

EN BANC

P.E.T. Case No. 005 - FERDINAND “BONGBONG” R. MARCOS, JR.,
protestant, versus MARIA LEONOR “LENI DAANG MATUWID” G.
ROBREDO, protestee.

Promulgated:

February 16, 2021

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J. Caguioa - Papa-Gombis

SEPARATE CONCURRING OPINION

CAGUIOA, J.:

The Protest lives or dies by the results of the determination under Rule 65 of the [Presidential Electoral Tribunal] Rules. Protestant is bound by his choice of pilot provinces. The Tribunal cannot accommodate protestant at the expense of violating its own rules. Protestant therefore has only himself to blame as the results of the revision and appreciation of millions of ballots in his three (3) pilot provinces only lead to one conclusion: the dismissal of his Protest.¹

These were the concluding words in my Dissenting Opinion to the Tribunal’s Resolution dated October 15, 2019. In the instant Decision, I maintain the same position. Accordingly, I fully concur with the *ponencia* in dismissing the entire Protest.

I write this Separate Concurring Opinion to stress that: 1) following Rule 65 of the 2010 Rules of the Presidential Electoral Tribunal² (PET Rules), the Protest should be dismissed for protestant Ferdinand “Bongbong” R. Marcos, Jr.’s (protestant) failure to make out a case using his pilot provinces; 2) a dismissal under Rule 65 applies to the whole Protest, including protestant’s third cause of action; 3) the PET Rules, specifically Rule 65, still apply in cases of annulment of elections contemplated in *Abayon v. House of Representatives Electoral Tribunal (HRET)*;³ and 4) *Abayon*’s strict requirements, as applied to protestant’s allegations, show that his third cause of action cannot be considered an annulment of elections but is essentially a petition for declaration of a failure of elections.

¹ J. Caguioa, Dissenting Opinion in P.E.T. Case No. 005, *Marcos, Jr. v. Robredo*, October 15, 2019, p. 7.
² A.M. No. 10-4-29-SC, May 4, 2010.
³ G.R. No. 222236 & 223032, May 3, 2016, 791 SCRA 242.

The Protest should be dismissed for protestant's failure to make out a case using his pilot provinces.

Rule 65 of the PET Rules provides for the initial determination of the merit of the protest through the examination of ballots and proof in three pilot provinces designated by protestant that best exemplify the frauds or irregularities raised in his Protest, thus:

RULE 65. Dismissal; when proper. – The Tribunal may require the protestant or counter-protestant to indicate, within a fixed period, the province or provinces numbering not more than three, best exemplifying the frauds or irregularities alleged in his petition; and the revision of ballots and reception of evidence will begin with such provinces. If upon examination of such ballots and proof, and after making reasonable allowances, the Tribunal is convinced that, taking all circumstances into account, the protestant or counter-protestant will most probably fail to make out his case, the protest may forthwith be dismissed, without further consideration of the other provinces mentioned in the protest.

The preceding paragraph shall also apply when the election protest involves correction of manifest errors. (R63) (Underscoring supplied)

As early as the Preliminary Conference Order, the Tribunal already explained the nature of the proceedings under Rule 65 of the PET Rules, as follows:

Rule 65 provides the Tribunal with a *litmus test* for protestant's grounds as raised in his Protest. Thus, protestant is given the opportunity to designate three provinces **which best exemplify** the frauds or irregularities raised in his Protest. These provinces constitute the “test cases” by which the Tribunal will make a determination as to whether it would proceed with the Protest — that is, retrieve and revise the ballots for all the remaining protested clustered precincts — or simply dismiss the Protest for failure of the protestant to make out his case.⁴ (Emphasis and underscoring supplied)

It was with this clear and unambiguous purpose that the Tribunal cumbersomely retrieved thousands of ballot boxes from the three pilot provinces chosen by protestant, meticulously re-counted millions of ballots, and painstakingly ruled on each and every objection and claim of the parties on these ballots.⁵ Based on the final tally after revision and appreciation of the votes in the pilot provinces, protestee Maria Leonor “Leni Daang Matuwid” G. Robredo (protestee) not only maintained, but even widened her lead with 14,436,337 votes over protestant Marcos who obtained 14,157,771 votes. Stated differently, instead of narrowing the margin of votes between protestant and protestee, the revision and appreciation of the votes in the pilot

⁴ *Rollo*, Vol. XXXII, p. 24591.

