



REPUBLIC OF THE PHILIPPINES
SENATE ELECTORAL TRIBUNAL
COA-NCR Bldg., Batasan Road, Quezon City

FRANCIS N. TOLENTINO,
Protestant,

- versus -

SET CASE No. 001-16

LEILA M. DE LIMA,
Protestee.

X- - - - - X

RESOLUTION NO. 16-37

In view of the stipulation in the AES Contract between the Commission on Elections (COMELEC) and Smartmatic-TIM, Inc. that "all goods still in the possession of COMELEC as of 01 December 2016 because of any election contest or audit requirement shall be considered sold to COMELEC pursuant to its option to purchase, and the COMELEC shall pay the corresponding price [. . .] without prejudice to COMELEC requiring the protestant to shoulder such cost", the Executive Committee of the Tribunal issued Resolution No. 16-15 dated 09 November 2016,¹ requiring "Protestant Tolentino to **MANIFEST** within a non-extendible period of three (3) days from receipt of the Resolution his intended course of action with respect to the equipment still in custody of the Commission on Elections by reason of the instant electoral protest. He shall furnish the Commission on Elections a copy of his Manifestation."

A copy of Resolution No. 16-15 was served on counsel for Protestant on 15 November 2016. In compliance therewith, counsel for Protestant filed by registered mail a *Manifestation* on 18 November 2016, it being the due date and a Friday, a non-working day for the SET Secretariat under its Four-Day Workweek.

¹ Confirmed by the full Tribunal in Resolution No. 16-19 dated 01 December 2016.

Schedule. However, considering that it might take a number of days for the mailed *Manifestation* to reach the Tribunal, counsel for Protestant filed on the following Monday, 21 November 2016, another *Manifestation* to which a copy of the mailed *Manifestation* was attached as Annex "A".

In accordance with the *Manifestation* (Annex "A"), the Executive Committee of the Tribunal issued Resolution No. 16-17 dated 22 November 2016² directing the COMELEC "to retain custody and possession of, and to safeguard and preserve six (6) Consolidated Canvassing System (CCS) Laptops, the forty-five (45) Vote Counting Machines (VCMs) enumerated in Protestant's *Manifestation* and the one hundred six (106) Vote Counting Machines (VCMs) and their Secure Digital (SD) Cards enumerated in Protestant's *Motion*, **SUBJECT** to the payment by Protestant of additional cash deposit to cover the costs of the said machines and equipment" and requiring Protestant to deposit with the Tribunal not later than 29 November 2016 the amount of Three Million Three Hundred Fifteen Thousand Seven Hundred Eighty Five & 36/100 Pesos (Php3,315,785.36), representing the cost of the aforesaid machines and equipment. A copy of Resolution No. 16-17 was served on counsel for Protestant on 24 November 2016.

On 28 November 2016, counsel for Protestant filed an *Urgent Clarificatory Manifestation and Motion*, stating that he was foregoing the inclusion of the 106 VCMs referred to in Resolution No. 16-17, but not the 106 SD Cards enumerated in his *Motion*. He moved that the Tribunal direct the COMELEC to retain custody and possession only of the 106 SC Cards found in the 106 VCMs enumerated in Protestant's *Motion*, in addition to the 6 CCS Laptops and 45 VCMs enumerated in his *Manifestation* (Annex "A"). Protestant further undertook to deposit with the Tribunal not later than 01 December 2016 the amount of only One Million One Hundred Fourteen Thousand One Hundred Twenty Two and 96/100 Pesos (Php1,114,122.96), representing the cost of 6 CCS Laptops and 45 VCMs, instead of the amount of Three Million Three Hundred Fifteen Thousand Seven Hundred Eighty Five and 36/100 Pesos (Php3,315,785.36).

²Confirmed by the full Tribunal in Resolution No. 16-19 dated 01 December 2016.

