



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. 16-141

Before the Tribunal is a *Motion for the Return of Payments* dated 01 October 2018, filed by Protestant Francis N. Tolentino on 03 October 2018, praying that the amount of Three Million Three Hundred Fifteen Thousand Seven Hundred Eighty-Five & 36/100 Pesos (P3,315,785.36) be returned to him.

It may be recalled that Resolution No. 16-01, dated 07 July 2016, directed the Commission on Elections (COMELEC) "to safeguard and preserve the integrity of all ballot boxes, their contents and keys, list of voters with voting records, books of voters and other documents and materials or paraphernalia used or accomplished in connection with the 09 May 2016 elections for the office of Senator of the Philippines, as well as data storage devices containing electronic data evidencing the conduct and the results of election, which are in their safekeeping and custody, as the case may be; and to hold all such materials/documents subject to further orders and instructions of the Senate Electoral Tribunal." The coverage of the protection order was modified in Resolution No. 16-06 dated 15 August 2016, excluding therefrom the hardware and suppletory components of the Vote Counting Machines (VCMs) and Consolidation and Canvassing System (CCS) laptops which do not contain any election data.

Then COMELEC Commissioner Christian Robert S. Lim, Project Director of the 2016 Automated Election System (AES) Project, in a letter dated 01 September 2016, informed the Tribunal that Protestant Tolentino may be required to pay P420,870,615.20 for the 20,263 Vote Counting Machines (VCMs) subject of the Protest and P12,596,025.84 for the 32 Consolidation and Canvassing System (CCS) laptops or a total of P433,466,641.04 should these equipment be still in the COMELEC's possession by 01 December 2016. This was pursuant to Section 6.9 of the AES Contract between COMELEC and Smartmatic-TIM which provided that "all goods still in the possession of the 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."¹

Relative thereto, the Tribunal, in Resolution No. 16-15 dated 09 November 2016, required Protestant Tolentino to manifest to the Tribunal his intended course of action with respect to the equipment in the custody of the COMELEC by reason of his election protest. He was further required to furnish the COMELEC a copy of his Manifestation.

In his *Manifestation* dated 18 November 2016, he informed the Tribunal that he intends to have the COMELEC retain custody and possession of forty-five (45) VCMs and six (6) CCS laptops. In his *Motion*, also dated 18 November 2016, Protestant Tolentino prayed that the Tribunal direct the COMELEC to safeguard one hundred six (106) VCMs and their Secure Digital (SD) cards.

In Resolution No. 16-17 dated 22 November 2016, the Tribunal directed the COMELEC to retain custody and possession of, and to safeguard and preserve six (6) CCS laptops, the forty-five (45) VCMs enumerated in his *Manifestation* and the one hundred six (106) VCMs and their SD cards enumerated in his *Motion*, subject to the payment by Protestant of additional cash deposit to cover the costs of the said machines and equipment; and required Protestant Tolentino to deposit

¹ Par. 6.9 of the Contracts of Lease with Option to Purchase.

with the Tribunal the amount of Three Million Three Hundred Fifteen Thousand Seven Hundred Eighty-Five & 36/100 Pesos (P3,315,785.36).

Records show that Protestant Tolentino initially deposited with the Tribunal the amount of One Million One Hundred Fourteen Thousand One Hundred Twenty Two and 96/100 Pesos (P1,114,122.96). Thereafter, the Protestant, in Resolution No. 16-37 dated 02 March 2017, was required to make further deposit in this wise:

“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 (P2,201,662.40), representing the cost of the retention by the COMELEC 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.” (underscoring supplied)

Protestant Tolentino’s *Motion for Reconsideration*² was denied in Resolution No. 16-49, which also reiterated the directive to deposit the aforesaid amount. The Protestant deposited the additional amount of P2,201,662.40 on 13 June 2017.

In his *Motion for Return of Payments*, Protestant Tolentino alleged that his payment was intended to acquire the machines and equipment in a way of sale.³ He anchored his position on the express provision of Resolution No. 16-17 dated 22 November 2016 which stated that the amount of P3,315,785.36 represents the cost of the machines and equipment.⁴ He lamented that after completing the full payment, Protestant never had the opportunity to enjoy ownership rights over the subject machines and equipment. He did not have the chance to possess them as the same remain under the custody of the COMELEC. He cannot even access them without permission from the COMELEC.⁵

² Dated 15 March 2017.

