

**BEFORE THE HONORABLE ISLAMABAD HIGH COURT,
ISLAMABAD
(Company Jurisdiction)**

C. O. No. ____ of 2018

Additional Registrar of Companies
Company Registration Office
Securities & Exchange Commission of Pakistan
State Life Building #7 Blue Area, Islamabad.

... Petitioner

Versus

M/s Southern Electric Power Company Limited
1 Salim Omer Road, Off Korang Road, Banigala, Islamabad through its Chief Executive.

... Respondent

**PETITION UNDER SECTION 301 READ WITH SECTION 304 OF THE
COMPANIES ACT, 2017, READ WITH ALL OTHER ENABLING PROVISIONS OF
LAW FOR WINDING UP OF RESPONDENT COMPANY**

Respectfully submitted that;

1. BACKGROUND.

- a) The Company was incorporated on December 20, 1994. As a public limited company under the Company Law. The principal business of the company is to generate and sell electricity.
- b) The Company is a power generating company capable of producing about 108 MW of electricity. it is a national asset in which general public has invested a large amount of money and all efforts were made to keep it a running concern,

- c) As disclosed in note 1.2 to the Accounts 2015, the Company had stopped its production since August 2012 due to acute shortage of funds caused by WAPDA/ National Transmission & Dispatch Company Limited for not paying its capacity purchase price (CPP) and other payments contrary to the Power Purchase Agreement (PPA).
- d) This led to dispute between both parties Under the PPA, the Company filed a case at the international Commercial Court in April 2008 against WAPDA for a claim of Rs. 5 billion, which to date remain unresolved, and the Arbitration proceedings initiated by the company are in abeyance with consent of both parties.
- e) The Company made all efforts to resolve the dispute amicably as it was unable financially and otherwise to pursue the expensive and time-consuming remedies available to it under PPA. In January 2010 the plant was restarted on the basis of agreements between WAPDA and the Company on the assurance given by the Managing Directors Pak-Kuwait Investment Company Limited. But still the matter could not be resolved amicably between parties and both parties are claiming payments from each other.
- f) It is not contested that the Company is in default of payments to many institutions persons banks and others, However, its lenders, while claiming such defaults have not moved to seek the remedies available to them under law and contracts.
- g) The Company in its correspondence made in respect of show cause notice dated August 22, 2016 stated that since 2012 the sponsors and the management have made every effort to have the plant restarted but to no positive success so far. The respondents further stated that, the incumbent government remains keen to have all sources of power available to it but the nature of disputes between the parties are complicated and after many deliberation and attempts could not resolved it. The respondents were of

the view that most of the employees have left the company apart from few which were serving without any payment of salary.

h) Pakistan stock Exchange has suspended the trading of shares of the Company with effect from January 12, 2016.

i) The operations of the company were suspended since 2012. The auditors of the Company i.e. KPMG Taser Hadi and Company Chartered Accountants, have given an adverse opinion in its audit report to the members on the annual audited financial statements for the year ended on June 30,2015. The auditor has also added following emphasis of matter paragraph in his report.

The company has incurred a net loss of Rs. 1,759.024 millions during the year and its equity is eroded as at June 30,2015 which stands at Rs.8,909.377 million negative. As of balance sheet date the Company current liabilities exceeded its total assets by RS 8,685.462 million. Operations of the company's plant is dependent upon the fuel advance facility from water and power development Authority/National Transmission and Dispatch Company Limited (WAPDA) who has discontinued the same since August 2012 and by virtue of which, the company's power project is closed for operations. Consequently (WAPDA) levied Liquidated Damages to the company during the year amounting to Rs1,276.627 million for failure to dispatch electricity.

Due to this reason, the company has not been able to generate sufficient cash flows from plant operations resulting in default on repayments of its obligations to the lenders. Furthermore, the directors have not indicated any commitment to provide or arrange working capital facility. however, these financial statements are prepared under the going concern assumption, because of the circumstances and events as mentioned in this paragraph along with other matters as set forth in Note 1.2 to the financial statements, in our opinion the company cannot be considered to be a going concern and thus the preparation of its financial statements on going concern basis is inappropriate. In our opinion the financial statements should reflect adjustment to reduce the value of assets to their recoverable amount and to provide for any further liabilities that might arise. These adjustments are likely to be substantial, but we are unable to determine the total of the required adjustments and provision with a reasonable degree of accuracy.

j) It is also clear that despite lapse of several years since business of the Company was suspended, the management of the Company was not able to formulate a viable revival plan for going concern, and for generation of funds from the daily operations of its core business. In the current circumstances the chance of revival of the Company are bleak. This view is further endorsed by the examination of correspondence made between WAPDA and Company, whereby litigations are pending at various forums and revival of the business is not feasible or expected.

