



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. III

In the matter of

Appeal No. 12 of 2010

National Insurance Company Limited

..... Appellant

Versus

Executive Director (Insurance)

Securities and Exchange Commission of Pakistan

..... Respondent

Date of Hearing

21/01/15

ORDER

Present:

For the Appellant

1. Ms. Mishal Nasir Advocate

For the Respondent (through video conferencing):

1. Mr. Tariq Hussain, Director (Insurance Division)

2. Mr. Arif Nizami, Deputy Director (Insurance Division)

1. This order shall dispose of appeal No. 12 of 2010 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 21/12/09 (the "Impugned Order") passed by the Respondent.

Appellate Bench No. III

Appeal No. 12 of 2010

Page 1 of 8



Securities and Exchange Commission of Pakistan

2. In terms of the provisions of section 29 of the Insurance Ordinance, 2000 (the "Ordinance"), National Insurance Company Limited (the "Appellant") was required to maintain statutory deposit with the State Bank of Pakistan ("SBP"). The annual accounts of the Appellant for the year ended 31/12/08 showed that the Appellant paid up capital was Rs. 2,000,000,000 and as such the statutory deposit requirement was Rs. 200,000,000. The record available with the SBP showed that the Appellant has NIL balance against the statutory deposit.
3. Show cause notice dated 05/11/09 ("SCN") was issued by the Respondent under section 11(1)(b), section 29, section 63 and section 157 of the Ordinance calling upon the Appellant to show cause as to why action should not be initiated against the Appellant for violation of aforementioned sections. The Appellant was provided an opportunity of hearing; however, dissatisfied with the response of the Appellant, the Respondent passed the Impugned Order. The Appellant through the Impugned Order was imposed penalty of Rs. 2 million and was further directed to submit the statutory deposit of two hundred million in the SBP.
4. The Appellant has preferred to file the instant appeal against the Impugned Order. The Appellant's counsel argued that the Respondent failed to take into account that upon fulfillment of all statutory requirements, the Appellant accrued a vested right to be granted exemption from the requirement of maintaining minimum statutory deposit under section 29 of the Ordinance, as it was incumbent upon the Respondent to set the minimum required amount as zero. The net admissible assets of the Appellant are well above the minimum solvency requirement. Section 29(2) of the Ordinance provides that, "...the required minimum amount is, either: (a) The higher of ten million rupees and ten percent of the Insurer paid up capital; or (b) such amount as may be prescribed by the Commission:" The proviso to section 29 of the Ordinance provides that, "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



Securities and Exchange Commission of Pakistan

section by reducing the required minimum amount to zero.” Section 36 of the Ordinance provides that every insurance company shall at all times have admissible assets in excess of its liabilities of an amount greater than or equal to the minimum solvency requirement which is stated in section 36(3) of the Ordinance and Rule 13 of the SECP Insurance Rules, 2002 (the “Rules”). Rule 9(2) of the Rules provides that, *“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 25 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.”* For the last several years the Appellant has met the minimum solvency requirements set in section 36 of the Ordinance read with Rule 13 of the Rules which is evidenced from our Annual Accounts and Regulatory Returns. Therefore, under the proviso in section 29 of the Ordinance, NICL must be exempted from the minimum solvency requirements. Furthermore, the Appellant sent letters to the Respondent dated 20/11/08, 03/11/09 and 25/11/09 informing them that there is an exemption and the Commission must exercise its discretion when the Appellant has fulfilled the conditions of meeting the meeting the minimum solvency requirement and statutory deposits. Reliance is placed on the *Baluchistan High Court Judgment of Abdul Karim versus the Returning Officer/AC Hub at Hub and another PLD 1999 Quetta 78*, wherein, it was held that ..., *“The word ‘may’ in the following circumstances can be treated as a binding obligation as the authority invested with the permission power;-*

- (1) When the power is given for the benefit of persons who are specifically pointed out and the condition upon which it is to be exercised has also been provided for.*
- (2) if this is effectuate a legal right*
- (3) if it authorises the doing of a thing for the sake of justice*
- (4) If it authorises the doing of a thing for the sake of public good*
- (5) in the light of the consequences that would follow by construing it one way or the other ...”*



Securities and Exchange Commission of Pakistan

SECP

In the instant case the word 'may' in the proviso to section 29 of the Ordinance is a binding obligation on the Commission to exercise their discretion to grant exemption to the Appellant when it has fulfilled the criteria for minimum solvency as well as maintenance of a statutory deposit.

