



Securities and Exchange Commission of Pakistan

BEFORE THE APPELLATE BENCH

In the matter of

Appeal No. 57 of 2019

Rafhan Maize Products Company Ltd.

...Appellant

Versus

Commissioner, Securities and Exchange Commission of Pakistan

...Respondent

Date of Hearing: 23/09/21

Present:

For the Appellant:

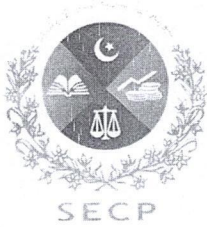
Mr. Mustafa Kamal Zuberi, Head of Legal/Corporate Affairs & Company Secretary,
(Rafhan Maize Products Company Ltd)

For the Respondent:

- (i) Mr. Asif Iqbal, Director/HOD (Securities Market Division)
- (ii) Ms. Sumaira Siddiqui, Additional Director (Securities Market Division)

ORDER

1. This Order is passed in the matter of Appeal No. 57 of 2019 filed under section 33 of the Securities and Exchange Commission of Pakistan Commission Act, 1997 (the SECP Act) against the order dated 16/05/19 (the Impugned Order) passed by Commissioner, Securities and Exchange Commission of Pakistan (the Respondent).



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2. The brief facts of the case are that Rafhan Maize Products Company Ltd (the Appellant) filed an application dated 30/04/19 (the Application) for relaxation under section 166(6) of the Companies Act, 2017 (the Companies Act) read with Regulation 6 and 42 of the Listed Companies (Code of Corporate Governance) Regulations 2017 (the CGC Regulations).
3. The Application was rejected by Assistant Director of the department of the Respondent vide Impugned Order dated 16/05/19. It was held that the Respondent could not accede to the request of the Appellant for relaxation from the requirements pertaining to minimum number of independent directors on the board of the Appellant and that regulation 6(1) of the CGC Regulations does not contain specific provision regarding rounding off any fraction. Therefore, it was held that rounding off was not required and the Appellant was required to have minimum of three independent directors on its board comprised of eleven members.
4. The Appellant preferred the instant appeal *inter alia* on the following grounds:
 - (i) The Appellant at this time has an 11-director board. The majority shareholder is Ingredion which holds 71% shares and a 29% minority shareholding. Ingredion has elected six directors representing its interests although it has a 71% shareholding. The minority shareholding is split in to a very small free float, its public shareholding is less than 4 %, which is represented by two independent directors and 25% shareholding of the Mannoo family is represented by three directors. Over all the board composition is 45% directors representing minority shareholders and 55% directors representing majority shareholders.
 - (ii) Ingredion during the 2018 Board elections had suggested that the minority shareholders use their shareholding to elect the remaining independent director to the Board. However, this option was rejected by them and instead they opted to retain their three seats on the Board while Ingredion used its shareholding to elect two independent directors. The two independent directors on the Board at the moment have been elected by Ingredion using its shareholding in spirit of compliance with the law. If the Appellant was to elect an additional independent director on the Board using Ingredion's shareholding it would change the Board composition to 55% directors representing the minority shareholders and 45% representing the majority shareholder. Ingredion as the major shareholder would like to retain a majority on the Board



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having already elected two independents to the Board using its own shareholding. The Appellant and Ingredion in the spirit of compliance are doing all that they can to ensure the Board composition. However, having a majority shareholding and having invested heavily in the Appellant with additional plans to further invest in the future, Ingredion would like to retain its majority on the Board. Furthermore, the minority shareholding is already over represented on the Board and any further change in the composition which adversely impacts the majority shareholder will further deepen this imbalance.

- (iii) The Respondent should relax the requirement of one-third numbers of Independent Directors on the Board of the Appellant under section 166(6) of the Companies Act. The Appellant will appreciate if they are allowed to continue with two Independent Directors instead of three. Moreover, the Chairman of the Audit Committee and Human Resource & Remuneration Committee are both independent directors in compliance with the CGC Regulations. Alternatively, it is submitted that the Commission may use its powers to direct the minority shareholders to concede one seat on the Board and elect an independent director as the purpose of the independent director is to bring diversity to the Board and represent minority shareholders' interests. All the while this will protect the interest of the majority shareholder and allow it to continue operating and investing in Pakistan along with the minority shareholders who will continue to have the same number of directors representing them on the Board as they have right now.

5. The Respondent rebutted the arguments of the Appellant *inter alia* on the following grounds:

- (i) Regulation 6 of the CGC Regulations provide that the Board must have at least two or one third of members, whichever is higher, as independent directors. The requirements of the Companies Act are unambiguous. An independent director shall be selected from the data bank as per section 166(1) of the Companies Act. Pakistan Institute of Corporate Governance (PICG) is the institution notified vide S.R.O. 73(I)/2018 dated 25/01/18 for maintaining databank of independent directors. Further, in terms of section 166(3) of the Companies Act, the independent directors shall be elected in the same manner as directors of listed companies are elected in terms of section 159 of the Companies Act. Moreover, the existing directors are



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responsible to hold election of directors in terms of requirements of section 158 of the Companies Act. Therefore, the retiring board has the responsibility to elect independent directors on the board. The criteria determining the independence of a candidate is provided under section 166(2) of the Companies Act.

- (ii) The assertion of Appellants is misconstrued and against the fundamental concept of good corporate governance which is separation of ownership and management. Section 166 read with section 188 of the Companies Act provides that the responsibility on the Board is to identify and elect independent directors, and not to safeguard the right of a particular group which is best ensured when the Appellant complies with good governance practices. Furthermore, if right of representation is strictly done by shareholding it would imply that in effect the board representation of minority shareholders through independent directors would be arbitrary and shall be practically ineffective. Moreover, the Regulation regarding requisite number of independent directors is not mutually exclusive to Regulation 28 and Regulation 29 regarding Audit committee and Human Resource and Remuneration Committee, respectively.

6. We have heard the parties i.e. the Appellant and the Respondent. We are of the view that the requirements, for the appointment of independent directors, are mandatory in terms of section 166 of the Companies Act. Although section 166(6) of the Companies Act mentions that requirements of the said section 166(1), for the appointment of independent directors, may be relaxed by the Commission, however, such relaxation may only be in situations where there exists any practical difficulty or sufficient justification. Furthermore, Regulation 42 of the Regulations also provides that in case it is not practicable to comply with any of the requirements of the Regulations, which include the requirement of electing independent directors under Regulation 6 of the Regulations, only then the Commission may relax the same subject to such conditions as it may deem fit and for reasons to be recorded.

7. However, in the instant matter, the Commission was of the view that the Appellant's contention that one of the minority shareholders is not willing to cooperate and use the shareholding to elect an independent director, does not amount to a practical difficulty or sufficient justification to relax the mandatory requirements of appointing an independent director. Hence, we concur with the



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Respondent that since the Commission was not satisfied in terms of any practical difficulty or sufficient justification, it is the responsibility of the Board to appoint independent directors, notwithstanding the shareholding of various groups, to ensure best practices of good governance. The Appellant, therefore, must resolve the issue *vis-a-vis* appointment of an independent director with its shareholders and ensure full compliance with the law in letter and spirit.

8. In view of the foregoing, the Impugned Order is upheld. The Appeal is disposed of accordingly with no order as to costs.

(Sadia Khan)
Commissioner

(Farrukh Hamid Sabzwari)
Commissioner

Announced on: **24 NOV 2021**