k) Registrar of the Company Registration Office Islamabad (the CRO) has approached the Commission for grant of sanction in terms of clause (b) of section 304 of the Companies Act, 2017 (Act) (clause (b) of section 309 of the repealed Ordinance) read with clause (m) of the repealed Ordinance read with clause (c) of section 305 of the repealed Ordinance to present a petition before the honorable High Court for winding up of the Company on the ground that operation of the Company has been suspended since August 2012.

l) The show cause notice dated August 22, 2016 was served on the Company and its directors, under section 305 read with section 309 of the repealed Ordinance(section 301 read with section 304 of the Act) indicating the aforesaid ground to present a petition for winding up of the Company. In order to provide opportunity of personal hearing, the case was fixed on September 08, 2016. Hearing could not be held on September 08, 2016 and was held on September 21, 2016. On the date of hearing Mr. Salman Rahim and Mr. Khalid Rashid appeared and requested a three months' time to present correspondence between the Company and other agencies of Government of Pakistan. Accordingly, fifteen days time was granted to present all the correspondence made between the Company and other agencies of Government of Pakistan.

m) The Executive Director of the Commission passed Order dated December 14, 2016 to conclude the proceedings (Annex A) in the following term:

- *A company incorporated under the Ordinance is a legal judicial person and Board of Directors is vested with the power to make decisions with respect to running of its business operation including purchase of assets and payment of liabilities through funds generated from the operations.*

Investors/shareholders in a listed company had invested funds keeping in view of the stated business of the company and accordingly evaluate its income generation capacity and successful business operation. The investment of these shareholders gets stuck in a company which shuts down its core business and does not have any formal plans to recommence business. In such circumstances the shareholders have the right to get their monies back so that these can be invested in some other fruitful venture. For this very reason the invoked provisions of the Ordinance provide closure of business for more than one year as a basis of going to court to seek winding up of the Company. The Ordinance does not envisage any role of the Board of Directors in the process of winding up once it is commenced and liquidator is appointed after requisite approval of the shareholders.

- *From the above discussion and after careful consideration of all the facts and circumstances of the case, I am of the view that Company is liable to be wound up as its business has been suspended since 2012 and is unable to revive its operations so as to make the company a going concern. It is a settled principle of law that a company is liable to be wound up under clause (c) of section 305 of the ordinance if it has suspended its business for a whole year.*

- *For the forgoing, I in exercise of the power conferred on me under Section 309 of the ordinance, hereby authorize the Registrar, Company Registration office, Islamabad to present a petition for winding up of Southern Electric Power Company Limited.*

2. GROUNDS FOR WINDING UP.

The petitioner seeks the winding up of the company on following grounds;

- That the respondent Company has ceased its operational activities since September, 2012, as disclosed its annual audit financial statement, for the year ended on June 30th, 2015. Therefore, the respondent Company is liable to be wound up under Clause (m) of section 301 of the Act, (clause © of section 305 of the repealed Ordinance), on this score alone.
- That it is a settled principle of law that a listed Company is liable to be wound up under clause (m) of section 301 of the Act, (clause © of section

305 of the repealed Ordinance) if it has suspended its business for a whole year.

- That the substratum of the respondent Company has been lost, as the Company has no employee left and is suspended from trading on the Pakistan Stock Exchange since January 12, 2016. The company has ceased its operation since September 2012 and since its suspension the management of the Company has not implemented any revival plans. [PLD 1990 SC 763]

- That the petitioner has the standing to bring the instant winding up petition as per Section 304 of the Act, which states that:

An application to the court for the winding up of a company shall be by petition presented subject to the provisions of this section, either by the company, or by any creditor or creditors (including any contingent or prospective creditor or creditors), or by any contributory or contributories or by all or any of the aforesaid parties, together or separately or by the registrar, or by the Commission or by a person authorized by the Commission in that behalf.

- That the respondent Company has incurred net loss of Rs. 1,759.024 million during the year 2015 (2015 audited financial statement) and its equity is eroded as at June 30, 2015 which stands at Rs.8,909.377 million negative. As of balance sheet date the Company's current liabilities exceeded its total assets by RS 8,685.462 million. Hence, the Company ought to be wound up on this score alone due to negative equity, and inability to pay to its creditors, and due to losses incurred [PLD 1985 Kar. 193].
- That the respondent Company is unable to pay its debts, hence, ought to be wound up on this score alone. [PLD 1990 SC 768].
- If respondents have not made any rebuttal or denied the statement of facts and law made in the instant winding up petition, then the content of the petition is deemed to be true and correct, and case for winding up is fully made. [2012 CLD 252].
- That the respondent is incurring losses every year and that its auditor has also expressed adverse opinion while observing that there is material

uncertainty about the respondent's ability to continue as a going concern, with the result that the respondent substratum has also gone and therefore it is liable to be wound up. [2012 CLD 252]

- That additional ground may kindly be allowed to be raised during the proceedings of the petition.
- That in view of the above it is therefore in the interest of justice and also just and equitable that the Respondent Company (i.e. M/s Southern Electric Power Company Limited) be wound-up in terms of law.