³ Motion for Return of Payments, par. 6.

⁴ *Ibid.*, par. 7.

⁵ *Ibid.*, par. 5.

Protestant further pointed out that the purchase of the said machines and equipment was in furtherance of his protest. Since free access to, use and enjoyment of the same, were denied, if not limited, forensic examinations of the hardware could not be done. Considering that the said machines and equipment were not utilized and would no longer be of use in the instant protest, the complete payment made by the Protestant did not bear its purpose.⁶

Acting on the *Motion*, the Executive Committee of the Tribunal issued Resolution No. 16-135 dated 24 October 2018,⁷ requiring the COMELEC to comment thereon within ten (10) days from receipt of the Resolution.

In its *Comment* dated 31 October 2018, which was filed with the Tribunal on 05 November 2018, COMELEC prayed that the Protestant's motion be denied for lack of merit. COMELEC argued, among others, that: (a) Protestant Tolentino was required to pay COMELEC for the cost it incurred in retaining the election paraphernalia and not the payment of the cost of the election paraphernalia itself;⁸ (b) There was no contract of sale, whether express or implied, between COMELEC and Protestant Tolentino, such that there will never be transfer of ownership over the said election paraphernalia to Protestant;⁹ (c) Notwithstanding COMELEC's ownership of the subject election paraphernalia, it has no authority to transfer the ownership thereof to the Protestant as disposal of government assets must be in accordance with law;¹⁰ (d) Although Resolution No. 16-17 stated that the amount represents the cost of the machines and equipment, this was clarified in Resolution No. 16-37 which stated that the amount represents the cost of the retention by the COMELEC of the VCMs.¹¹

The COMELEC emphasized that it was constrained to retain the six (6) CCS laptops and one hundred fifty-one (151) units of VCMs in compliance with Resolution No. 16-17 and paid the corresponding amount thereof to Smartmatic.

⁶ *Ibid.*, pars. 10 and 11.

⁷ Confirmed by the Full Tribunal in Resolution No. 16-139 dated 22 November 2018.

⁸ COMELEC's Comment, par. 11.

⁹ *Ibid.*, par. 15.

¹⁰ *Ibid.*, pars. 20 and 21.

¹¹ *Ibid.*, pars. 28 and 29.

Thus, the amount of Three Million Three Hundred Fifteen Thousand Seven Hundred Eighty-Five & 36/100 Pesos (P3,315,785.36) which was deposited by Protestant Tolentino with the Tribunal belongs to the government.¹²

Considering the arguments raised by the COMELEC, the Executive Committee of the Tribunal required Protestant Tolentino to file a reply thereto within five (5) days from receipt of Resolution No. 16-136 dated 13 November 2018.¹³

In his *Reply* dated 19 November 2018,¹⁴ Protestant Tolentino argued among others that "(a) he agreed to pay the subject machines and equipment with the understanding that the transaction would be by purchase as the same would be used for forensic examination in the instant proceedings¹⁵; (b) the consent given by him in the transaction was within the purview of Resolution No. 16-17, that is, that he was paying the cost of the machines and equipment so that the same would be used in the instant proceedings¹⁶, however, the subject machines and equipment were not used for reasons beyond the control of the Protestant and the Tribunal and the same would no longer be used.¹⁷

Protestant Tolentino also cited the fact that no such exaction or charges were imposed by the Presidential Electoral Tribunal upon Protestant Ferdinand "Bongbong" R. Marcos, Jr., in PET Case No. 005 entitled Ferdinand "Bongbong" R. Marcos, Jr., vs. Maria Leonor "Leni Daang Matuwid" G. Robredo, and questioned why should Protestant Tolentino be treated differently.¹⁸

The Protestant pointed out that to have the entire cost of the subject machines and equipment paid as "retention cost", notwithstanding that the same was not used and would no longer be used in the proceedings is tantamount to an onerous and unconscionable imposition of charges and fees and would constitute a violation of the right of herein Protestant to free access and due process.¹⁹ He added that the powers and discretion of the Tribunal should not be subordinated

¹² *Ibid.*, pars. 30, 31 and 32.