⁵ P.E.T. Case No. 005 is the first and only election protest before the Tribunal in which the recount, revision and appreciation process of the pilot provinces were successfully concluded.



provinces even led to the widening of the margin of votes from 263,473 to 278,566 in favor of protestee.

To reiterate, in order to proceed with the Protest, protestant should have been able to show reasonable recovery from his designated pilot provinces. Yet, far from doing so, the results of the revision and appreciation proceedings in the pilot provinces established that protestee increased her lead over protestant. Given this, the entire Protest should be dismissed for protestant's failure to make out a case based on his chosen pilot provinces.

As I had intimated in my Dissenting Opinion to the Tribunal's October 15, 2019 Resolution, Rule 65 is plain in its wording and no legal acrobatics are needed to decipher its meaning.⁶ It speaks of indicating three provinces "best exemplifying" the frauds and irregularities alleged in the Protest, and the revision and appreciation of ballots and/or reception of evidence will begin with such provinces. In other words, protestant must show through his three (3) chosen pilot provinces that his Protest has merit; otherwise, the Tribunal may dismiss the Protest without further consideration of the other provinces mentioned in his Protest.

Protestant simply had to demonstrate to the Tribunal, through recovery of votes in his chosen pilot provinces, that he would most likely overcome protestee's lead. It was incumbent upon protestant to show through the three (3) pilot provinces that the margin between him and protestee had decreased to such an extent that would convince the Tribunal to consider the rest of the protested precincts.

Despite the foregoing, the opposite was achieved, to the detriment of protestant's cause. To emphasize once more, the numbers irrefutably show that instead of narrowing the margin of votes between protestant and protestee, the margin even widened from 263,473 to 278,555.

As the lead of protestee increased after the revision and appreciation proceedings in the pilot provinces, which protestant himself designated as best exemplifying the grounds in his Protest, it is clear that protestant will most likely fail to make out his case even if the rest of the protested provinces were considered. Having failed to hurdle the requirement in Rule 65, the inevitable conclusion is that the Protest must be dismissed.

Following Rule 65, the dismissal involves the whole protest, including protestant's third cause of action.

⁶ J. Caguioa, Dissenting Opinion in *Marcos, Jr. v. Robredo*, supra note 1, at 2.



Proceeding from the foregoing, protestant's failure to make out a case through his three (3) pilot provinces affects all causes of action in his Protest.

The use of pilot provinces, which is common among electoral tribunals, has an underlying wisdom and public purpose. As far back as the 1992 PET Rules, the public interest involved in the speedy termination of election contests had been emphasized. In fact, the PET Rules from 1992 to 2005, and until 2010 have consistently affirmed the principle that the rules shall be liberally construed to achieve a just, expeditious and inexpensive determination and disposition of every election contest filed before the tribunal. The requirement of the three pilot provinces under Rule 65 aids the Tribunal in achieving this goal.

As I had stated in my Dissenting Opinion, the Protest should already have been dismissed then – and protestant has only himself to blame for his failure to surmount the litmus test provided under Rule 65 of the PET Rules:

The dismissal of the protest for protestant's failure to make out a case under Rule 65 is not because of convenience. Indeed, given the divisiveness of elections, the purpose of an initial determination is to weed out protests that have no basis, most especially for a protest involving a national position. Given the massive logistical and administrative concerns, as well as the significant government resources and costs involved in an election protest for the national positions of President and Vice President, the Tribunal is only to proceed with the entire protested precincts and/or provinces if protestant is able to show to the Tribunal the need to look into the other provinces. On the other hand, if protestant fails to make out a case, the Tribunal must dismiss the Protest.