PRAYER:

It is, therefore, most respectfully prayed that this honorable Court may be pleased:

- A. to order the Winding-Up of the respondent Company (i.e. **M/s Southern Electric Power Company Limited**) under the provisions of the Companies Act 2017 (repealed Companies Ordinance, 1984.
- B. To appoint Official Liquidator/Provisional Manager to conduct the winding-up proceedings as per sub section (3) of the section 308 of the Companies Act 2017 which states that:

Where the Court makes an order for the winding up of a company, it shall forthwith cause intimation thereof to be sent to the official liquidator appointed by it and to the registrar.

and perform related duties, and be directed to record the statement of affair of the Company within the contemplation of Section 320 of the Companies Act.
- C. to pass such further order or orders and to issue all consequential and necessary directions as this Honorable Court may deem fit and proper in the circumstances;

D. to order the respondent Company to pay the costs of the instant Petition;

Any other relief which this Honorable Court deems fit and proper in the peculiar circumstances of the instant petition may very kindly be awarded.

SHAHZAD AFZAL KHAN
Additional Registrar of Companies
Securities & Exchange Commission of Pakistan
Islamabad



Shahzad Afzal Khan

*Additional Registrar of Companies
Securities & Exchange Commission of Pakistan
Company Registration Office, Islamabad*

Through

*Mohsin Kamal
Advocate High Court
(LLM, UC BERKELEY)
CC NO: 37582*

Certificate:

As per instructions it is the first petition on the subject matter.

BEFORE THE HONORABLE ISLAMABAD HIGH COURT,
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I Salim Omer Road, Off Korang Road, Banigala, Islamabad through its Chief Executive.

... Respondent



AFFIDAVIT

I, Mr. Shahzad Afzal Khan, Additional Registrar of Companies, Securities and Exchange Commission of Pakistan, do hereby solemnly declare and affirm that the contents of the accompanying Writ petition are true and correct to the best of my knowledge, information and belief and nothing material has been concealed there from.

SHAHZAD AFZAL KHAN
Additional Registrar of Companies
Securities & Exchange Commission of Pakistan
Islamabad

DEPONENT



Verified on oath this _____ day of January, 2018 at Islamabad that the contents of the above affidavit are true and correct to the best of my knowledge, information and belief and nothing material has been concealed therefrom.

SHAHZAD AFZAL KHAN
Additional Registrar of Companies
Securities & Exchange Commission of Pakistan
Islamabad

DEPONENT



POWER OF ATTORNEY
(VAKALATNAMMA)

I/we, Security and Exchange Commission of Pakistan, hereby nominate, appoint and empower Mohsin Kamal of MK& Associates ("Advocates") in Company matter titled as:-

Additional Registrar of Companies, SECP

Versus

Southern Electric Power Company Ltd.

Before the Islamabad High Court to perform all legal acts falling within the scope of authority of a general attorney - in - fact and to be counsel in the above matter for me/us and on my/our behalf to appear, plead, act and answer in the above Court or any appellate Court or any other Court to which the *lis* is transferred/assailed in the above matter.

This power of attorney includes in particular the following rights: 1) to act, appear, defend and plead the above mentioned cause in this court/tribunal or any other court/tribunal in which the same may be tried or heard in the first instance or in appeal, review or revision or execution or in any other stage of its progress until its final decision; 2) to present pleadings, cross objections or petitions for appeal, execution, review, revisions, withdrawals, compromise or petition or affidavits or other documents as shall be deemed necessary or advisable for the prosecution of the said cause in all its stages; 3) to withdraw or compromise the said cause or submit to arbitration any difference or dispute that shall arise touching or in any manner relating to the said cause; 4) to receive money and grant receipts thereof and to do all other acts and things which may be necessary to be done for the progress and the course of the prosecution of the said cause; 5) to further engage advocates and delegate the powers of this attorney to such advocates and 5) to execute judgments and settlements, to receive and deliver securities, payments or any other matter in dispute.

AND to do all acts legally necessary to manage and conduct the said case in all respect, whether herein specified or not as may be proper and expedient.

AND I/we hereby agree to ratify and confirm all lawful acts done on my/our behalf under or by virtue of these presents or of the usual practice in such matter.

PROVIDED always, that, if the case may be dismissed in default, if it be proceeded ex-parte the Advocates (or their delegates) shall not be held responsible for the same.

AND I/we hereby agree that in the event of the whole or any part of the fee agreed by me to be paid to the Advocate remaining unpaid, he shall be entitled to withdraw from the prosecution of the said cause until the same is paid.

The attorney-in-fact is authorized to destroy the files without previous inquiry at the end of one year following the termination of this matter.

IN WITNESS WHEREOF I hereunto set my hand to these presents the contents of which have been explained to and understood by me this the 24th day of January 2018

Accepted by the Advocates

Mohsin Kamal: _____
(Attorney at Law)

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Principal

SHAHZAD AFZAL KHAN
Additional Registrar of Companies
Securities & Exchange Commission of Pakistan
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