COMELEC was served a copy of the *Urgent Clarificatory Manifestation and Motion* by registered mail.

Acting on the *Urgent Clarificatory Manifestation and Motion*, the Executive Committee of the Tribunal issued Resolution No. 16-18 dated 29 November 2016,³ modifying Resolution No. 16-17, directing the COMELEC to retain custody and possession only of 6 CCS Laptops and the 45 VCMs referred to in Protestant's *Manifestation* dated 18 November 2016 and the 106 SD Cards and other paraphernalia enumerated in Protestant's *Motion* dated 18 November 2016. The undertaking of Protestant Tolentino to deposit the amount representing the cost of the equipment and paraphernalia not later than 01 December 2016 was noted. Copies of Resolution No. 16-18 were served on 01 December 2016 on the Office of Commissioner Christian Robert S. Limat 3:20 p.m., and on the Office of the Executive Director, COMELEC at 3:30 p.m.⁴

On the same day, 01 December 2016, Protestant deposited with the Tribunal the amount of One Million One Hundred Fourteen Thousand One Hundred Twenty Two and 96/100 Pesos (Php1,114,122.96) as promised.

On 27 December 2016, COMELEC, through its Law Department, filed a *Manifestation*, praying that Protestant be required to pay the amount of Three Million Three Hundred Fifteen Thousand Seven Hundred Eight Five Pesos and Thirty-Six Centavos (P3,315,785.36) as stated in Resolution No. 16-17 of the Tribunal dated 22 November 2016 to cover the cost of the machines and equipment being retained by the COMELEC in his favor.

On 09 January 2017, counsel for Protestant filed a *Comment on Manifestation and Motion*, praying that the COMELEC's Motion, disguised as a Manifestation, be denied for lack of merit. On the same day, the Executive Committee of the Tribunal issued Resolution No. 16-26,⁵ requiring COMELEC to file a *Reply* to Protestant's *Comment on Manifestation and Motion* within five (5) days from receipt of the Resolution. COMELEC moved an additional period of

³Confirmed by the full Tribunal in Resolution No. 16-19 dated 01 December 2016.

⁴November 30, 2016, being a national holiday; Notice of Resolution, Rollo, Vol. V, p. 01876.

⁵Confirmed by the full Tribunal in Resolution No. 16-30 dated 26 January 2017.

ten (10) days from 17 January 2017 or until 27 January 2017 within which to file the required *Reply*⁶, which motion was granted by the Executive Committee of the Tribunal in Resolution No. 16-27 dated 17 January 2017.⁷ On 26 January 2017, COMELEC filed its *Reply (to Protestant's Comment to COMELEC Manifestation and Motion)*.

In his *Comment to Manifestation and Motion*, Protestant alleges that the Motion filed by COMELEC is not only improper but has no legal basis for the following reasons:

1. The circumstances narrated in the Manifestation of the COMELEC shows that the COMELEC personnel were grossly negligent;
2. The basic principle of relativity of contracts can only bind the parties who entered into it and cannot favor or prejudice a third person, even if he is aware of such a contract and has acted with knowledge thereof;
3. In any case, the Contract of Lease between COMELEC and Smartmatic-TIM is a void contract; considering that under its terms, the COMELEC abdicated its constitutional duties to administer and enforce the rules and regulations relative to the conduct of an election, and delegating the same to a foreign-controlled entity, Smartmatic-TIM; and
4. Smartmatic-TIM is in no position to insist on a rigid and strict interpretation of the Contract of Lease, considering that Smartmatic itself is in breach of Art. 7.3 of the Contract of Lease, in that the System furnished by Smartmatic failed to meet the minimum system capabilities mandated by R.A. 8436, Sec.7.

⁶*Motion for Extension of Time to File Reply* filed on 16 January 2017.

⁷Confirmed by the full Tribunal in Resolution No. 16-30 dated 26 January 2017.