This is necessitated also by the fact that the choice of the pilot provinces was protestant's sole unfettered choice. He could have chosen any three provinces in any of his causes of action. In fact, his choice was not limited to three provinces for a particular cause of action. He could have chosen one province for his second cause of action and two provinces for his third cause of action, or vice versa. He could have, in fact, opted to limit the three provinces to his third cause of action. The permutations are numerous and the decision as to which permutation would best exemplify his cause rested solely on protestant. The only limitation was the number of pilot provinces — **not more than three**. That protestant, the astute politician that he is, and represented by a well-recognized election lawyer, chose three provinces for his second cause of action which were all known bailiwicks of protestee, was his own legal gamble.

This Protest is a thorny and divisive issue that is of paramount importance to the nation, not just to the parties. And this is where the numbers are decisive. Numbers do not hold any feelings or political leanings. Numbers do not lie. They state things simply as they are. And when the numbers reveal a definite conclusion, the Tribunal would do a disservice to the public and to the nation not to heed the conclusion they provide. The majority cannot turn a blind eye to the numbers, when the figures here confirm that protestee indeed won by the slimmest of margins. The numbers also show that even with the provinces that protestant himself



chose to be the ones that would best exemplify his Protest, the margin widened.⁷

To recall, the Tribunal, with the conformity of protestant, categorized his two remaining causes of action after the dismissal of the first one as follows:

Second Cause of Action - Revision and Recount

Revision and recount of the paper ballots and/or the ballot images as well as an examination, verification, and analysis of the voter's receipts, election returns, audit logs, transmission logs, the lists of voters, particularly the EDCVL, and VRRs, the books of voters and other pertinent election documents and/or paraphernalia used in the elections, as well as the automated election equipment and records such as the VCMs, CCS units, SD cards (main and backup), and the other data storage devices containing electronic data and ballot images in ALL of the 36,465 protested clustered precincts pursuant to Rules 38 to 45 of the 2010 PET Rules; and

Third Cause of Action - Annulment of Elections

Annulment of election results for the position of Vice President in the provinces of Maguindanao, Lanao del Sur and Basilan, on the ground of terrorism; intimidation and harassment of voters as well as pre-shading of ballots in all of the 2,756 protested clustered precincts that functioned in the aforesaid areas.⁸

When protestant chose his pilot provinces, he had complete autonomy to select any province and he could have identified which cause of action to use on any such province. Now that he failed to achieve his desired result, he cannot now escape the dismissal of his entire Protest which was the direct result of his own legal tactic.

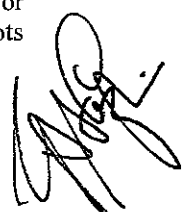
This notwithstanding, protestant claims that pursuant to *Abayon*, a cause of action on the annulment of elections can stand on its own, and is not dependent on the cause of action involving the recount and revision of ballots.⁹ It is his stance that according to *Abayon*, a dismissal under Rule 37¹⁰

⁷ Id. at 6.

⁸ P.E.T. Case No. 005, *Marccs, Jr. v. Robredo*, October 15, 2019, p. 18.

⁹ *Ponencia*, p. 14.

¹⁰ **RULE 37. Post-Revision Determination of the Merit or Legitimacy of Protest Prior to Revision of Counter-Protest; Pilot Precincts; Initial Revision.** — Any provision of these Rules to the contrary notwithstanding, as soon as the issues in any contest before the Tribunal have been joined, the protestant, in case the protest involves more than 50% of the total number of precincts in the district, shall be required to state and designate in writing within a fixed period at most, twenty-five (25%) percent of the total number of precincts involved in the protest which said party deems as best exemplifying or demonstrating the electoral irregularities or fraud pleaded by him; and the revision of the ballots or the examination, verification or re-tabulation of election returns and/or reception of evidence shall begin with such pilot precincts designated. Otherwise, the revision of ballots



of the 2011 Rules of the House of Representatives Electoral Tribunal (HRET Rules) – the counterpart of Rule 65 of the PET Rules – will not lead to the dismissal of an action for annulment of elections, as the two causes of action are separate and distinct from each other.¹¹ Hence, protestant alleges that by the same token, a dismissal of an election protest under Rule 65 of the PET Rules is limited to the judicial recount and revision of ballots such that if the protest contains a separate cause of action – such as the present annulment of elections – such cause of action may proceed independently.¹²

The facts and the procedure followed by the HRET in *Abayon* do not support this contention.