5. The department's representative argued that on achieving the levels of solvency on the part of an insurance company as provided by the Ordinance, the Commission, in its sole discretion may grant waiver to any insurance company from the requirement of depositing with the State Bank. However, nowhere it has entitled an insurance company to assume on its own that they have been absolved of the responsibility of complying with the depository requirement with the State bank. The Company has not at any given time sought the exemption on this account from the Commission. It is also a matter of fact that so far the Commission has not granted a waiver to any insurance company in this regard. The main objective of the Ordinance is to ensure that the protection of interests of insurance policy holders. In this regard, maintenance of a statutory deposit as well as the minimum solvency requirement of the insurance companies registered in Pakistan determines the ability to meet their obligations under the policy issued to them. As regards the insurers engaged in non-life insurance business, section 36 of the Ordinance lays down extent to which the "admissible assets" of an insurance company must exceed its liabilities. The difference between the admissible assets and the liabilities of an insurance company must be greater than or equal to the minimum solvency requirement in terms of section 36(3) of the Ordinance. As regards the statutory deposits with the State Bank, precluding any further need to dwelling on it, suffice it to say no insurance company can claim any privileged status on any ground whatsoever and can assume to have a carte blanche to flout the law with impunity. The fulfillment of solvency level does not automatically bestow exemption on any insurance company from the necessity of depositing the due amount with the State Bank. The Company has never sought, never contacted the Commission on this account of solvency and exemption. Furthermore, Rule 9 of the Rules that the Appellant has adhered to has been omitted pursuant to S.R.O. 682(I)/2008 dated 25/06/08.

Appellate Bench No. III

Appeal No. 12 of 2010

Page 4 of 8



Securities and Exchange Commission of Pakistan

6. We have heard the arguments. Sections 11(1), 29(1), 29(2), 36 and 157 of the Ordinance are reproduced for ease of reference:

11. Conditions imposed on registered insurers.-(1) *An insurer registered under this Ordinance shall at all times ensure that:*

(a) *the provisions of this Ordinance relating to minimum paid-up share capital requirements are complied with;*

(b) *the provisions of this Ordinance relating to minimum statutory deposits have been complied with;*

(c) *the provisions of this Ordinance relating to minimum solvency requirements are complied with;*

(d) *the provisions of this Ordinance relating to the obtaining of reinsurance arrangements are complied with;*

(e) *the insurer is, and is likely to continue to be, able to meet its liabilities;*

(f) *the insurer meets, and is likely to continue to meet, criteria for sound and prudent management including without limitation those set out in section 12;*

(g) *the insurer has appointed an auditor recognised by the Commission as appropriately qualified to audit the business of life or non-life insurance as the case may be; and*

(h) *the insurer is, and is likely to continue to be, able to comply with such other of the provisions of this Ordinance as are applicable to it.*

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*

(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.

Islamabad, 25th June, 2008

S.R.O. 682(I)/2008.- *In exercise of the powers conferred by sub section(2) of section 167 of the Insurance Ordinance, 2000 (XXXIX of 2000), the Securities and*



Securities and Exchange Commission of Pakistan

Exchange Commission of Pakistan, with the approval of the Board, hereby makes the following amendments in the Securities and Exchange Commission (Insurance) Rules 2002, namely:-

In the aforesaid Rules,-

- (i) rule 9 shall be omitted; and
(ii) in rule 15, in sub-rule (1), the words "by the 31st January of each year" appearing after the word "arrangement" shall be omitted.

