

[Islamabad]

Before Hasnat Ahmad, Director (Insurance)

In the matter of

The Pakistan Mutual Insurance Company (Guarantee) Limited

Show Cause Notice Issue Date: February 21, 2014

Date of Hearing: March 11, 2015

Attended By:

1. Mr. Abdul Karim
Chief Executive
M/s. The Pakistan Mutual Ins. Co. (Gte) Ltd;
2. Mr. Awais
M/s. The Pakistan Mutual Ins. Co. (Gte) Ltd;
3. Mr. Hafiz M. Farooq
M/s. The Pakistan Mutual Ins. Co. (Gte) Ltd;
4. Mr. Irfan Ilyas, FCA
Partner
M/s. Ilyas Saeed & Co., Chartered Accountants.

Date of Order: March 11, 2015

ORDER

(Under Section 178 Read With Section 186 of the Companies Ordinance, 1984)

.....

This Order shall dispose of the proceedings initiated against the chief executive and directors of M/s. The Pakistan Mutual Insurance Company (Guarantee) Limited ("the Company") for alleged non-compliance with the provisions of Section 178 of the Companies Ordinance, 1984 (the "Ordinance"), relating to the procedure for election of directors.





A. Background

2. An onsite inspection of M/s. The Pakistan Mutual Insurance Company (Guarantee) Limited (the "Company") was conducted by the Commission under Section 59A of the Insurance Ordinance, 2000, through an order dated April 23, 2013.

3. During the course of onsite inspection of the Company, it was observed that the Company held its election of directors on April 14, 2011, in which seven directors were elected. Three casual vacancies occurred during the years 2012 and 2013 were filled in by the Company. Keeping in view Section 178 of the Ordinance, following observations were noted by the inspection team:

- a. Sub-Section (1) of Section 178 of the Ordinance requires the directors of the Company to fix the number of elected directors of the Company not later than thirty five days before convening of the general meeting at which directors are to be elected. The Company failed to provide its record evidencing compliance with this requirement of the Ordinance;
- b. Notice of meeting in which directors are to be elected must expressly state the number of elected directors fixed in the aforementioned meeting and the names of retiring directors in compliance with Section 178(2) of the Ordinance. However, the notice of the Annual General Meeting (AGM) of April 14, 2011 provided by the Company did not disclose the abovementioned information;
- c. Any person who seeks to contest an election must file a notice of his intention to offer himself for election as a director not later than fourteen days before the date of the meeting as required under Section 178(3) of the Ordinance. The Company failed to provide evidence of the notices from the directors to show their intentions to offer themselves for the election;
- d. In compliance with Section 178(4) of the Ordinance, the Company did not provide the evidence that the Company transmitted all the notices received by the Company from the proposed directors to the members not later than seven days before the date of the aforesaid meeting.

4. It would be pertinent to mention that since all the policyholders are considered to be the members of a mutual insurance company, in terms of Section 2(xxxix) of the Insurance Ordinance, 2000, it appeared to the Commission that the notices from the persons proposing to be elected as the directors of the Company were not transmitted to all members of the Company.





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5. From the foregoing paras hereof, it appeared that the Company grossly contravened the provisions of Section 178 of the Ordinance, for which the chief executive and the directors of the Company could be penalized under Section 186 of the Ordinance.

6. Accordingly, a Show Cause Notice was issued on February 21, 2014 under Section 178 read with Section 186 of the Ordinance to the chief executive and directors of the Company (the "Respondents"), calling upon them to show cause as to why the penalty, as provided under Section 186 of the Ordinance, should not be imposed for not complying with provisions of Section 178 of the Ordinance.

7. In response to the said Show Cause Notice, the Company, vide its letter no. A/20/14 dated March 6, 2014, stated that:

"...It is submitted that we intend to exercise our legal right to defend the above said show cause notice on facts and the law, to assist this Hon'ble forum and to clarify the queries raised therein, we intend to be heard through a counsel, who will appear on our behalf the date of hearing as and when fixed by this Hon'ble forum.