In *Abayon*, Raul A. Daza (Daza) filed an election protest against Harlin C. Abayon (Abayon), questioning the results in 25 Clustered Precincts (CPs) in the Municipalities of Biri, Capul, Catarman, Lavezares, San Isidro, and Victoria in Northern Samar. He alleged that there was massive fraud, vote-buying, intimidation, and employment of illegal and fraudulent devices and schemes before, during, and after the elections which benefitted Abayon. Moreover, Daza alleged that terrorism was committed by Abayon and his unidentified cohorts, agents and supporters.

Without requiring Daza to choose his pilot precincts, the HRET proceeded to conduct revision of the ballots in all the 25 CPs. After revision, the votes of Abayon increased by 28 and Daza by 14. Eventually, Daza moved for the withdrawal of his cause of action for revision and moved for the HRET to receive evidence on the issue of terrorism but limited to only eight CPs out of the 25 CPs subject of his protest.

The HRET annulled the results in only five CPs over which Daza was able to present evidence. The HRET ruled that Daza was able to show that 50% of the votes cast in the five CPs were affected by terrorism and it was impossible to determine the good votes from the bad. Thus, the HRET annulled the results for these CPs, resulting in Daza's proclamation as the winning candidate.

Sitting as members of the HRET, former Chief Justice Lucas P. Bersamin and Associate Justice Presbiterio J. Velasco, Jr. took no part while then Associate Justice, now Chief Justice, Diosdado M. Peralta (Chief Justice

or the examination, verification or re-tabulation of election returns and/or reception of evidence shall begin with all the protested precincts. The revision of ballots or the examination, verification or re-tabulation of election returns in the counter-protested precincts shall not be commenced until the Tribunal shall have determined through appreciation of ballots or election documents and/or reception of evidence, which reception shall not exceed ten (10) days, the merit or legitimacy of the protest, relative to the pilot protested precincts. Based on the results of such post-revision determination, the Tribunal may dismiss the protest without further proceedings, if and when no reasonable recovery was established from the pilot protested precincts, or proceed with the revision of the ballots or the examination, verification or re-tabulation of election returns in the remaining contested precincts. (Approved on February 10, 2011).

¹¹ *Ponencia*, 14.

¹² *Id.*



Peralta) dissented. In his dissent, Chief Justice Peralta explained that there was no clear and convincing evidence to warrant the annulment of the results in the five CPs. Chief Justice Peralta opined that the testimonial evidence presented by Daza failed to identify a single ballot that was affected by terrorism, and that there was no evidence that Abayon was responsible for any of the alleged acts of terrorism.

Chief Justice Peralta further declared that another strong ground existed to dismiss Daza's protest: Daza's protest, although captioned as such, was essentially a petition to declare a failure of elections, which should have been promptly and appropriately brought before the Commission on Elections (COMELEC), which has exclusive jurisdiction over such petitions. Chief Justice Peralta pointed out that a prayer to annul election results and a prayer to declare failure of elections based on allegations of fraud, terrorism, violence or analogous cases are within the jurisdiction of the COMELEC, not the HRET.

In its Decision on Abayon's petition for *certiorari*, the Court agreed with Chief Justice Peralta that Daza failed to present clear and compelling evidence to annul the elections. The Court, however, ruled that the HRET has jurisdiction to annul the results.

The question, therefore, is this: Is *Abayon* applicable to the instant Protest such that even if the margin between protestant and protestee increased as a result of the proceedings under Rule 65, the Tribunal can still proceed with the third cause of action?

My answer is no – for three reasons.