¹³ Confirmed by the Full Tribunal in Resolution No. 16-139 dated 22 November 2018.

¹⁴ Filed on 20 November 2018.

¹⁵ Reply, par. 2.

¹⁶ *Ibid.*, par 4.

¹⁷ *Ibid.*, p. 7.

¹⁸ *Ibid.*, p. 5.

¹⁹ *Ibid.*, pp.3 and 4.

to Section 6.9 of the contract between COMELEC and Smartmatic; and that the Tribunal, as the sole judge of the election case at hand and having inherent powers of control over the proceedings, should not be compelled to enforce and uphold Section 6.9 of the said contract.²⁰

Protestant Tolentino claimed that the exaction based on the provision of par. 6.9 of the above-mentioned contract between COMELEC and Smartmatic-TIM Corporation is illegal and invalid because said contractual provision bestows upon the COMELEC the sole discretion whether or not to require the Protestant to shoulder the cost, hence, constitutive of an unlawful intrusion upon the powers, prerogative and discretion of the Tribunal;²¹ and, even assuming for the sake of argument that such exercise is allowed, Section 6.9 does not provide for any parameters or measures on how the COMELEC should exercise such discretion, thus, Section 6.9 should not be enforced or implemented.²²

Protestant Tolentino likewise claimed that “the fact that COMELEC extended the option to purchase from one year until 12 January 2018 and eventually exercised the option to purchase and paid for all the subject machines and equipment, debunks the necessity for demanding any retention costs, as indeed, the COMELEC did not suffer damages by way of retention costs because it eventually purchased the subject machines and equipment.”²³

The Tribunal, thru a letter dated 26 November 2018, sought clarification from the COMELEC if indeed the subject VCMs and CCS laptops were paid for with government funds when the COMELEC exercised its option to purchase on 12 January 2018.

In response thereto, the COMELEC Law Department filed a *Manifestation* dated 29 January 2019.²⁴ Citing Minute Resolution No. 18-1274,²⁵ COMELEC reiterated its position that the Three Million Three Hundred Fifteen Thousand

²⁰ *Ibid.*, p.5.

²¹ *Ibid.*, p. 6.

²² *Ibid.* p. 7.

²³ *Id.*

²⁴ Filed with the Tribunal on 04 February 2019.

²⁵ Excerpt from the Minutes of the Regular *En Banc* Meeting of the Commission on Elections held on December 19, 2018.

Seven Hundred Eighty-Five & 36/100 Pesos (P3,315,785.36) which was deposited by Protestant Tolentino with the Tribunal, represents the cost of the retention by the COMELEC, and thus belongs to the government. The aforesaid COMELEC Minute Resolution quoted *in toto* the contents of the COMELEC *Comment* dated 31 October 2018.

From all the foregoing, it would appear that the core of the controversy is Section 6.9 of the *Contract of Lease with Option to Purchase* between COMELEC and Smartmatic-TIM Corporation aforequoted.

Notwithstanding the arguments presented by Protestant Tolentino showing the alleged illegality and/or unenforceability of Section 6.9 of the contract between COMELEC and SMARTMATIC-TIM Corporation, it is beyond the jurisdiction of the Tribunal to interpret the controversial provision in the contract. Under existing rules, the power of interpreting contracts and passing on its validity and enforceability is within the exclusive original jurisdiction of the regular courts.²⁶ Any decision, resolution or action which the Tribunal may take touching on the illegality and/or unenforceability of the disputed provision of the contract would be wanting of any legal basis.