We also reserve our legal right to file any further replies, and documents, if and when required in order to clarify our stance.

With reference to your show cause notice no.ID/Enf/PMICL/2014/18969 dated February 21, 2014 on the subject stated above. We explain as hereunder:

Election of directors were held during the year 2011, wherein the same number of directors were elected as was the number of retiring directors. In compliance of section 178 (6) read with Article 33 B of Article of Association of the company, the position is as under:-

Clause 6 of section 178 overrides other provisions of section 178 , and directors of the company not having share capital shall be elected by members of the company in the manner as provided for in the Articles of Association of the Company. In pursuance of the same and other applicable laws, the members were duly intimated about the election of directors, no expression of interest/query was received from any member with respect to the election of directors. In pursuance of 33-B of Articles of Association of the Company, as the retiring directors being eligible, were with the number of directors fixed, they were duly elected.

In the light of the aforesaid submission it is humbly stated the company did not contravene the provisions of section 178 of the Companies Ordinance, 1984 or any other law for the time being in force.





However, the inadvertent mistake of not stating the number of directors in the Notice is highly regretted. However, it has not caused any advantage, benefit and/or disadvantage or loss to any person, interested party, the company, and/or the state, or any of its institutions(s)/organization(s)..." (Underlined to put emphasis)

8. To summarize, the reply of the Respondents reflects that the Company has followed the procedure for election of directors as laid down in its Articles of Association, considering that Article 33B overrides the provisions of Section 178 of the Ordinance based on the provision given in Section 178(6) of the Ordinance. The Respondents are of the view that it is a company not having share capital, and its Article 33B of the Articles of Association lays down the procedure for election of the directors of the Company, therefore, the Company is in compliance with the provisions of Section 178 of the Ordinance.

9. On the other hand, Article 33B of the Company's Articles of Association gives an implicit impression that the number of votes available with each member varies from member to member.

10. However, as per the provisions of Section 160(6) of the Ordinance read with Section 2(xxxix) of the Insurance Ordinance, 2000, all policyholders of the Company shall be the members of the Company and that each such policyholder / member shall have one vote.

B. Hearings

11. The Commission issued notice no. ID/ENF/PMICL/2014/21232 dated November 6, 2014, whereby the hearing in the matter of the aforesaid Show Cause Notice was scheduled for November 13, 2014 at 11:30 a.m. Subsequently, on the request of the Company, the hearing was adjourned and rescheduled for January 12, 2015 through video conferencing, vide notice no. ID/Enf/PMICL/2014/21640 dated January 1, 2015. The hearing was attended by Mr. Irfan Ilyas - Partner, M/s. Ilyas Saeed & Co., Chartered Accountants, Mr. Mubashir Raza - Manager, M/s. Ilyas Saeed & Co., Chartered Accountants, Mr. Ch. Abdul Karim - Chief Executive of the Company and Mr. Hafiz M. Farooq Afzal - Manager Finance of the Company (collectively representing the Respondents).

12. Brief proceedings of the hearing of January 12, 2015 are as follows:

- a. Prior to the start of the hearing proceedings, a Power of Attorney in favor of M/s. Ilyas Saeed & Co., Chartered Accountants was handed over to the





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Commission. The said Power of Attorney was signed by the chief executive of the Company;

- b. The Respondents were asked to present their stance, to which the Respondents stated that the Respondents have already submitted their contentions before the Commission vide letter dated March 6, 2014;
- c. The Respondents further mentioned that the same number of directors was elected during the year 2011 as the retiring directors, however, the names of the retiring directors was missed out. But, the Company has ensured compliance of these requirements of the law in the Company's new notice for election of directors dated March 21, 2014, a copy of which was also provided at the time of hearing;
- d. Lastly, the Respondents requested the Commission to take a lenient view as the Company's intention was not to violate the provisions of the law.