First, in *Abayon*, no initial revision or examination in pilot precincts was conducted. The HRET immediately proceeded to revise all 25 CPs which were subject of Abayon's cause of action for revision. Hence, there can be no gainsaying that *Abayon* set no precedent on the issue of whether the dismissal on the basis of the results of the revision and appreciation of a protestant's pilot precincts or pilot provinces would affect the entirety of the protest — as it was not a question that was raised then before the Court.

Second, *Abayon* did not state that an annulment of elections is separate and distinct from an election protest. A careful reading of *Abayon* will show that an annulment of elections is entertained as part of an election contest – specifically an election protest. The discussion of the Court in *Abayon* centered on the extent of the HRET's jurisdiction in an election protest – **that is, whether an election protest covers a cause of action for annulment of elections**. The Court ruled that the HRET has jurisdiction, as follows:

Both Abayon and Daza do not contest the exclusive jurisdiction of the HRET to decide election protests filed against members of



the House of Representatives. They, however, diverge as to the extent of its jurisdiction.

An Election Protest proposes to oust the winning candidate from office. It is strictly a contest between the defeated and the winning candidates, based on the grounds of electoral frauds or irregularities. It aims to determine who between them has actually obtained the majority of the legal votes cast and, therefore, entitled to hold the office.

The Court agrees that the power of the HRET to annul elections differ from the power granted to the COMELEC to declare failure of elections. The Constitution no less, grants the HRET with exclusive jurisdiction to decide all election contests involving the members of the House of Representatives, which necessarily includes those which raise the issue of fraud, terrorism or other irregularities committed before, during or after the elections. To deprive the HRET the prerogative to annul elections would undermine its constitutional fiat to decide election contests. The phrase "election, returns and qualifications" should be interpreted in its totality as referring to all matters affecting the validity of the contestee's title. Consequently, the annulment of election results is but a power concomitant to the HRET's constitutional mandate to determine the validity of the contestee's title.

The power granted to the HRET by the Constitution is intended to be as complete and unimpaired as if it had remained originally in the legislature. Thus, the HRET, as the sole judge of all contests relating to the election, returns and qualifications of members of the House of Representatives, may annul election results if in its determination, fraud, terrorism or other electoral irregularities existed to warrant the annulment. Because in doing so, it is merely exercising its constitutional duty to ascertain who among the candidates received the majority of the valid votes cast.

To the Court's mind, the HRET had jurisdiction to determine whether there was terrorism in the contested precincts. In the event that the HRET would conclude that terrorism indeed existed in the said precincts, then it could annul the election results in the said precincts to the extent of deducting the votes received by Daza and Abayon **in order to remain faithful to its constitutional mandate to determine who among the candidates received the majority of the valid votes cast.**¹³ (Emphasis and underscoring supplied.)

From the foregoing, what *Abayon* held was that the HRET had jurisdiction to rule on the annulment of elections as part of the election protest of Daza. Thus, following *Abayon*, electoral tribunals – including the PET – has jurisdiction to rule on the existence of terrorism in order to determine who between protestant and protestee obtained majority of the legal votes cast, and therefore entitled to hold office. *Abayon* did not, however, create a third type of electoral contest separate from an election protest and *quo warranto*. In

¹³ *Abayon v. House of Representatives Electoral Tribunal (HRET)*, supra note 3, at 258-259.



fact, in *Abayon*, the HRET used its 2011 Rules, which, like the PET Rules, speaks of election contests as an election protest or *quo warranto* petition.

Finally, *Abayon* did not exempt the action for annulment of elections from the coverage of HRET Rules. As mentioned, *Abayon* applied the 2011 HRET Rules to the cause of action for annulment of elections, which was treated as part of the protest and not as a separate and independent cause of action. Thus, in the present Protest, while *Abayon* allows protestant to include in his protest the cause of action for the annulment of elections in the provinces of Basilan, Lanao del Norte, and Maguindanao, this cause of action is nevertheless covered by the PET Rules, particularly Rule 65. What this means is that before the Tribunal may act on the rest of the protested precincts, including the precincts forming part of the third cause of action for annulment of elections, **protestant must first hurdle Rule 65. And, as discussed, protestant failed to do this.**

At this juncture, it is worth noting that the Tribunal had repeatedly recognized the need for protestant to make out a case under Rule 65 before proceeding to any precincts other than those in his pilot provinces.