In two (2) earlier resolutions it issued on the matter, the Tribunal has consistently desisted in ruling on any concerns relative to the disputed provision of the contract between COMELEC and Smartmatic-TIM, especially on the issue of ownership over the machines as a result of Protestant's payment. The Tribunal declared in Resolution No. 16-37²⁷ that "*Any right, if any, of Protestant Tolentino arising from his payment of the said amount shall be threshed out between Protestant Tolentino and COMELEC.*" Likewise, in Resolution No. 16-53,²⁸ the Tribunal stated that "*the Contract relative to the Vote Counting Machines (VCMs), Consolidated Canvassing System (CCS) laptops, and other paraphernalia was between the COMELEC and Smartmatic-TIM Corporation. As such, concerns relative thereto, particularly the issue of ownership, should be properly addressed to the Commission on Elections.*"

²⁶ Batas Pambansa Blg. 129 otherwise known as "The Judiciary Reorganization Act of 1980", Section 19.

²⁷ Dated 02 March 2017.

²⁸ Dated 28 June 2017.

While it may be true that the Tribunal, in Resolution No. 16-17, used the term *costs of the said machines and equipment*, the Tribunal was referring to the cost which COMELEC needed to pay Smartmatic-TIM Corporation under the *Option to Purchase (OTP) Clause* of the contract.

During its meeting on 02 March 2017, the Tribunal's attention was drawn to the letter of Commissioner Lim specifying therein the lease price per VCM unit which was paid by the COMELEC to Smartmatic²⁹ and the OTP price per unit which must be paid to Smartmatic once OTP clause becomes operative.³⁰ Clearly, part of the costs of the machines and equipment were paid for by the COMELEC in the form lease or rental fee. Thus, the amount paid by the Protestant did not cover the full costs of the machines and equipment. It was in this context that the Tribunal eventually used the term "cost of the retention by the COMELEC" in its Resolution No. 16-37 dated 02 March 2017.

When the disputed provision in the contract became operative on 01 December 2016, the machines and equipment which were retained by the COMELEC pursuant to the request of Protestant Tolentino were considered sold to the COMELEC, with the latter requiring the Protestant to shoulder the costs under the option to purchase.

The provisions of par. 6.9 of the *Contract of Lease with Option to Purchase between COMELEC and Smartmatic-TIM Corporation* remain valid and effective unless declared void by a proper court. Prevailing law, rules and jurisprudence require that a specific action be instituted in the proper forum to question the validity of the contract entered into by the parties. The alleged illegality and/or unenforceability of the provisions of par. 6.9 of the contract cannot be a valid ground for the Tribunal to withhold the turn-over to COMELEC of the amount deposited by the Protestant. Protestant Tolentino is not without recourse as he can still question the validity of the disputed provision by availing of the proper remedies, even after the amount is released to the COMELEC.

²⁹ Php37,848.00.

³⁰ Php20,770.40.

IN VIEW OF THE FOREGOING, the Tribunal resolves to:

- a. **DENY** Protestant's *Motion for the Return of Payments* dated 01 October 2018, involving the amount of Three Million Three Hundred Fifteen Thousand Seven Hundred Eighty-Five and 36/100 Pesos (P3,315,785.36) for lack of merit;
- b. **DIRECT** the Secretary of the Tribunal to cause the immediate turn-over to the Commission on Elections the amount of Three Million Three Hundred Fifteen Thousand Seven Hundred Eighty-Five and 36/100 Pesos (P3,315,785.36);
- c. **NOTE** the *COMMENT (on Protestant Francis N. Tolentino's Motion for the Return of Payments)* dated 24 October 2018 filed by the Commission on Elections;
- d. **NOTE** the *REPLY (to COMELEC's Comment dated 31 October 2018)* dated 19 November 2018 filed by Protestant Tolentino; and
- e. **NOTE** the *MANIFESTATION* of the Commission on Elections dated 29 January 2019.

SO ORDERED.
21 February 2019.



ANTONIO T. CARPIO
Senior Associate Justice
Chairperson



MARIANO C. DEL CASTILLO
Associate Justice
Member



MARVIC MARIO VICTOR F. LEONEN
Associate Justice
Member



RICHARD J. GORDON
Senator
Member



MARIA LOURDES "NANCY" S. BINAY
Senator
Member

JOEL VILLANUEVA
Senator
Member

EMMANUEL "MANNY" D. PACQUIAO
Senator
Member

FRANKLIN M. DRILON
Senator
Member

ANTONIO "SONNY" F. TRILLANES IV
Senator
Member