



**QORI CIVILI  
(SEZZJONI TAL-KUMMERC)**

**ONOR. IMHALLEF  
JOSEPH ZAMMIT McKEON**

**Illum il-Hamis 25 ta` Frar 2021**

**Kawza Nru. 12  
Rikors Nru. 58/2020 JZM**

**Dr. Antoine Naudi [K.I. 448570M]  
bhala mandatarju specjali tal-  
kumpanija estera UR s.r.l. [Kodici  
Fiskali Taljan 07512420725] -**

***kontra***

**Talocan Ltd (C-51275)**

**Il-Qorti :**

**I. Preliminari**

Rat ir-rikors li kien prezentat fit-8 ta` Ottubru 2020 li jaqra :-

*1. Illi dan ir-rikors qed isir a tenur tal-Artikolu 218(1)(b) kif ukoll l-Artikoli 214(2)(a)(ii) u 214(5)(a) tal-Kap. 386 tal-Ligijiet ta` Malta.*

2. Illi l-kumpanija intimata giet inkorporata fis-sitta u ghoxrin (26) ta' Novembru 2010 u ghandha kapital azzjonarju awtorizzat u mahrug ta' mija u sittin elf ewro (€160,000) kollha mhallsa u dan kif jirrizulta mill-estratt tal-Authorised Shares tal-kumpanija intimata mehud minn fuq is-sit elettroniku tal-Malta Business Registry (ara estratt anness u mmarkat `DOK A`).

3. Illi fil-kumpanija intimata hemm zewg azzjonisti u cioe' l-kumpanija Invictus Holdings Ltd [C-51274) li hija proprjetarja ta' mija disgha u disghin elf, disa`mija disgha u disghin (159,999) sehem ordinarju tal-valur ta' Ewro (€1) u Antignani Investment Group Limited (C-62852) li hija proprjetarja ta' sehem ordinarju wiehed (1) tal-valur ta' Ewro (€1), u dan kif inhu kkonfermat mill-estratt tal-Involved Parties tal-kumpanija intimata mehud minn fuq is-sit elettroniku tal-Malta Business Registry (ara `DOK B` anness).

4. Illi permezz ta' kuntratt ta' kostituzzjoni ta' debitu datat erbatax (14) ta' Frar 2020 in atti tan-Nutar Dottor Daniela Vella Borda (ara kopja annessa u mmarkata `DOK C`), il-kumpanija rikorrenti otteniet titolu ezekkuttiv ai termini tal-Artikolu 253(b) tal-Kap. 16 tal-Ligijiet ta' Malta fil-konfront tal-kumpanija intimata fir-rigward ta' kreditu tal-valur ta' €272,577.44, oltre l-ispejjez u l-imghax ta' 8% kif imsemmijin fl-istess kuntratt, u dan in kwantu €257,690.44 bhala somma kapitali u €20,887 rapprezentanti imghax li lahaq iddekorra sal-jum tal-kuntratt imsemmi.

5. Illi permezz ta' ftehim ta' cessjoni ta' kreditu datat 25 ta' Lulju 2020 iffirmit f' zewg originali (ara ftehim redatt bil-lingwa Taljana anness bhala `DOK D1` u ftehim redatt bil-lingwa Ingliza anness bhala `DOK D2`), l-ammont tas-somma kapitali originali kanonizzata bhala dovuta lill-kumpanija rikorrenti minghand dik intimata naqas ghal €177,819.84, b`dan ghalhekk illi flimkien mal-ammont ta' €20,887, illum fadal kreditu kanonizzat ta' mija tmienja u tletin elf seba' mija u sitt ewro erbgha u tmenin centezmu (€138,706.84), oltre l-ispejjez u l-imghax ta' 8% kif applikabbli skont il-kuntratt ta' kostituzzjoni ta' debitu imsemmi.

6. Illi permezz tal-ittra ufficjali numru 2766/2020 u t-trapass ta' jumejn mill-10 ta' Settembru 2020 ossija l-jum tan-notifika tal-istess att lill-kumpanija intimata (ara kopja legali annessa u mmarkata `DOK E`), it-titolu ezekkuttiv premess gie rez ezegwibbli ai termini tal-Artikolu 256(2) tal-Kap.12.