To recall, protestant filed a *Motion for Technical Examination* dated July 10, 2017, praying for the conduct of technical examination on the voters' signatures on the Election Day Computerized Voter's List (EDCVL) as against the voters' signatures in the Voters Registration Records (VRRs) in the 2,756 CPs of Lanao del Sur, Maguindanao and Basilan, which would allegedly show massive presence of pre-shaded ballots and substitute voting in the said provinces.¹⁴ In its August 29, 2017 Resolution, the Tribunal deferred action on the *Motion for Technical Examination* because, following Rule 65, it would be premature to conduct the technical examination without protestant first showing, through his pilot provinces, that he has a meritorious case.¹⁵

When protestant again moved for the Tribunal to conduct a technical examination for the provinces of Basilan, Lanao Del Sur, and Maguindanao in an *Extremely Urgent Manifestation of Grave Concern with Omnibus Motion* dated December 10, 2018, this time on the allegation that in the election protest filed by Abdusakur M. Tan against Mujiv Hataman, the COMELEC's Voter's Identification Division (VID) of the COMELEC conducted a technical examination of 508 established precincts in the provinces of Lanao Del Sur, Maguindanao, and Basilan allegedly revealing that 40,528 signatures and 3,295 thumbprints in the EDCVL of the precincts did not match the signatures in the VRRs — the Tribunal, in its Resolution dated July 2, 2019, again resolved to defer action until after the initial determination of the grounds of the Protest under Rule 65, reiterating its August 29, 2017 Resolution that it would be premature to conduct a technical

¹⁴ *Marcos, Jr. v. Robredo*, supra note 8, at 23.

¹⁵ *Id.* at 41.



examination on the three provinces which are not part of the protestant's pilot provinces.¹⁶

Evidently, the Tribunal had consistently held that it is premature to conduct a technical examination of the EDCVL and VRRs in precincts other than those in protestant's pilot provinces in light of Rule 65's mandate that before it can proceed thereto, protestant must first establish his case through his designated pilot provinces.

Now, with the conclusion of the revision and appreciation of ballots in the pilot provinces, which resulted in an utter failure by protestant to make out a case as, in fact, the margin between him and protestee even increased, the Tribunal must dismiss the entire Protest, including the third cause of action for annulment of elections.

Abayon's strict requirements as applied to protestant's allegations show that his cause of action cannot be considered an annulment of elections. It essentially seeks a declaration of a failure of elections.

At any rate, even if the Tribunal were to consider protestant's third cause of action for annulment of elections as an independent and separate cause of action, the same should still be dismissed as it failed to meet the strict requirements stated in *Abayon* for annulment of elections.

Abayon instructs that annulment of elections is a drastic measure that may only be granted under very narrow and exceptional circumstances, thus:

It must be remembered that "[t]he power to declare a failure of elections should be exercised with utmost care and only under circumstances which demonstrate beyond doubt that the disregard of the law had been so fundamental or so persistent and continuous that it is impossible to distinguish what votes are lawful and what are unlawful, or to arrive at any certain result whatsoever, or that the great body of the voters have been prevented by violence, intimidation and threats from exercising their franchise." Consequently, a protestant alleging terrorism in an election protest must establish by clear and convincing evidence that the will of the majority has been muted by violence, intimidation or threats.¹⁷ (Emphasis supplied)

Adopting Chief Justice Peralta's dissent in the HRET Decision, the Court in *Abayon* provided for two indispensable requisites that must concur in order to justify the drastic action of nullifying elections:

¹⁶ Id. at 39-41.

¹⁷ *Abayon v. House of Representatives Electoral Tribunal (HRET)*, supra note 3, at 263.