13. The matter could not be decided during the hearing held on January 12, 2015. Therefore, it was decided to provide another hearing opportunity to the Company to defend the instant Show Cause Notice. The Commission vide notice no. ID/Enf/PMICL/2015/394 dated February 26, 2015, rescheduled the hearing for March 11, 2015 at 12:00 noon.

14. Accordingly, the hearing in the matter was attended by Mr. Irfan Ilyas - Partner, M/s. Ilyas Saeed & Co., Chartered Accountants, Mr. Abdul Karim - Chief Executive of the Company, Mr. Hafiz M. Farooq Afzal - Manager Finance of the Company and Mr. Owais of the Company (collectively representing the Respondents).

15. Brief proceedings of the hearing of March 11, 2015 are as follows:

- a. The Respondents again submitted that the Company has acted upon the law by following the provisions of its Articles of Association in light of procedure given in Section 178(6) of the Ordinance;
- b. Thereupon, the Respondents were clarified that the provisions of Section 178(1) to (4) of the Ordinance have to be followed by every company, regardless of whether that company has a share capital or not. It was also clarified that only the provisions of Section 178(5) & (6) of the Ordinance provide for a different treatment for conducting the election of directors for a company having share capital and a company not having share capital, respectively.





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C. Issues

16. The Respondents were required to ensure compliance with the provisions of Section 178 of the Ordinance, which stipulate that:

“Procedure for election of directors. - (1) The directors of a company shall subject to section 174, fix the number of elected directors of the company not later than thirty-five days before the convening of the general meeting at which directors are to be elected, and the number so fixed shall not be changed except with the prior approval of a general meeting of the company.

(2) The notice of the meeting at which directors are proposed to be elected shall among other matters, expressly state-

(a) the number of elected directors fixed under sub-section (1); and

(b) the names of the retiring directors.

(3) Any person who seeks to contest an election to the office of director shall, whether he is a retiring director or otherwise, file with the company, not later than fourteen days before the date of the meeting at which elections are to be held, a notice of his intention to offer himself for election as a director:

Provided that any such person may, at any time before the holding of election, withdraw such notice.

(4) All notices received by the company in pursuance of sub-section (3) shall be transmitted to the members not later than seven days before the date of the meeting, in the manner provided for sending of a notice of general meeting in the normal manner or in the case of a listed company by publication at least in one issue each of a daily newspaper in English language and a daily newspaper in Urdu language having circulation in the Province in which the stock exchange on which its securities are listed is situate.

(5) The directors of a company having a share capital shall, unless the number of persons who offer themselves to be elected is not more than the number of directors fixed under sub-section (1), be elected by the members of the company in general meeting in the following manner, namely:-

(a) a member shall have such number of votes as is equal to the product of the number of voting shares or securities held by him and the number of directors to be elected;





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(b) a member may give all his votes to a single candidate or divide them between more than one of the candidates in such manner as he may choose; and

(c) the candidate who gets the highest number of votes shall be declared elected as director and then the candidate who gets the next highest number of votes shall be so declared and so on until the total number of directors to be elected has been so elected.

(6) The directors of a company not having share capital shall be elected by members of the company in general meeting in the manner as provided in articles of association of the company."

17. The Company held its election of directors on April 14, 2011, in which seven directors were elected. In this regard, it was observed by the inspection team that there was no evidence available with the Company to fix the number of directors to be elected, which was required to be fixed by the retiring directors of the Company at least thirty five days before convening of the general meeting as contained in Section 178(1) of the Ordinance.

18. It was also pointed out by the inspection team that the notice of the general meeting in which the directors were being elected, should have contained the number of the directors to be elected along with the names of the retiring directors. This procedure was not followed by the Respondents hence, non-compliance of Section 178(2) of the Ordinance.

19. Moreover, the Company was unable to provide to the inspection team, the notices from the consenting persons to show their intentions to offer themselves for election, which are required to be filed with the Company not later than fourteen days before the convening of the general meeting in pursuance of Section 178(3) of the Ordinance.

20. Also, in view of Section 2(xxxix) of the Insurance Ordinance, 2000, each policyholder of the Company is its member. The Company failed to provide evidence to the inspection team that the said notices from the consenting persons were transmitted to all the members who were entitled to attend and vote at the general meeting at which the election of directors were held, as required by Section 178(4) of the Ordinance.

D. Summary of Arguments and Conclusions in Respect of Each Issue

21. Grossly, the only argument on which the Respondents relied upon was that the provisions of Section 178(6) of the Ordinance allow a company not having share capital to follow the procedure for election of its directors as provided under the





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articles of association of that company. However, as stated earlier that the provisions of Section 178(1) to (4) of the Ordinance have to be followed by every company, regardless of whether that company has a share capital or not. It was also clarified that only the provisions of Section 178(5) & (6) of the Ordinance provide for a different treatment for conducting the election of directors, with regard to a company having share capital and a company not having share capital, respectively. Hence, the provisions of Section 178 of the Ordinance were violated.

E. Overall Conclusion

22. I have carefully examined and given due consideration to the written and verbal submissions of the Respondents, and have also referred to the provisions of the Ordinance and other legal references, I am of the view that there has been an established default of Section 178 of the Ordinance, due to the reason that the Company has not followed the requirements of Section 178 of the Ordinance and has relied upon its interpretation of Section 178(6) of the Ordinance.

23. Before proceeding further, I find it relevant to discuss the duties of the directors. The directors, in addition to the day-to-day running of the Company and the management of its business, also have some 'fiduciary' duties i.e. duties held in trust and some wider duties imposed by statute. Hence, the directors are gauged against a higher standard of accountability which requires them to be vigilant and perform their duties with due care. In the instant case, however, the directors have failed to perform their duties with due care and prudence. As the directors are supposed to be well aware of their legal obligations in connection with the aforesaid statutory requirement of Section 178 of the Ordinance, therefore, it could be legitimately inferred that the default was committed knowingly and willfully.

24. After carefully examining the facts, findings of the inspection team and arguments put forward by the Respondents, I am of the firm view that the Respondents failed to comply with the provisions of Section 178 of the Ordinance. Therefore, the penalty as provided under Section 186 of the Ordinance can be imposed onto the chief executive and directors of the Company.

25. The provisions of Section 186 of the Ordinance state that:

"Penalties. - Whoever knowingly and willfully contravenes or fails to comply with any of the provisions of sections 174 to 185 or is a party to the contravention of the said provisions shall be liable to a fine which may extend to ten thousand rupees and may also be debarred by the authority which imposes the fine from becoming or continuing a director of the company for a period not exceeding three years."





F. Penalties and Directions

26. As provided under Section 186, the directors of the Company can be debarred from becoming or continuing as directors of the Company for a period not exceeding three years. However, keeping in view that the violation has been highlighted first time; I am taking a lenient view and therefore, in exercise of the power conferred on me under Section 186 of the Ordinance, I impose a fine of Rs. 10,000/- (Rupees Ten Thousand Only) on each of the Respondents, due to the willful default of Section 178 of the Ordinance, as mentioned hereinabove. The Respondents are further directed to ensure full compliance with the Ordinance, rules, regulations and directives of the Commission in future.

27. Hence, each Respondent is hereby directed to deposit the applicable fine in the designated bank account maintained in the name of Securities and Exchange Commission of Pakistan with MCB Bank Limited within thirty (30) days from the date of this Order and furnish copy of the receipted vouchers issued in the name of Commission for information and record.

28. This Order is issued without prejudice to any other action that the Commission may initiate against the Company and / or its management (including the Chief Executive Officer of the Company) in accordance with the law on matters subsequently investigated or otherwise brought to the knowledge of the Commission.


Hasnat Ahmad
Director

