that the Commission, upon petition of a stockholder on a showing of good cause therefor, may issue an order to the petitioning stockholder directing him to call a meeting of the corporation. The petitioning stockholder or member shall preside thereat **UNTIL** at least a majority of the stockholders or members present have chosen one of their number as presiding officer.

In this case, appellee Marcelino M. Florete, Jr. should be directed to call and preside at the stockholders' meeting of MARSAL since he is the petitioning stockholder, (or the stockholder who filed the Petition with the OGC praying that the Commission issue such order). Contrary to the appellant's assertion, Section 50 of the Corporation Code clearly does not state that the Commission shall direct the chief executive officer and chairman of the board of the company to call and preside at the stockholders' meeting.

Lastly, the appellees pray that the Commission issue an order authorizing appellee Marcelino M. Florete, Jr. to appoint an interim or acting corporate secretary of MARSAL. Unfortunately, considering that the jurisdiction of intra-corporate

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[11] Mandaue Galleon Trade, Inc., et al. v. Isidto, et al., G.R. No. 181051, 5 July 2010.

controversies[12] has been transferred to the trial court,[13] the Commission cannot authorize the appellee to appoint an interim or acting corporate secretary since the matter may ripen into an intra-corporate controversy, if the appellant were to question such appointment, under Section 1(a)(3) of the Interim Rules of Procedure for Intra-Corporate Controversies, to wit:

> "Controversies in the election or appointment of x x x officers x x x of corporations x x x."

WHEREFORE, premises considered, the appeal is DISMISSED for the failure of appellant Rogelio M. Florete, Jr. to perfect the same within the prescribed period.

SO ORDERED.

Mandaluyong City, 20 October 2015.

TERESITA J. HERBOSA*
Chairperson

MANUEL HUBERTO B. GAITE
Commissioner

ANTONIETA F. IBE
Commissioner

EPHYRO LUIS B. AMATONG
Commissioner

BLAS JAMES G. VITERBO
Commissioner

* Inhibit

[12] In order for there to be an intra-corporate controversy, there must be two elements present: (1) there is controversy or dispute between a stockholder and a corporation, among others; and (2) the controversy or dispute among the parties be intrinsically connected with the regulation of the corporation (*Speed Distributing Corp., et al. v. Court of Appeals,* G.R. No. 149351, 2004).

[13] Originally, the Commission had the power to resolve intra-corporate controversies but such power has been transferred to the Regional Trial Court on 8 August 2000 under Section 5.2 of the Securities Regulation Code (SRC).