- 1) The illegality of the ballots must affect more than fifty percent (50%) of the votes cast on the specific precinct or precincts sought to be annulled, or in case of the entire municipality, more than fifty percent (50%) of its total precincts and the votes cast therein; and
- (2) It is impossible to distinguish with reasonable certainty between the lawful and unlawful ballots.”¹⁸

Finally, and still echoing Chief Justice Peralta’s dissent, the Court held that nullifying elections is warranted only when there is proof that protestee was responsible for the fraud and terroristic acts perpetrated to frustrate the free will of the electorate:

It is worthy to note that no evidence was presented which will directly point to the protestee as the one responsible for the incidents which allegedly happened before and during the elections. Absent anything that would concretely and directly establish protestee as the one who had induced or actually perpetrated the commission of terroristic acts and demonstrate that those incidents were part of a scheme to frustrate the free expression of the will of the electorate, the alluded handing of material considerations, including guns, to the NDF-EV officials, and the garnering of votes higher than those of the protestant in the protested clustered precincts, do not *per se* make him responsible for the charges of terrorism.¹⁹

Here, applying the foregoing principles from *Abayon*, protestant utterly **failed to even allege, much less submit proof**, that the circumstances of the case warrant the drastic relief of nullifying the election results in Maguindanao, Lanao del Sur, and Basilan. This conclusion is anchored on three points:

First, as noted by the *ponencia*,²⁰ the threshold of more than fifty percent (50%) of the precincts in said provinces being affected by the alleged illegality of the ballots was not met. The affidavits submitted by protestant are far from the required threshold in *Abayon*. Protestant submitted affidavits for only four out of the 11 municipalities and two cities of Basilan; only one out of the 36 municipalities and one city of Maguindanao; and only three out of the 39 municipalities and one city of Lanao del Sur.²¹ Accordingly, even assuming that all of these affidavits are meritorious and credible, they are still not enough to meet the threshold in *Abayon*.

Second, there is likewise no allegation as to the impossibility of distinguishing with reasonable certainty between the lawful and unlawful ballots.²²

¹⁸ C.J. Peralta, Dissenting Opinion on HRET Case No. 13-023(EP), *Daza v. Abayon*, p. 17.

¹⁹ *Id.* at 18.

²⁰ *Ponencia*, p. 76.

²¹ *Id.* at 76 and 79.

²² *Id.* at 58.



Finally, there is neither allegation nor proof submitted to show that it was protestee who perpetrated the unlawful acts which supposedly tainted the invalid ballots.

Again, the import of the ruling in *Abayon* is clear and unequivocal: the **annulment of election results is warranted only when there is evidence directly pointing to protestee as the one responsible for the fraud and terrorism which happened before and during the elections to ensure protestant's defeat.** In such case, only the votes received by the parties are deducted and the votes for the other candidates in other positions are unaffected.

Consequently, even assuming that the Tribunal can proceed to the third cause of action despite the failure of protestant to make out a case under Rule 65, such cause of action must still fail because protestant did not allege, and did not submit proof of, the requisites in *Abayon* to treat his third cause of action as one for annulment of elections.

Further, I am of the position that protestant's third cause of action is essentially a petition for failure of elections, over which the Tribunal has no jurisdiction.

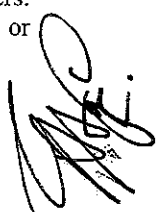
Section 6 of the Omnibus Election Code of the Philippines²³ defines failure of elections as follows:

SECTION 6. Failure of election. — If, on account of force majeure, violence, terrorism, fraud, or other analogous causes the election in any polling place has not been held on the date fixed, or had been suspended before the hour fixed by law for the closing of the voting, or after the voting and during the preparation and the transmission of the election returns or in the custody or canvass thereof, such election results in a failure to elect, and in any of such cases the failure or suspension of election would affect the result of the election, the Commission shall, on the basis of a verified petition by any interested party and after due notice and hearing, call for the holding or continuation of the election not held, suspended or which resulted in a failure to elect on a date reasonably close to the date of the election not held, suspended or which resulted in a failure to elect but not later than thirty days after the cessation of the cause of such postponement or suspension of the election or failure to elect. x x x

Jurisdiction to declare a failure of elections is with the COMELEC *En Banc*, following Section 4 of Republic Act No. 7166.²⁴

²³ Batas Pambansa Blg. 881, December 3, 1985.