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 nonlife 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 required minimum amount as may be prescribed by the Commission;

(b) such percentage as may be prescribed by the Commission of its earned premium revenue in the preceding twelve months, net of reinsurance expense subject to a maximum deduction for reinsurance of fifty per cent of the gross figure; and

(c) such percentage as may be prescribed by the Commission of the sum of its liability for unexpired risk and its liability for outstanding claims, net of reinsurance subject to a maximum deduction for reinsurance in each case of fifty per cent of the gross figure:

Provided that in the case of an insurer incorporated in a jurisdiction outside Pakistan the amounts set out in clauses (b) and (c) of the subsection shall be calculated with reference to the earned premium revenue, unexpired risk liability and outstanding claims liability and related reinsurance balances of that insurer in respect of its insurance business in Pakistan only.

(4) The Commission may direct an insurer not to deal with any specified asset for any specified period of time in order to ensure compliance by the insurer with the provisions of this Part.

157. Penalty for transacting insurance business in contravention of sections 5, 6 and 29.- (1) Any insurer or any person acting on behalf of an insurer, who carries on any class of insurance business in contravention of any of the provisions of sections 5, 6 and 29, or does any one or more of the acts constituting the business of insurance in relation to any insurance business carried on in contravention of any of the said sections shall be punishable with fine which may extend to two million rupees.

(2) Any person knowingly taking out a policy of insurance with any insurer or person guilty of an offence under sub-section (1) shall be punishable with fine which may



Securities and Exchange Commission of Pakistan

extend to five hundred thousand rupees: Provided that nothing in sub-section (1) or sub-section (2) shall apply to the business of reinsurance between an insurer in Pakistan and an insurer not having an office in Pakistan.

Emphasis Added

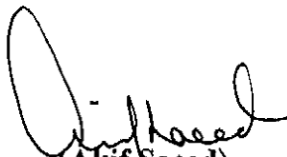
The Appellant has argued that the Respondent failed to take into account that upon fulfillment of all statutory requirements, the Appellant accrued a vested right to be granted exemption from the requirement of maintaining minimum statutory deposit under section 29 of the Ordinance. Moreover, the Appellant wrote letters dated 20/11/08, 03/11/09 and 25/11/09 informing Respondent that there is an exemption available under the provisions of Law and the Commission must exercise its discretion when the Appellant has fulfilled the conditions of meeting the minimum solvency requirement and statutory deposits. However, there repeated requests were not responded by the Respondent. Furthermore, the Appellant has placed reliance on *Baluchistan High Court Judgment of Abdul Karim versus the Returning Officer/AC Hub at Hub and another PLD 1999 Quetta 78*. The Respondent on the other hand has argued that on achieving the levels of solvency, the Commission, in its sole discretion may grant waiver to any insurance company from the requirement of depositing with the State Bank. Moreover, the Appellant cannot assume that such a waiver has been given. We are of the view that when an application for granting exemption was made on 20/11/08 and subsequent applications made on 03/11/09 and 25/11/09, the Respondent should have responded to the request and even if they had to refuse such a request reasons should have been communicated to the Appellant. We accept the Appellant's argument that their application requesting exemption from minimum statutory deposit under section 29 of the Ordinance should have been properly dealt with by the Respondent. In light of the above judgment of Balochistan High Court the word 'may' in the proviso to section 29 of the Ordinance is a binding obligation on the Commission as this effectuates a "legal right". The Respondent must exercise their discretion to grant exemption to the Appellant when the criterion for minimum solvency as well as maintenance of a statutory deposit has been fulfilled.



Securities and Exchange Commission of Pakistan

In view of the foregoing, we set aside the Impugned order with no order as to costs.

The Respondents are hereby directed to review the matter and recommend appropriate amendments in this regard to the Commission so that in future the same issue is not faced by other Insurance Companies


(Akif Saeed)
Commissioner (SCD)


(Tahir Mahmood)
Commissioner (CLD)

Announced on: 17 FEB 2015