



Corporate Supervision Department
Company Law Division

Before Amina Aziz –Director (CSD)

In the matter of

Southern Electric Power Company Limited

Number and date of notice: CSD/ARN/1302/2016-3882, dated March 31, 2016
Dates of hearings: May 2, 2016
Present: Mr. Salman Rahim, Mr. Khalid Rashid

ORDER

**UNDER SECTIONS 160 AND 164 READ WITH SECTION 476 OF THE COMPANIES
ORDINANCE, 1984**

This order shall dispose of the proceedings initiated against the following directors (the “respondents”) of Southern Electric Power Company Limited (the “Company”):

- | | |
|----------------------------------|----------------------|
| 1. Mr. Yahia Aowd Idris | 5. Ms. Louisa Grasso |
| 2. Ms. Lynn Margaret Isobel Bell | 6. Ms. Carolyne Khan |
| 3. Mr. Mohammad Khalid Rashid | 7. Mr. Osama Salik |
| 4. Mr. Salman Rahim | 8. Mr. Rashid Mirza |

The proceedings against the respondents were initiated through show cause notice (the “SCN”) dated March 31, 2016, under sections 160 and 164 read with section 476 of the Companies Ordinance, 1984 (the “Ordinance”).

2. The brief facts of the case are that perusal of the minutes of the of the annual general meeting (“AGM”) of the Company held on October 30, 2015 revealed that the following resolution was, inter alia, passed in the AGM:

“Further resolved that the members accept and confirm the appointment of Mr. Salman Rahim as Chief Executive Officer on terms agreed between him and the Board as to salary and conditions given to the outgoing CEO for a period of 6 months.”

Perusal of the notice of the AGM further revealed that it neither included the agenda regarding seeking members’ sanction for appointment of the chief executive (the “CEO”) nor the terms of his appointment and statement of material facts in this regard were attached thereto. The notice of the AGM also did not include draft resolution that was to be presented for approval by shareholders with regard to the appointment of the CEO.



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3. It appeared that the Company, prima facie, contravened the following provisions of the Ordinance:

- Section 160 (1) (b) of the Ordinance by not including the aforesaid business regarding seeking members' approval for appointment of the CEO and by not annexing to the notice of the AGM the statement of material facts containing the information in this regard, hence, depriving the shareholders of the mandatory material information required to make a well informed decision with regard to the aforesaid business that was to be transacted at the AGM.
- Sub-section (1) of section 164 of the Ordinance as the aforesaid notice of the AGM did not include draft resolution that was to be presented for approval by shareholders with regard to the appointment of the CEO.

Consequently, the SCN was issued to the respondents in terms whereof they were called upon to show cause in writing as to why penalties may not be imposed on them for the aforesaid, prima facie, contraventions of the law.

4. In response to the SCN, the Company Secretary through letter dated April 12, 2016 submitted reply. A brief of the reply with reference to the contents of the SCN is given below:

- The Company's generation plant which is its sole source of income was shut down in September 2012 due to disputes with WAPDA and despite numerous efforts to reach a resolution, the Company failed to restart its plant. The deteriorating financial situation came to crisis point in the summer of 2015. Resultantly, the CEO resigned in June and the employees of technical and finance departments also resigned due to non-payment of their salaries for about a year.
- Numerous creditors demanded their dues and the Company had to call on the sponsors for aid in the hope that once the plant was restarted it would be able to normalize its affairs. The Company had to shift from its office premises to ones provided by the sponsors and this involved packing and moving massive records with its consequential confusion and chaos. Since it was essential to appoint a replacement CEO and there were no funds available to pay for a new one, the only executive left was the undersigned who



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was appointed by the BOD for a short period of six months because he was continuing to work on accrued but unpaid salary. To compound matters further thefts at the plant, lack of funds to provide sufficient security guards, resignations of officers and the impending BOD meetings to approve annual and interim accounts and call AGM, in the absence of supportive staff, led to some defaults of the provisions of the law, including that of the omission of the insertion of special business in the agenda of the AGM.

- The appointment of the CEO, however, did not really involve the sort of documentation sought by section 160 (1) (b) as neither the interest of any director or approval of any document was needed and the appointment was for a limited period under peculiar circumstances and no salary was being paid out. Moreover no officer of the Company was in knowing and willful default but was done under pressure and circumstances outlined above.
- It may also kindly be noted that the CEO appointed has resigned in December 2015 and been replaced with another one whose salary is also on hold.

Based on the above submissions, he requested to condone the unintentional default.

5. The case was fixed for hearing on May 2, 2016. On due date, Mr. Saleem Rahim and Mr. Khalid Rashid, appeared before the undersigned and mainly reiterated their earlier written submissions. They further stated as under:

- The outgoing CEO who resigned as of July 1, 2015 due to non-payment of salary for a year needed to be replaced by July 14, 2015 but the Company had no fund to pay salary of a new CEO, therefore, the executive director legal was requested to accept additional office of the CEO for a period of six months on accrued salary.
- Section 200 of the Ordinance provides that terms and conditions of appointment of a CEO shall be determined by the BOD and it was done. The resolution passed by the members was more in nature of informing them of the reality of the situation and not something that would draw default under section 160 (1) (b). The members' approval was not needed for appointment or its terms and conditions as that was for the BOD to determine.



