



BEFORE APPELLATE BENCH NO. 1

In the matter of

Appeal No. 29 of 2008

Pakistan Mutual Insurance Company (Guarantee) Limited ... APPELLANT

Versus

Chairman Securities and Exchange Commission of Pakistan NIC Building, Jinnah
Avenue, Blue Area, Islamabad. RESPONDENT

ORDER

Date of Hearing 21 October 2008

Present:

For the Appellant:

Ch. Abdul Karim
Chief Executive (Appellant Company)

For the Respondent Department:

Ali Azeem Ikram
Uzma Farogh



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

1. This order shall dispose of the appeal No. 29 of 2008 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 by Pakistan Mutual Insurance Company (Guarantee) Ltd (the "Appellant") against the directive of the Chairman, Securities Exchange Commission of Pakistan ("SECP"), (the " Impugned Directive") dated 24-06-2008.
2. The Appellant is a mutual insurance company incorporated on 24-06-1946 and was later registered in accordance with the provisions of section 6 of the Insurance Ordinance 2000 (the "Ordinance"). The Appellant was allowed to transact business of "motor class of insurance including motor 3rd party compulsory business" under the certificate of registration issued on 01-01-2001.
3. That after coming into force of the Ordinance, the Insurance Division of SECP sent a notice calling upon the Appellant to comply with the provisions of section 29 of the Ordinance read with Rule 9 of the Securities and Exchange Commission of Pakistan (Insurance) Rules 2002 (the "Rules") and submit the statutory deposit of two and half (2.5) million Rupees as then required. In response to the said notice, the petitioner deposited two and half (2.5) million Rupees with the State bank of Pakistan on 06-01-2003. Later the Insurance Division of SECP issued circular no 14 of 2007 dated 20-11-07, calling upon all the insurance companies to maintain statutory deposit of five (5) million Rupees effectively from 01-01-2005 as required under rule 9 (3) of the Rules. The Appellant in its response dated 01-12-2007 contended that it is a mutual insurance company and is entitled to exemption of statutory deposit under proviso to section 29(2) (b) as it meets the required solvency level.
4. SECP in pursuance of its earlier communication and in exercise of its powers under section 63 of the Ordinance called upon the Appellant through the



Impugned Directive dated 24-6-2008 to comply with the requirements of section 11(1) of the Ordinance within one month of the issuance of the Impugned Directive, failing which the Appellant was directed to cease entering into new contracts of insurance. The Impugned Directive was issued on the basis that the Appellant had:

- a) failed to maintain statutory deposit of Rs. 5 million with State Bank of Pakistan, as required by section 11 (1) (b) of the Ordinance read with rule 9 of the Rules; and
 - b) failed to meet the minimum solvency requirement consistently for the years 2004, 2005, 2006 and 2007 as set forth in section 11(1) (c) and section 36 of the Ordinance.
5. The Appellant aggrieved by the Impugned Directive has preferred the instant appeal. Ch. Abdul Karim, Chief Executive of the Appellant, appeared before the Appellate Bench (the "Bench") and as a preliminary objection stated that the direction under section 63(1) was issued to the Appellant without any show cause. He contended that the SECP under section 63(2) of the Ordinance was required to give opportunity of hearing before it issued the Impugned Directive. Mr. Karim contended that the Appellant always complied with the directives issued by the SECP; and had as instructed deposited two and half (2.5) million Rupees on 18.1.2003 with the State bank of Pakistan. Mr. Karim maintained that Appellant has never defaulted in submitting annual supervisory fee to the SECP and has always submitted the federal insurance fee to the Federal Government. Mr. Karim alleged that he inquired from SECP time and again whether the Appellant was required to submit a further statutory deposit of two and half (2.5) million Rupees in terms of rule 9(3) of the Rules, however, no response was received to his

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queries. Mr. Karim argued that the Appellant is ready to submit further statutory deposit of two and half (2.5) million Rupees and requested for extension of time. Mr. Karim stated that Appellant meets the minimum solvency level and in support of his contention relied on the statement of assets attached with the appeal for the years ending 2004, 2005, 2006 and 2007. Mr. Karim also placed reliance on proviso of section 29 (2) (b) of the Ordinance and stated that the Appellant achieved the level of solvency as required by the SECP and was therefore entitled to reduction of statutory deposit.

6. Mr. Ali Azeem Ikram, on behalf of Respondent department stated that the requirements of section 11 of the Ordinance, except the requirement of having a paid up share capital, are all applicable to mutual insurance companies. Mr. Ali argued that the mandatory requirement of statutory deposit in rule 9 of the Rules is clear and unambiguous and therefore the Appellant's argument that Insurance Division of SECP failed to respond to its queries is not sufficient reason for the non-compliance. The Appellant has failed to submit the further statutory deposit of two and half (2.5) million Rupees even after the issue of circular No 14 of 2007 dated 20-11-07 and the Impugned Directive dated 24-6-2008.
7. On the issue of whether the Appellant has maintained the solvency level and is therefore entitled to the waiver of statutory deposit under proviso to section 29 (2) (b) of the Ordinance. Mr. Ali argued that the Appellant under section 36 (2) of the Ordinance is required to maintain at all times admissible assets in excess of its liabilities of an amount greater than or equal to the minimum solvency requirement. The minimum solvency requirement has been laid down in 13 (1) (b) (iv) of the Rules, which is fifty (50) million Rupees for the year 2005 and onward. The total admissible assets of the Appellant, as per the



solvency statement attached with the appeal for the year ending 2007 is ten million seven hundred and twenty thousand (10.72) Rupees which is far less than the required level of fifty (50) million Rupees. The Appellant has thus failed to meet the solvency requirement as such it is not entitled to waiver of statutory deposit as provided in proviso to section 29 (2) (b).