7. *Illi nonostante d-diversi interpellazzjonijiet maghmula lill-kumpanija intimata, hija baqghet inadempjenti.*

8. *Illi fil-wiehed u tletin (31) ta` Jannar 2020, gie mitlub il-hrug tal-mandat ta` sekwestru ezekuttiv numru 168/2020 quddiem l-Onorabbli Prim`Awla tal-Qorti Civili kontra l-kumpanija intimata (ara kopja legali tal-mandat ta` sekwestru ezekuttiv relattiv anness u mmarkat `DOK F`), liema talba giet akkordata permezz ta` digriet tat-tmintax (18) ta` Frar 2020.*

9. *Illi peress illi ghaddew aktar minn erbgha u ghoxrin [24] gimgha mill-ezekuzzjoni tat-titolu ezekuttiv imsemmi fil-paragrafu precedenti, il-kumpanija intimata ghandha titqies li ma tistax thallas id-djun taghha ai termini tal-Artikolu 214(5)(a) tal-Kap. 386 u ghalhekk, in vista tal-Artikolu 214(2)(a)(ii) tal-Kap. 386, qieghed jintalab ix-xoljiment u l-istralc mill-Qorti.*

*Ghaldaqstant ghar-ragunijiet suesposti, il-kumpanija rikorrenti fil-kapacita` taghha ta` kreditrici tal-kumpanija intimata, umilment titlob ai termini tal-Artikol u 218 (1) tal-Kap. 386 tal-Ligijiet ta` Malta li din l-Onorabbli Qorti joghgobha :*

1. *Tiddikjara illi l-kumpanija intimata Talocan Ltd ma tistax thallas id-djun taghha ai termini tal-Artikolu 214(5)(a) tal-Kap. 386 tal-Ligijiet ta` Malta.*

2. *Tordna x-xoljiment u l-istralc konsegwenzjali tal-kumpanija intimata ai termini tal-Artikolu 214 (2)(a)(ii) tal-Kap. 386 tal-Ligijiet ta` Malta.*

3. *Tahtar stralcarju sabiex jiehu hsieb l-istralc tal-kumpanija intimata u taghti dawk l-ordnijiet applikabbli skont id-dispozizzjonijiet tal-ligi fir-rigward tal-kondotta tal-istess stralc.*

4. *Taghti kull provvediment iehor, inkluzi ordnijiet interim, kif jidhrilha xieraq u opportun.*

*Bl-ispejjez kollha kontra l-kumpanija intimata inkluzi dawk tal-itttra ufficjali numru 2766/2020.*

Rat id-dokumenti li kienu prezentati mar-rikors.

Rat illi ghalkemm l-intimata kienet debitament notifikata skont il-ligi bir-rikors promotur u bl-avviz tas-smigh tal-kawza, ma pprezentatx risposta.

Rat il-verbal tal-udjenza tat-12 ta` Jannar 2021.

Semghet ix-xiehda tal-Av. Dr. Veronica Spiteri fl-udjenza tas-26 ta` Jannar 2021.

Rat id-digriet li tat fl-istess udjenza fejn kien applikat ir-Reg 3(3) tal-Avviz Legali 373 tal-2020.

Rat illi l-kawza thalliet ghal provvedimenti ghal-lum bil-fakolta` li l-intimata tipprezenta nota ta` osservazzjonijiet.

Rat illi l-intimata ma pprezentat ebda nota ta` osservazzjonijiet.

Rat l-atti l-ohra tal-kawza.

## **II. L-Art 218(1) tal-Kap 386**

Bl-azzjoni odjerna, ir-rikorrent noe qieghed jitlob ix-xoljiment u stralc tal-intimata abbazi tal-**Art 214(2)(a)(ii) u tal-Art 214(5)(a) tal-Kap 386**.

L-eligibilita` o meno tal-mandanti tar-rikorrent li tippromwovi l-azzjoni tal-lum hija stabbilita` fl-**Art 218 tal-Kap 386** li jghid :-

*Talba lill-qorti (aktar `il quddiem imsejha "rikors ghal stralc") ghal -*

- (a) stralc ta` kumpannija mill-qorti skont l-artikolu 214(1)(a) ;*
- (b) xoljiment u stralc ta` kumpannija mill-qorti skont l-artikolu 214(2)(a) ; jew*
- (c) xoljiment u stralc ta` kumpannija skont l-artikolu 214(2)(b),*

*ghandha ssir b`rikors li jista` jsir jew mill-kumpannija wara decizjoni tal-laqgħa generali jew mill-bord tad-diretturi tagħha jew minn xi detentur ta` obbligazzjoni, kreditur jew kredituri, jew minn xi kontributorju jew kontributorji :*

*Izda rikors skont il-paragrafi (b) jew (c) jista` wkoll isir minn xi azzjonist jew direttur tal-kumpannija.*

Fil-kaz tal-lum, l-azzjoni kienet istitwita minn kreditur [ara Dok C a fol 7 et seq]. Għalhekk il-mandanti tar-rikorrent għandha *locus standi* sabiex tippromwovi l-azzjoni odjerna.