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- Section 164 was also not violated as the resolution in question was a routine and procedural and did not require to be sent with the notice of the AGM.

6. Before proceeding further, it is necessary to advert to the following relevant provisions of Ordinance.

Section 160 (1) (b) of the Ordinance:

"where any special business, that is to say business other than consideration of the accounts, balance-sheets and the reports of the directors and auditors, the declaration of a dividend, the appointment and fixation of remuneration of auditors, and the election or appointment of directors, is to be transacted at a general meeting, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning such business, including, in particular, the nature and extent of the interest, if any, therein of every director, whether directly or indirectly, and, where any item of business consists of the according of an approval to any document by the meeting, the time when and the place where the document may be inspected shall be specified in the statement."

Sub-section (1) of section 164 of the Ordinance:

"With the notice for a meeting, the company shall send to the members copies of draft resolutions, other than routine or procedural resolutions, which are proposed for consideration in the meeting."

Sub-section (8) (a) of section 160 of the Ordinance, inter alia, provides that *every officer of a listed company who knowingly or willfully fails to comply with any of the provisions of this section shall be liable to a fine which may extend to fifty thousand rupees and in the case of a continuing default to a further fine which may extend to two thousand rupees for every day after the first during which the default continues.*

Sub-section (3) of section 164 of the Ordinance, inter alia, provides that *in the event of any default in complying with any of the provisions of this section, the company and every officer of the company who is knowingly or willfully a party to such default shall be liable to a fine which may extend to five thousand rupees if the default relates to a listed company.*



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In terms of the Commission's notification SRO 1003 (I)/2015 dated October 15, 2015, powers to adjudicate cases under section 160 and 164 of the Ordinance have been delegated to the Director (Corporate Supervision Department).

7. I have reviewed the facts of the case, relevant provisions of the Ordinance, and submissions made by the respondents and my observations are as under:

- Section 160 of the Ordinance not only requires the agenda items of the meeting of members to be disclosed in the notice of the meetings sent to the members, but it also requires to attach to the notice a statement setting out all material facts concerning such business, including, in particular, the nature and extent of the interest, if any, therein of every director, whether directly or indirectly. The Company in its AGM sought the approval of members for accepting and confirming the appointment Mr. Salman Rahim as CEO along with its terms and conditions of his appointment through a resolution. However, it failed to include the aforesaid business as an agenda item in the notice and also failed to attach thereto the requisite statement of material facts.
- The respondents have referred to the provisions of section 200 of the Ordinance to plead that appointment of the CEO and determining the terms and condition of such appointment only required approval of the directors and in the AGM it may only be taken as sharing of information with the members regarding terms and conditions of appointment of the CEO. On the first place, section 200 of the Ordinance *the terms and conditions of appointment of a chief executive shall be determined by the directors or the company in general meeting in accordance with the provisions in the company's articles*. Therefore, the Ordinance has left it up to the Company to decide the authority of appointment of a CEO in line with the provisions of its AoA. The respondents have, however, not given any reference to the provisions of the AoA of the Company which authorize the directors in this behalf.
- Section 160 of the Ordinance clearly specifies special business as any business other than consideration of the accounts, balance-sheets and the reports of the directors and auditors, the declaration of a dividend, the appointment and fixation of remuneration of auditors, and the election or appointment of directors. Therefore, seeking members' approval and confirmation through a resolution for confirmation of appointment of the CEO was a



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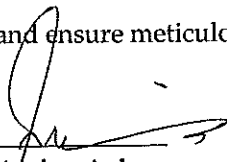
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special business and the Company was not only required to include it in the agenda of the AGM as a special business but was also required to attach statement of material facts with the notice of the AGM. Moreover, it was mandatory for the Company to attach the draft resolution for which members' approval was sought, as it was not the ordinary or routine business. The respondent's plea in this regard bears no ground.

- In respect of Company's plea that the aforesaid violation of sections 160 and 164 (1) (a) was caused due to lack of professionally competent staff who had left due to financial crisis, it is important to note that as a pre-requisite of good corporate governance, all the companies are required to employ suitably qualified and skilled persons to ensure smooth operations and regulatory compliance. It is important to highlight here that in addition to their responsibilities of overseeing and managing affairs of the Company, directors also have fiduciary duties towards the Company and its shareholders. They are, therefore, liable to a higher level of accountability which requires them to be vigilant and perform their duties with care and prudence. It is directors' responsibility to oversee the functioning of the company and keep it appropriately staffed to ensure due compliance of law.

8. For the foregoing reasons, I am of the view that the provisions of sections 160 and 164 of the Ordinance have been contravened by the respondents. However, I take cognizance of the facts that the Company has been financially constrained due to closure of operation and the appointment of the CEO, which is the subject matter of the instant proceedings, was made on a temporary basis to replace the outgoing CEO who had resigned. Moreover, the respondents have shown their commitment to comply with the relevant provisions of the Ordinance in future. Therefore, in exercise of the powers conferred by the Ordinance, instead of imposing fines, I hereby conclude the proceedings with a stern warning to the respondents to be careful in future and ensure meticulous compliance with applicable provisions of the Ordinance.


Amina Aziz
Director (CSD)

Announced:
June 13, 2016
Islamabad