



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. 16-143

Before the Tribunal is a *Motion for Reconsideration* filed through registered mail on 04 March 2019 by Protestant Francis N. Tolentino and received by the Tribunal on 08 March 2019, seeking a reversal of Resolution No. 16-141¹ which denied for lack of merit Protestant's *Motion for the Return* of the amount of Three Million Three Hundred Fifteen Thousand Seven Hundred Eighty-Five and 36/100 Pesos (₱3,315,785.36) representing the payment for the retention by the Commission on Elections (COMELEC) of one hundred fifty-one (151) Vote Counting Machines (VCMs) and six (6) Consolidation and Canvassing System (CCS) laptops.

Protestant Tolentino invoked the inherent power of the Tribunal to "*control its processes and amend its decisions, resolutions and orders to make them conformable to law and justice,*"² and presented the following arguments as bases for his *Motion for Reconsideration*:

- a) Protestant Tolentino was compelled to pay the amount pursuant to the directives of the Tribunal as Resolution No. 16-37 stipulated that upon failure of Protestant to seasonably comply, the election protest may be dismissed or the Tribunal may take such other action as it may deem equitable under the premises;

¹ Dated 21 February 2019.

² Motion for Reconsideration, p. 1.

- b) Protestant requested the subject machines and equipment with intent and view that the same will be utilized for forensic audit but the same were not used for reasons imputable to the COMELEC and not to the Protestant;
- c) The consideration for the amount paid by Protestant, which is purposely for the use of the machines and equipment, was never delivered by the COMELEC; and
- d) To give said funds to the COMELEC which did not deliver what is incumbent upon it would result to plain and obvious unjust enrichment.

Further, Protestant alleged that the Presidential Electoral Tribunal (PET), in the case of “Ferdinand ‘Bongbong’ R. Marcos, Jr., vs. Maria Leonor ‘Leni Daang Matuwid’ G. Robredo” (PET Case No. 005), did not impose upon the Protestant any exaction or charges for the expenses incurred by the COMELEC in retaining machines and equipment of the same nature. Protestant, thus, posited that if the PET has the discretion to have such a resolve, then the same could be done by the SET.³

Protestant Tolentino likewise raised the following issue with respect to the Option to Purchase clause of the Contract of Lease between COMELEC and Smartmatic-TIM, which is quoted, thus⁴:

“x x x If the subject machines and equipment were considered as sold by virtue of the provisions of Sec. 6.9., why would COMELEC buy the same units again from SMARTMATIC TIM, Inc. on 12 January 2018? xxx If the funds paid by Protestant Tolentino were already considered as government funds, why would the same units be considered as part of the Deed of Sale executed between COMELEC and SMARTMATIC TIM, Inc.?”

³ *Ibid*, p. 8.

⁴ *Ibid*, pp. 9-10.

The COMELEC owes this Honorable Tribunal and Protestant Tolentino candor. The Option to Purchase clause appeared to have been extended. This is implied from the fact that the option expired on 01 December 2017 while the sale was consummated on 12 January 2018.”

We DENY the *Motion for Reconsideration*.

A perusal thereof would show that the issues raised therein were the same issues that were considered by the Tribunal when it issued Resolution No. 16-141. Protestant Tolentino failed to convince the Tribunal to reverse its ruling in the said resolution which is the subject of the *Motion for Reconsideration*.

Be that as it may, the instant *Motion* gives the Tribunal an opportunity to refute Protestant's notion of the nature of the cash deposit being required under the 2013 Rules of the Tribunal.

The Protestant maintains that the cash deposit he made to the Tribunal was in the nature of an advance payment in a sale transaction. He relies on the pronouncement of the Supreme Court in *Abeto v. People*⁵ that “*an advance payment is subject to the disposal of the vendor. If the transaction fails, the obligation to return the advance payment ensues x x x.*”

Undoubtedly, there was no contract of sale between Protestant Tolentino and the Tribunal. The COMELEC likewise maintained that it has no contract of sale with the Protestant. The Tribunal, in Resolution No. 16-141, had recognized the COMELEC's position that the amount required to be deposited by the Protestant did not cover the full costs of the machines and equipment. The deposit made by Protestant Tolentino covered only the cost which COMELEC needed to pay Smartmatic-TIM under the Option to Purchase clause of their contract.