### **III. L-Avviz Legali 373 tal-2020**

Il-qorti tirreferi għall-verbal tal-udjenza tas-26 ta` Jannar 2021. B`appozitu digriet mogħti dakinhar, u b`riferenza għall-Art 3(3) tal-Avviz Legali 373 tal-2020, iddikjarat ruhha sodisfatta *prima facie* li l-fatti u cirkostanzi li wasslu biex ikun prezentat ir-rikors promotur tal-azzjoni odjerna sehew qabel is-16 ta` Marzu 2020.

### **IV. L-Art 214(2)(a)(ii) tal-Kap 386**

Meta tfassal il-mudell għal-ligi tagħna l-gdida dwar il-kumpanniji, dik li llum hija Kap 386 tal-Ligijiet ta` Malta, u li kellha tiehu post l-Ordinanza dwar Socjetajiet Kummercjali (Kap 168), il-qafas magħzul kien dak tal-Companies Act Ingliza 1985.

Fil-ligi Ingliza, ix-xoljiment u l-istralc ta` kumpanniji kien trattat b`legislazzjoni *ad hoc* u cioe` l-Insolvency Act 1986. Meta sar l-Att XXV tal-1995 dwar il-Kumpanniji, id-disposizzjonijiet li jirregolaw ix-

xoljiment u l-istralc kienu integrati fil-ligi l-gdida, mhux kif sar fl-Ingilterra.

L-**Art 214(2)(a)(ii)** jaghti lill-qorti diskrezzjoni li xxolji u tistralcja kumpannija *jekk il-kumpannija ma tkunx tista` thallas id-djun taghha.*

Id-disposizzjoni trid tingara flimkien ma` l-**Art 214(5)** li jghid liema huma s-sitwazzjonijiet fejn il-ligi taghna tqis illi kumpannija ma tkunx tista` thallas id-djun taghha.

Fil-ligi taghna li *kumpannija ma tkunx tista` thallas id-djun taghha* ghandu sinjifikat preciz u definit, mentri fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha.

Fil-Pag 859 ta` **Boyle & Birds` Company Law** (Eighth Edition – Jordans – 2012) jinghad illi :-

*There are two principal, although not exclusive or exhaustive, tests of insolvency : a company is insolvent if it unable to pay its debts as they fall due ("cash flow insolvency") ; it is also insolvent if its liabilities exceed its assets ("balance sheet insolvency") ...*

Fil-ligi taghna, **tnejn** huma c-cirkostanzi definiti fejn kumpannija titqies li ma tistax thallas id-djun taghha :-

- *jekk id-dejn dovut mill-kumpannija jkun baqa` ma thallasx ghal kollox jew f`parti wara erbgha u ghoxrin gimgha mill-ezekuzzjoni ta` titolu ezeuttiv kontra l-kumpannija b`xi wiehed mill-atti ezeuttivi msemmijin fl-artikolu 273 tal-Kodici ta` Organizzazzjoni u Procedura Civili ;*

**jew**

- *jekk ikun ippruvat ghas-sodisfazzjon tal-qorti li l-kumpannija ma tkunx tista` thallas id-djun taghha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpannija.*

**Abbazi ta` li jirrizulta mill-kawzali tar-rikors promotur, ir-rikorrent noe qieghed isostni l-azzjoni abbazi tal-paragrafu (a) tad-disposizzjoni.**

**V. L-Art 214(5)(a) tal-Kap 386**

Ghalkemm b` mod aktar ristrett, fil-ligi taghna dak previst mill-Art 214(5)(a) **jixbah** dak maghruf bhala *cash flow insolvency* fil-ligi Ingliza.