8. The preliminary argument of the Appellant is that the Impugned Directive was issued to the Appellant without any show cause notice and that SECP was required to give an opportunity of hearing before issuing any direction under section 63(2) of the Ordinance. Section 63 (1) (2) and (3) stipulates:

63. Power of Commission to issue direction to cease entering into new contracts of insurance.- (1) The Commission may issue a direction to cease entering into new contracts of insurance if it believes on reasonable grounds that an insurer registered under this Ordinance has failed, or is about to fail, to comply with the conditions of registration set out in section 11.

(2) The Commission shall issue a direction to cease entering into new contracts of insurance if:

- (a) a petition is presented for the winding up of the insurer and has not been withdrawn or vacated within a period of sixty days;*
- (b) the whole of the business of an insurer has been transferred to any person;*
- (c) the Tribunal has made an order that a direction be given to that insurer to cease entering into new contracts of insurance; or*
- (d) the insurer has failed to comply with a directive issued under this Ordinance concerning a contravention of the Ordinance or the rules made thereunder, within the time specified in the Ordinance or, if not so specified, within the time specified in the*

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directive or three months, whichever is longer, and the directive had stated that the failure to comply would lead to a direction to cease entering into new contracts of insurance:

Provided that a direction shall not be issued under clause (d) without giving the insurer an opportunity to be heard.

(3) *A direction to cease entering into new contracts of insurance shall have effect one month from the date of the direction unless a later date is specified in the direction.*

(4)

(5)

(6)

The perusal of section 63(1) of the Ordinance leads us to the conclusion that the direction to cease entering into new contracts of insurance can be issued, if the company fails to comply with the condition of registration even without affording an opportunity of hearing. The conditions for registration laid down in section 11 of the Ordinance are basic conditions for registration. The companies are required to comply with the requirements within a period of one month or a later period as may be specified in the direction; therefore, the argument of the Appellant that an opportunity of hearing should have been given before passing the Impugned Directive is not sustainable. However, where a directive is issued under section 63(2)(d) of the Ordinance in respect of violation, other than those violations mentioned in section 11 of the Ordinance, an opportunity of hearing ought to be afforded as clearly stipulated in the proviso to section 63 (2) (d) of the Ordinance.

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9. Rule 9(3) of the Rules, as then in existence lays down the threshold of statutory deposits. Rule 9 reads as follows:

9. *Minimum statutory deposit levels.* - (1) *Subject to sub-rules (2) and (3), for the purposes of clause (b) of sub-section (2) of section 29 of the Ordinance, the prescribed amount shall be five million rupees.*

(2) *For an insurance company which has, for two years immediately preceding the end of any calendar year, maintained not less than the minimum level of paid up capital applicable to that company under section 28 of the Ordinance and not less than the minimum level of solvency applicable to that company under section 35 or 36 of the Ordinance, in both cases without applying the proviso to section 28 of the Ordinance, the prescribed amount in respect of that company under sub-rule (1) shall be zero.*

(3) *Subject to sub-rule (2), with immediate effect the amount of statutory deposit shall be one million rupees and from then for the period until the 31st December, 2002, two and half million rupees, until the 31st December, 2003, three and half million rupees and until the 31st December, 2004, and thereafter five million rupees.*

Emphasis Added

Rule 9 of the Rules was apparently introduced to reduce the burden of the minimum statutory requirement of ten (10) million Rupees provided by section 29 of the Ordinance. The insurance companies were therefore required to increase the statutory deposits gradually, starting from one (1) million Rupees and raise it each year until it reached five (5) million Rupees between the years 2002 until 2004. Thereafter, in the year 2008,



rule 9 of the Rules was done away with vide SRO No 682 (1)/2008 dated 25th June 2008. This resulted in the limit of statutory deposit as provided in section 29 (2) (a) of the Ordinance becoming applicable. Section 29(1) and (2) of the Ordinance stipulate:

29. Deposits.-(1)..Every insurer shall, in respect of the insurance business carried on by him in Pakistan, deposit and keep deposited with the State Bank of Pakistan, in one of the offices in Pakistan of the State Bank of Pakistan for and on behalf of the Federal Government the required minimum amount specified in sub-section (2), either in cash or in approved securities estimated at the market value of the securities on the day of deposit, or partly in cash and partly in approved securities so estimated.