⁵ G.R. No. L-3935, 21 December 1951.

We direct Protestant's attention to the provisions of Rule 36 of the SET Rules, which clearly states:

"The cash deposits shall be applied to the payment of all expenses not programmed into or provided for in the Tribunal's budget which may be necessary or incidental to the resolution and adjudication of the protest, counter or cross protest, or petition for *quo warranto*, including, but not limited to, transportation and storage of the ballot boxes, and election documents and paraphernalia as well as the compensation of the Head Revisors/Head Correctors.
x x x"

The cost of retaining the subject machines and equipment was not provided for in the Tribunal's budget by the General Appropriations Act. The COMELEC, on the other hand, had emphasized that it was constrained to pay the corresponding amount to Smartmatic-TIM based on the provision of par. 6.9 of their contract. Invoking Section 4(2) of Presidential Decree No. 1445, otherwise known as the Government Auditing Code of the Philippines, COMELEC asserted that government funds should be spent or used solely for public purposes, not in favor of one person, much less in favor of a senatorial candidate.⁶ As such, COMELEC maintained that 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.

Indeed, the Tribunal has retained the amount deposited by the Protestant in its safekeeping, not because it has discretion to return the same to the Protestant, as he posited, but only because the Tribunal intended to give the Protestant and the COMELEC ample time to address their concerns relative to the issue of ownership over the machines and equipment, and the disputed provisions of the contract of lease, as well.

⁶ COMELEC's Reply (To Protestant's Comment to COMELEC's Manifestation and Motion) dated 25 January 2017.

As to the alleged non-imposition of similar charges by the PET, Minute Resolution No. 16-0734 of the COMELEC dated 29 November 2016 is responsive thereto. Said resolution states: “x x x *the Presidential Electoral Tribunal (PET) in its November 8, 2016 Resolution issued an order excluding from its Precautionary Protection Order (PPO) election materials and peripherals which do not contain election results data, among which, are the VCMs and its accessories.*”⁷ Clearly, there was no order for the COMELEC to retain VCMs relative to the PET case. *Ergo*, no retention cost.

Further, records show that in the COMELEC Minute Resolution No. 16-0734 aforementioned, the Commission *En Banc* had approved the request of Commissioner Christian Robert Lim, then Project Director of the Automated Election System (AES), to return to Smartmatic-TIM, “*the Ninety-Seven Thousand Three Hundred Sixty-Six (97,366) leased units of Optical Mark Reader (OMR) Machines and the Election Management System (EMS), including accessories not purchased by the Commission, less the One Hundred Fifty One (151) units being ordered retained by the Senate Electoral Tribunal (SET), x x x.*” (Emphasis supplied).

Again, the Protestant is raising an issue as regards the AES contract, alleging that the COMELEC was able to extend the period to exercise the Option to Purchase notwithstanding the expiration thereof. To reiterate, issues concerning the contract between COMELEC and Smartmatic-TIM is beyond the jurisdiction of the Tribunal. Under existing rules and jurisprudence, the same is within the exclusive jurisdiction of the regular courts.

Similarly, the issue as to whether the 151 machines were bought again by the COMELEC from Smartmatic-TIM or were part of the Deed of Sale executed on 12 January 2018 between COMELEC and Smartmatic-TIM should be raised by the Protestant directly with the COMELEC.

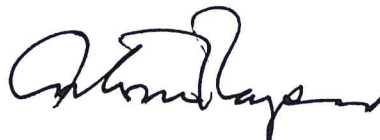
⁷ Excerpts from the Minutes of the Regular *En Banc* meeting of the COMELEC held on November 29, 2016 which as per SET records, a copy was furnished to Protestant’s counsel by registered mail on 23 December 2016.

IN VIEW OF THE FOREGOING, the Executive Committee of the Tribunal resolves to:

1. **DENY** Protestant's *Motion for Reconsideration* of Resolution No. 16-141 dated 21 February 2019 for lack of merit; and
2. **DIRECT** the Financial Management Service of the Tribunal to immediately 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).

SO ORDERED.


06 May 2019.



ANTONIO T. CARPIO
Senior Associate Justice
Chairperson



MARIANO C. DEL CASTILLO
Associate Justice
Member



MARVIC MARIO VICTOR F. LEONEN
Associate Justice
Member