²⁴ SEC. 4. *Postponement, Failure of Election and Special Elections.* — The postponement, declaration of failure of election and the calling of special elections as provided in Sections 5, 6 and 7 of the Omnibus Election Code shall be decided by the Commission sitting en banc by a majority vote of its members. The causes for the declaration of a failure of election may occur before or after the casting of votes or on the day of the election. (Approved on November 26, 1991).



The Court in *Abayon* differentiated a tribunal's power in an annulment of elections and the COMELEC's power in a failure of elections as follows:

Consequently, the difference between the annulment of elections by electoral tribunals and the declaration of failure of elections by the COMELEC cannot be gainsaid. *First*, the former is an incident of the judicial function of electoral tribunals while the latter is in the exercise of the COMELEC's administrative function. *Second, electoral tribunals only annul the election results connected with the election contest before it whereas the declaration of failure of elections by the COMELEC relates to the entire election in the concerned precinct or political unit. As such, in annulling elections, the HRET does so only to determine who among the candidates garnered a majority of the legal votes cast. The COMELEC, on the other hand, declares a failure of elections with the objective of holding or continuing the elections, which were not held or were suspended, or if there was one, resulted in a failure to elect. When COMELEC declares a failure of elections, special elections will have to be conducted.*²⁵ (Emphasis supplied.)

The allegations of protestant as well as the tenor of his *Motion for Technical Examination* lend support to the conclusion that the actual relief sought by him is to annul the entire election in Maguindanao, Lanao del Sur, and Basilan.

In protestant's *Motion for Technical Examination*, he is questioning, not the validity of the votes cast for protestee but **the validity of the ballots themselves**. The supposed report relied upon by protestant showing that the signatures in the EDCVL are different from the signatures in the VRRs, indicates that the alleged fraud, violence, and terrorism affected the people's right to vote **not only for the contested position but for all other positions – including the President, Senators, Members of the House of Representatives, and other local positions – which again, as Chief Justice Peralta pointed out, is akin to a failure of elections.** This defies the nature of an election protest as being “strictly a contest between the defeated and the winning candidates,”²⁶ the aim of which is to “determine who between them has actually obtained the majority of the legal votes cast and, therefore, entitled to hold office.”²⁷

As his cause of action is essentially that for a declaration of a failure of elections, the same should be dismissed as the same is within the exclusive jurisdiction of the COMELEC.

All told, with the undeniable increase in vote margin obtaining in the pilot provinces, which protestant himself designated as best exemplifying the grounds for his Protest, protestant failed to make out his case. In keeping with

²⁵ *Abayon v. House of Representatives Electoral Tribunal (HRET)*, supra note 3, at 262.

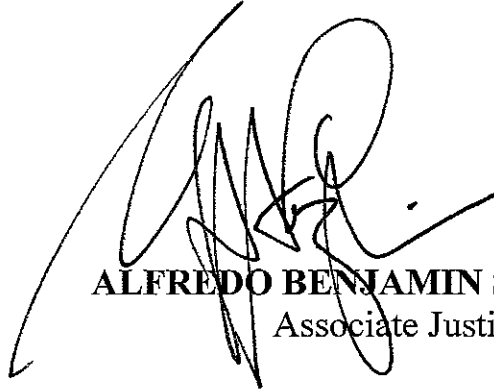
²⁶ Id. at 258.

²⁷ Id.



the PET Rules, this leaves the Tribunal with no other verdict than to dismiss the Protest in its entirety.

WHEREFORE, in view of the foregoing, I vote that the instant Election Protest be **DISMISSED** without further proceedings for lack of merit.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the left.

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice