



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO II

In the matter of

Appeal No. 18 of 2012

1. Askari General Insurance Company Ltd
2. Mr. Abdul Waheed, CEO Appellants

Versus

Executive Director (Insurance) Respondent

Date of Hearing 04/03/14

ORDER

Present:

For the Appellant No. 1:

Mr. Syed Ahmed Hassan Shah, Advocate

Mr. Ashraf Malik, JVP Legal

Appellant No. 2:

Mr. Abdul Waheed, President and CEO

For the Respondent:

Mr. Muhammad Azam Nizami, Deputy Director (Insurance Division)

Mr. Nisar Yousuf Zai, Deputy Director (Insurance Division)



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1. This order is in appeal No. 18 of 2012 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 13/04/12 (the "Impugned Order") passed by the Respondent.
2. Askari General Insurance Company Ltd (the "Company") vide email dated 26/04/11 applied for NOC for insurance of four PAF JF-17 Aircrafts (the "Aircrafts"). In response the Commission informed the Company that insurance of aircrafts of PAF have to be placed with National Insurance Company Limited ("NICL") in terms of section 166 of the Insurance Ordinance, 2000 (the "Ordinance"). The Company made an application for provisional approval of the Commission vide letter dated 02/11/11 for placement of 100 percent of the risk, i.e. Aircrafts, facultative abroad. The coverage spanned 12 days. It was revealed that the Company had underwritten Third Party (Bodily Injury/ Property damage) Legal Liability (Aviation Liability) insurance cover for the Aircrafts. The Commission vide emails dated 15/11/11 and 08/12/11 asked the Company to submit the acceptance /regret slip issued by NICL. The Company submitted its response via letter dated 12/12/11 stating that the project will be financed out of non-public funds, therefore, No Objection Certificate ("NOC") from NICL is not required. The Company further stated that under section 166(3) of the Ordinance it is the option of the insured to place all such marine, aviation and transport risks with the insurers, other than NICL, where the risk is financed out of an external loan or external aid.
3. Show cause notice dated 21/11/11 ("SCN") under section 166 read with section 156 of the Ordinance was issued to the Company and its CEO and directors. The Respondent, dissatisfied with the response of the Appellants, passed the Impugned Order and imposed a penalty of Rs. 100,000 on the CEO of the Company and a fine



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of Rs. 200,000 on the Company. The management of the Company was warned to exercise due caution in the future. The Company was also directed to cancel the policy issued to PAF and to furnish to the Commission the endorsement from the policyholder for the effect of this cancellation along with evidence of refund of premium and any other such documents deemed necessary for this purpose.

4. The Appellants have preferred to file the instant appeal against the Impugned Order. The Appellant's representative argued that:

- a) that the Respondent has misapplied the law to the facts of the case. As per the insurance policy contract, the insurance cover was extended to third party insurance cover not for public property/assets as ascertained by the Respondent. Section 166 of the Ordinance applies to non-life insurance of public property. In the instant case, the insurance policy was not for the Aircrafts which were public property but for third party liability in respect of the Aircrafts from 08/11/11 to 19/11/11 intending to be displayed for commercial purposes in the Dubai Air Show 2011. Further, section 165(1) of the Ordinance applies to coverage of risks in respect of 'any property or interest' outside Pakistan which expression covers public property as well. The said sub-section does not require that such insurance be placed with NICL;
- b) it is an established principle of law that in case of any inconsistency between the Ordinance/act and a rule, the Ordinance/Act shall prevail. Reliance is placed on *Pearl Continental Hotel and another versus Government of N.W.F.P and others* cited at *PLD 2010 Supreme Court 1004*, wherein, it was held Rule 4(1) of Hotel Tax Rules 2003 was ultravires the provisions of section 4 of the



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N.W.F.P. Province Finance Ordinance, 2002. In the instant case, the Respondent has relied on rule 23 of the Insurance Rules, 2002 (the "Rules") which is in contradiction of section 165 of the Ordinance. The Federal Government has not framed any rules imposing conditions in respect of section 165(1) of the Ordinance. In the absence of any such rules, the Appellants shall be deemed permitted to extend the subject insurance without procuring any permission and no objection certificates from NICL and the Commission; and

- c) the Company, its CEO and directors acted in good faith and no loss was caused either to the Company or to the shareholders. The penalty imposed on the Company and the CEO was harsh and a lenient view needs to be taken.

5. The department's representative argued that:

- a) On 26/04/11 the Company asked for permission for the Third Party Insurance regarding the Aircrafts. The Commission in its reply letter on the same date informed the Appellants that the Aircrafts being public property fall under section 166 of the Ordinance and the Appellants were not competent to extend the third party cover to the public assets. Section 166 of the Ordinance provides in an unequivocal way that all non-life insurance business pertaining to public property which includes third party liability insurance will be placed with NICL only. Section 165 of the Ordinance is not relevant to the facts of the case and states that the Federal Government may make rules by imposing conditions on the ability of any person to insure outside Pakistan in respect of any property or interest located in Pakistan;



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- b) the Federal Government has framed the rules as required by section 165 of the Ordinance. The Federal Government has prescribed rule 23 of the Rules in line with section 165 of the Ordinance imposing the conditions of obtaining 'exemption' from the Government on certain grounds, i.e. non-availability of suitability of insurance in Pakistan; and (b) reasons of some exceptional nature. The Appellant has conveniently chosen to ignore the 'requirements' articulated under the Rules; and
- c) the Company contravened the provisions of the Ordinance and the CEO and directors of the Company were fully aware of their legal obligations towards the Company and its shareholders. The penalty, therefore, was rightly imposed on the CEO and the Company.
6. We have heard the parties. Section 165, 166 of the Ordinance and rule 23 of the Rules are reproduced for ease of reference:

165. Insurance of interests in Pakistan.- (1) The Federal Government may make rules, not inconsistent with this Ordinance, imposing conditions on the ability of any person to insure outside Pakistan any risk or part thereof in respect of any property or interests which are located in Pakistan at the time the insurance is effected.

(2) The Federal Government may make rules, not inconsistent with this Ordinance, imposing conditions on the ability of any insurer to issue life insurance policies denominated in currencies other than the Pakistan Rupee to persons who are citizens of Pakistan and resident in Pakistan at the time the insurance is effected.



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166. Insurance of public property. - (1) This section applies to direct nonlife insurance of public property.

(2) In this section -

(a) "Company" means the National Insurance Company Limited;

(b) "public property" means:

(i) any property, movable or immovable, which belongs to, or the safety of which is the legal responsibility of, -

(A) the Federal Government, a Provincial Government or a local authority or statutory corporation; or

(B) any company, firm, undertaking, institution, organization or other establishment which is managed or controlled by the Federal or a Provincial Government or local authority or statutory corporation or in which such Government, by itself or jointly with a local authority or corporation or company managed or controlled by it, holds a controlling financial share or interest or which is specified by the Federal Government for the purposes of this clause; and

(ii) a project financed out of an external loan, or with external aid until it reaches:

(A) in the case of an industrial project, the stage at which it is capable of commencing normal production; and

(B) in the case of any other project, the stage at which it is capable of being put to the use for which it is intended; and

(c) "statutory corporation" means a body corporate, other than a company, established or set up by the Federal Government or a Provincial Government in pursuance of any law.



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(3) *Subject to the provisions of sub-sections (4) and (5), all insurance business relating to any public property, or to any risk or liability appertaining to any public property, shall be placed with the Company only and shall not be placed with any other insurer:*

Provided that marine, aviation and transport insurance relating to goods the import of which is financed out of an external loan, or with external aid, may, at the option of the importer, be placed with any insurer authorised to carry out such insurance business in the country giving the loan or aid.

23. Insurance of interest in Pakistan.... (1) *For the purposes of sub section (1) of section 165 of the Ordinance, no person shall insure outside Pakistan any risk or part thereof in respect of any property or interest which is located in Pakistan at the time insurance is effected.*

(2) *The Federal Government may grant exemption to any person from the requirement of sub-rule (1) ---*

(a) *where any risk cannot be insured suitably in Pakistan; or*

(b) *where there are reasons of exceptional nature for granting exemption*

(3) *The exemption under sub-rule (2) shall be for such property or interests, and for such period as the Federal Government may deem fit.*

a) section 166 of the Ordinance applies to non-life insurance and section 166(3) of the Ordinance provides that, “...all insurance business relating to any public property or to any risk or liability appertaining to any public property, shall be placed with the Company only and shall not be placed with any other insurer”. In the instant case, the Aircrafts are public property and “all insurance business” in terms of section 166 of the Ordinance includes third party liability insurance. The third party liability insurance of the Aircrafts, therefore, could only be placed with NICL. Section 165(1)



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of the Ordinance provides that, “*the Federal Government may make rules, not inconsistent with this Ordinance, imposing conditions on the ability of any person to insure outside Pakistan...in respect of any property or interests which are located in Pakistan at the time insurance is effected*”. We are of the view that section 165 of the Ordinance is applicable in a situation when a person or company outside Pakistan insures a property located in Pakistan and is, therefore, not attracted to the facts of the instant case;

- b) we have perused the judgment of *Pearl Continental Hotel and another versus Government of N.W.F.P and others PLD 2010 Supreme Court 1004* relied on by the Appellant, wherein, it was held that in case of a conflict between primary law and rules made thereunder, the primary law shall prevail. In the instant case, section 165(1) of the Ordinance provides that, “*The Federal Government may make rules, not inconsistent with this Ordinance, imposing conditions on the ability of any person to insure outside Pakistan any risk or part thereof...*”. Rule 23(1) of the Rules states that, “*1) For the purposes of sub section (1) of section 165 of the Ordinance, no person shall insure outside Pakistan any risk or part thereof in respect of any property or interest which is located in Pakistan at the time insurance is effected...*” Rule 23(2) of the Rules, however, provides that, “*... (2) The Federal Government may grant exemption to any person from the requirement of sub-rule (1)....*” provided certain conditions are met.

Rule 23 of the Rules was made in consonance with section 165(1) of the Ordinance, when the rule is read as a whole. Rule 23(1) of the Rules prohibits insurance of any property or interest outside Pakistan, however, rule 23(2) of the Rules lays down the



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conditions for exemption. We do not see any conflict between section 165 of the Ordinance and rule 23 of the Rules made thereunder; and

- c) as stated in paragraph 15 of the Impugned Order, the CEO of the Company submitted vide letter dated 25/01/12 to the Respondent that he was responsible for the decision to extend insurance for third party liability associated with the Aircrafts and that none of the directors of the Company had taken any part in the said decision. We are of the view that the CEO of the Company has not caused any loss to the Company or its shareholders and has acted in good faith by taking responsibility for his actions.

In view of the observations made in paragraph 6(c) above, penalty to the extent of CEO is set aside. The Company is strictly directed to comply with the provisions of the Ordinance in future.

Imtiaz Haider
Commissioner (SMD)

Tahir Mahmood
Chairman

Announced on: 23/4/14