In reply, the COMELEC argues that the COMELEC personnel were neither negligent nor grossly negligent as it was in fact Protestant who was negligent or grossly negligent. Records show that Protestant's *Urgent Clarificatory Manifestation and Motion* dated 27 November 2016 was filed on 28 November 2016, copy furnished the COMELEC via registered mail, through its Law Department only on 20 December 2016. Considering the urgency of Protestant's prayer for the modification of Resolution No. 16-17 dated 22 November 2016, Protestant should have resorted to personal delivery in furnishing COMELEC his *Urgent Clarificatory Manifestation and Motion* so that COMELEC could have filed its Comment and/or could have acted accordingly prior to 01 December 2016.

COMELEC claims that Protestant acted in bad faith when he deliberately served a copy of his *Urgent Clarificatory Manifestation and Motion* via registered mail instead of by personal delivery. It was, to COMELEC's mind, a clear strategy against COMELEC, attended with an intention to delay, which the COMELEC implores the Tribunal not to tolerate.

COMELEC further argues that Protestant cannot unilaterally declare that the Contract of Lease between COMELEC and Smartmatic-TIM is void; much more question the contract entered into by the parties and its interpretation, such course of action being a collateral attack. Prevailing law, rules and case law require Protestant to question the contract in a specific action instituted mainly for that purpose and/or directly via a proper formal action with the appropriate tribunal and not collaterally as in this case. It needs to be reiterated that the validity of the contract is not in issue in this case and therefore cannot be the subject of a valid argument.

COMELEC emphasizes that in consonance with Section 4(2) of Presidential Decree No. 1445, otherwise known as the Government Auditing Code of the Philippines, "*Government funds or property shall be spent or used solely for public purposes.*" Thus, government funds should not be spent in favor of one person, much less in favor of a senatorial candidate in the 09 May 2016 National and Local Elections.

Furthermore, COMELEC claims that in complying with what was required by the Tribunal, under an Order validly and timely received, the COMELEC cannot be faulted for asking recompense and reimbursement from the Protestant of the amount advanced and paid to the government supplier.

Thus, COMELEC prays that Protestant be ordered and directed to pay the COMELEC the amount stated in Resolution No. 16-17.

Rule 32 of the 2013 Rules of the Tribunal states:

“All other pleadings, motions and papers shall be filed with the Office of the Secretary of the Tribunal personally or by registered mail, in fifteen (15) clearly legible copies and must be accompanied by proof of service upon the adverse party or parties.

x x x

x x x

x x x

“Whenever practicable, the service and filing of pleadings, motions and other papers under this Rules shall be done personally. A resort to other modes must be accompanied by a written explanation why personal service was not practicable. A violation of this rule may be cause to consider the paper as not filed.”

In the case of *Rogelio Aberca, et al. vs. Maj. Gen. Fabian Ver, et al*, G.R. No. 166216, 14 March 2012, the Supreme Court laid down the rationale on why personal service is preferred, to wit:

“The Rules of Court has been laid down to insure the orderly conduct of litigation and to protect the substantive rights of all party litigants. It is for this reason that the basic rules on the modes of service provided under Rule 13 of the Rules of Court have been made mandatory and, hence, should be strictly followed. In *Marcelino Domingo v. Court of Appeals*,⁸ the Court wrote:

“Section 11, Rule 13 of the Rules of Court states:

⁸G.R. No. 169122, February 2, 2010, 611 SCRA 364-365.

SEC. 11. Priorities in modes of service and filing. Whenever practicable, the service and filing of pleadings and other papers shall be done personally. Except with respect to papers emanating from the court, a resort to other modes must be accompanied by a written explanation why the service or filing was not done personally. A violation of this Rule may be cause to consider the paper as not filed.