(2) For the purposes of this section the required minimum amount is, either:

(a) the higher of ten million rupees and ten per cent. (10%) of the insurer's paid-up capital; or

Emphasis Added

(b) such amount as may be prescribed by the Commission:

Provided that the Commission may, subject to achievement of levels of solvency as required by this Ordinance, abolish the requirement for deposits specified by this section by reducing the required minimum amount to zero.

All insurance companies are thus required to keep a deposit of ten (10) million Rupees with State Bank of Pakistan from the date of the aforementioned notification of 25th June 2008 in terms of section



29 (2) (a) or 10% the insurers paid up capital which ever is higher. The wording of 29 (2) (a) would have been clearer, had the words "or ten percent" been used instead of "and ten percent". Nevertheless, the intent of the legislature is clear i.e all insurance companies are required to make a deposit of ten (10) million Rupees, however, where such companies have a paid up capital; the statutory deposit must be ten percent of the insurers paid up capital where such percentage works out to more than ten (10) million Rupees.

In any case the above brief discussion by us on the notification of 25-6-08 and section 29 (2) (a) of the Ordinance are academic, as they for the present purposes are neither applicable nor material to the case.

10. The Impugned Directive was issued before the aforementioned notification, therefore, the Appellant was required to enhance the statutory deposit upto five (5) million Rupees. The contention of the Appellant that the Insurance Division of SECP failed to inform it of the statutory obligation is not tenable. The Insurance Division of SECP in any case informed the Appellant to enhance the statutory deposit through circular No 14 of 2007 issued on 20-11-2007. Even if the circular had not been issued, the requirements of law are clearly laid down in the Rules and in section 29 of the Ordinance, as such the Appellant was obliged to meet its obligations imposed by the law.

11. On the issue of whether the Appellant meets the minimum solvency level, it transpires from the Appellant's own record that it does not meet the solvency level as prescribed by law. The Appellant's record illustrates assets of ten million, seven hundred and twenty thousand (10.72) Rupees



for the year ending December 2007. Section 36 which lays down the criteria for solvency, reads as follows:

36. Insurers of non-life insurance business to have assets in excess of minimum solvency requirement.- (1) An insurer registered under this Ordinance to carry on non-life insurance business shall at all times have admissible assets in Pakistan in excess of its liabilities in Pakistan of an amount greater than or equal to the minimum solvency requirement.

(2) An insurer incorporated in Pakistan and registered under this Ordinance to carry on non-life insurance shall at all times have admissible assets in excess of its liabilities of an amount greater than or equal to the minimum solvency requirement.

(3) For the purposes of this section, the minimum solvency requirement is the greatest of:

(a) such requirea minimum amount as may be prescribed by the Commission;

Emphasis Added

(b)

(c)

(4)



The minimum solvency has been prescribed by the Commission in Rule 13(1) (b) of the Rules, which states:

13. Solvency of non-life insurer.- (1) For the purposes of clause (a) of sub-section (3) of section 36 of the Ordinance, the following shall be the prescribed amount, namely:-

(a) In the case of an insurance company registered after the commencement date, fifty million rupees; and

(b) In the case of an insurance company registered at the commencement date-

- (i) the amount applicable under the repealed Act, until the 31st December, 2002;*
- (ii) fifteen million rupees until the 31st December, 2003;*
- (iii) twenty-five million rupees until the 31st December, 2004; and*
- (iv) fifty million rupees until the 31st December, 2005, and thereafter .*

Emphasis Added

The minimum solvency level has been raised gradually from year 2003, where it was fifteen (15) million Rupees to fifty (50) million Rupees by the year 2005 and beyond. The Appellant admittedly failed to maintain and gradually enhance its assets and as result could not meet the solvency level laid down in rule 13 (1) (b) of the Rules and is therefore not entitled to the waiver of statutory deposit as provided in proviso to section 29 (2) (b).

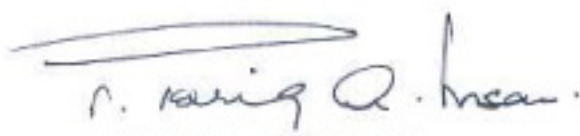
12. We have also examined the status of mutual insurance companies, to see whether the intention of the legislature was to treat them differently from the insurance companies with a paid up capital. We find that the Ordinance does not distinguish between an insurance company with a paid up capital and one

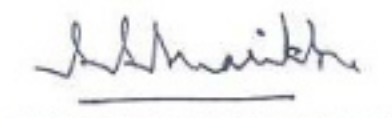


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which does not have a paid up capital. As such all requirements of the Ordinance other than maintaining paid up capital mutatis mutandis apply to mutual insurance companies.

13. For the reasons stated the appeal is not maintainable. The Appellant had sufficient time to comply with the requirements of law since 2004 and which it has failed to do. The Appellant is therefore directed to comply with the Impugned Directive. We further direct that the Appellant shall cease to carry out any kind of Insurance business


(S. TARIQ. A HUSAIN)
Commissioner (LD)


(SALMAN ALI SHAIKH)
Commissioner (SCD)

Announced on: /2 November 2008