Section 11 is **mandatory**. In *Solar Team Entertainment, Inc. v. Judge Ricafort*⁹, the Court held that:

Pursuant x x x to Section 11 of Rule 13, service and filing of pleadings and other papers must, whenever practicable, be done personally and if made through other modes, the party concerned must provide a written explanation as to why the service or filing was not done personally. x x x

Personal service and filing are preferred for obvious reasons. Plainly, such should expedite action or resolution on a pleading, motion or other paper; and conversely, minimize, if not eliminate, delays likely to be incurred if service or filing is done by mail, considering the inefficiency of postal service. Likewise, personal service will do away with the practice of some lawyers who, wanting to appear clever, resort to the following less than ethical practices: (1) servicing or filing pleadings by mail to catch opposing counsel off-guard, thus leaving the latter with little or no time to prepare, for instance, responsive pleadings or an opposition; or (2) upon receiving notice from the post office that the registered parcel containing the pleading or other paper from the adverse party may be claimed, unduly procrastinating before claiming the parcel, or worse, not claiming it at all, thereby causing undue delay in the disposition of such pleading or other papers.¹⁰

⁹G.R. No. 132007, August 5, 1998.

¹⁰Emphasis and underlining supplied.

If only to underscore the **mandatory nature** of this innovation to our set of adjective rules requiring personal service whenever practicable, Section 11 of Rule 13 then gives the court the discretion to consider a pleading or paper as not filed if the other modes of service or filing were resorted to and no written explanation was made as to why personal service was not done in the first place. The exercise of discretion must, necessarily consider the practicability of personal service, for Section 11 itself begins with the clause 'whenever practicable.'

We thus take this opportunity to clarify that under Section 11, Rule 13 of the 1997 Rules of Civil Procedure, personal service and filing is the general rule, and resort to other modes of service or filing, the exception. Henceforth, whenever personal service or filing is practicable, in light of the circumstances of time, place and person, personal service or filing is **mandatory**. Only when personal service or filing is not practicable may resort to other modes be had, which must then be accompanied by a written explanation as to why personal service or filing was not practicable to begin with. In adjudging the plausibility of an explanation, a court shall likewise consider the importance of the subject matter of the case or the issues involved therein, and the prima facie merit of the pleading sought to be expunged for violation of Section 11. This Court cannot rule otherwise, lest we allow circumvention of the innovation introduced by the 1997 Rules in order to obviate delay in the administration of justice.

x x x x

x x x [F]or the guidance of the Bench and Bar, **strictest compliance with Section 11 of Rule 13 is mandated.** [Emphasis supplied.]”

The very title of the pleading under consideration, *Urgent Clarificatory Manifestation and Motion*, is by itself a clue as to how it should have been served

on the COMELEC. The importance of the subject matter, the urgency of the request, the amount of money involved as well as the remaining time before the obligation of COMELEC with Smartmatic-TIM attached made service of said *Urgent Clarificatory Manifestation and Motion* on the COMELEC by personal delivery imperative.

It must be emphasized that from 28 November 2016, when the pleading was filed with the Tribunal, there was effectively only one day left (29 November 2016) until the purchase option attached on 01 December 2016, as the 30th of November was a national holiday. Any prudent individual would have realized that the only effective mode of service under the circumstances was by personal delivery.

Notwithstanding, Protestant insisted on serving COMELEC a copy of the *Urgent Clarificatory Manifestation and Motion* via registered mail, knowing fully well that it was impossible for the pleading to reach COMELEC before 01 December 2016; thereby allowing the purchase option to attach also on the 106 VCMs, which Protestant prayed to be excluded in the *Urgent Clarificatory Manifestation and Motion*.

The explanation given in Protestant's "Written Explanation and Affidavit of Service" which is attached to his *Urgent Clarificatory Manifestation and Motion* is insufficient to excuse personal delivery. It reads:

"1. I am assigned to deliver, serve and file papers, pleadings and other documents for the above law office. However, considering the number of pleadings and other papers which require personal delivery, it is impracticable for the affiant to serve and file them all by hand."

Given that time was of the essence in this particular case, we see no reason why Protestant could not have served an advanced copy of his *Urgent Clarificatory Manifestation and Motion* via personal delivery to COMELEC. His messenger could have done this the next day, 29 November 2016, to ensure that the COMELEC was duly notified before 01 December 2016 of the said pleading. Protestant had done this several times with respect to pleadings filed with the Tribunal via registered mail in order to meet the deadlines, i.e., file with the

Tribunal at the earliest opportunity by personal delivery a copy of the pleading previously sent by registered mail.

A clear case in point was the *Manifestation* filed by registered mail on 18 November 2016, the due date, which was a Friday, a non-working day for the SET Secretariat under its Four-Day Workweek Schedule. Protestant lost no time in filing the following Monday, 21 November 2016, another *Manifestation*, to which he attached a copy of the mailed *Manifestation* as Annex "A". Protestant should have exercised the same care and caution with respect to the *Urgent Clarificatory Manifestation and Motion*, not only for his own protection and that of the COMELEC but more importantly, of the government itself.

From the foregoing, it is clear that it was Protestant who failed to exercise the diligence required of him under the circumstances. He failed to observe the mandatory nature of priorities in the modes of service of pleadings and should therefore suffer the consequences thereof.

In accordance with Rule 32 of the Rules of the Tribunal, the Tribunal considers the *Urgent Clarificatory Manifestation and Motion* of Protestant dated 27 November 2016 as not having been filed. The Tribunal further revokes and sets aside Resolution No. 16-18 dated 29 November 2016, pursuant to Rule 9, paragraph (f) of the Rules, which states:

"Rule 9. *Inherent Powers.*- The Tribunal has inherent powers, among others, to:

x x x

x x x

x x x

- f. Control its processes and amend its decisions, resolutions and orders to make them conformable to law and justice;".

The Tribunal finds discussion of the other issues raised by Protestant Tolentino unnecessary.

IN VIEW OF THE FOREGOING, the Tribunal resolves to:

- a. **EXPUNGE** from the records Protestant Tolentino's *Urgent Clarificatory Manifestation and Motion* dated 27 November 2016;
- b. **REVOKE** Resolution No. 16-18 dated 29 November 2016;
- c. **REQUIRE** the Commission on Elections to retain custody and possession of, and to safeguard and preserve six (6) Consolidated Canvassing System (CCS) Laptops, the forty-five (45) Vote Counting Machines (VCMs) enumerated in Protestant's *Manifestation* dated 18 November 2016 and the one hundred six (106) VCMs and their Secure Digital (SD) Cards enumerated in Protestant's *Motion* dated 18 November 2016; and
- d. **REQUIRE** Protestant Tolentino to deposit with the Tribunal within fifteen (15) days from receipt of this Resolution the amount of Two Million Two Hundred One Thousand Six Hundred Sixty Two and 40/100 Pesos (Php2,201,662.40), representing the cost of the retention by the Commission on Elections of the 106 Vote Counting Machines enumerated in his *Motion* dated 18 November 2016. Any right, if any, of Protestant Tolentino arising from his payment of the said amount shall be threshed out between Protestant Tolentino and COMELEC.

Upon failure of Protestant Tolentino to seasonably comply with this Resolution, the Tribunal may dismiss the instant electoral protest or take such other action as it may deem equitable under the premises.

SO ORDERED.

02 March 2017.



ANTONIO T. CARPIO
Senior Associate Justice
Chairperson



TERESITA J. LEONARDO-DE CASTRO
Associate Justice
Member



LUCAS P. BERSAMIN
Associate Justice
Member



CYNTHIA A. VILLAR
Senator
Member



GRACE L. POE
Senator
Member



MA. LOURDES "NANCY" S. BINAY
Senator
Member



RICHARD J. GORDON
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FRANKLIN M. DRILON
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ANTONIO "SONNY" F. TRILLANES IV
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