Filwaqt illi fil-ligi taghna huwa specificat **bil-preciz** x` m`ghandhiex taghmel kumpannija debitrici sabiex ma tkunx meqjusa li ma tistax thallas id-djun taghha, fil-ligi Ingliza il-kriterju huwa aktar generiku, ghaliex dik l-ghamla ta` insolvenza ssehh meta kumpannija tkun *unable to pay its debts* **as they fall due.**

Fil-Pag 860 ta` **Boyle & Birds` Company Law** (op. cit.) jinghad illi :-

*Failure to pay a debt which is due and not disputed amounts to evidence of cash flow insolvency. Thus a company which has a policy of late payment of bills could find itself the subject of a petition for a winding-up order or administration order. Such a petition will not be struck out at an early stage as a form of improper pressure and an abuse of the process of the court, because, as Staughton LJ explained in Taylor`s Industrial Flooring (1990. BBC 44 at 51) creditors, not late payers, are more worthy of insolvency law`s protection.*

*"Many people today seem to think that they are lawfully entitled to delay paying their debts when they fall due or beyond the agreed period of credit, if there is one ... This can cause great hardship to honest traders, particularly those engaged in small businesses recently started. Anything which the law can do to discourage such behaviour in my view should be done.*

Fil-Pag 17 tal-ktieb **Insolvency Law - Corporate and Personal - Andrew Keay u Peter Walton** (Pearson Longman - 2003) jinghad hekk dwar *cash flow insolvency* fil-kuntest tal-Insolvency Act 1986 -

*The court, in examining whether a company is suffering cash flow insolvency, will consider whether the company is actually paying its debtors. Courts must take into account what current revenue the company has as well as what the company can procure by realising assets within a relatively short time ... A company can rely upon money which might be obtained from the sale of assets or upon money which might be obtained on the strength of its assets ... It is possible that sometimes a debtor might be able to establish solvency by demonstrating that funds can be obtained through an unsecured loan. In considering whether a person or a company is insolvent, the debtor`s whole financial position must be studied ... and a temporary lack of liquidity does not necessarily mean that the company is insolvent ...*

*At one time courts were rather strict on what they required to be established before they were willing to deem a person or a company insolvent, but in more recent times they have become more liberal as far as creditors are concerned and have held that a debtor is insolvent if a creditor is able to prove that he or she has not paid an undisputed debt after a demand has been made ... and this is the case even if there is other evidence which suggests that the value of the assets outweighs liabilities ...*

*Whether a company is cash flow insolvent is principally a question of fact and one which may be established in any number of ways, such as the existence of a large number of outstanding debts and unsatisfied judgments ... or there is lack of assets on which execution can be levied ...*

*It has been said that a debtor is not regarded as solvent just because if sufficient time were granted the debts could be paid off ...*

Il-qorti tirrileva li sabiex tirnexxi l-azzjoni tar-rikorrent noe bhala kreditur tal-intimata, huwa bizzejjed li jkun dejn (anke jekk ikun ta` terzi) li jkun gie ezegwit kif previst fil-paragrafu (a).

Fil-kaz tal-lum, jirrizultaw ippruvati dawn il-fatti li bl-ebda mod ma kienu kontestati :-

- Permezz ta` kuntratt ta` kostituzzjoni ta` debitu tal-14 ta` Frar 2020 fl-atti tan-Nutar Dottor Daniela Vella Borda (Dok C) il-mandanti tar-rikorrent kisbet titolu eżekuttiv skont l-Art 253(b) tal-Kap 12 kontra l-intimata għal kreditu ta` €272,577.44, oltre l-ispejjeż u l-imghax ta` 8% skont il-



kuntratt : in kwantu ghal €257,690.44 bhala somma kapitali u €20,887 bhala imghax li lahaq iddekorra sal-jum tal-kuntratt.

- Bi ftehim ta` cessjoni ta` kreditu tal-25 ta` Lulju 2020 (Dok D1 u D2) l-ammont tas-somma kapitali originali dovuta lill-mandanti tar-rikorrent naqas ghal €177,819.84. B`hekk flimkien mal-ammont ta` €20,887, illum fadal kreditu kanonizzat ta` €138,706.84 favur il-mandanti tar-rikorrent, oltre l-ispejjez u l-imghax ta` 8% skont il-pattijiet tal-kuntratt Dok C.
- Fit-2 ta` Settembru 2020, ir-rikorrent noe ipprezenta ittra ufficjali kontra l-intimata, li permezz taghha wara li ghaddew jumejn skont il-ligi fejn l-intimata kellha thallas l-ammont mitlub, sar ezegwibbli l-att pubbliku tal-14 ta` Frar 2020 skont l-Art 256(2) tal-Kap 12 (Dok E).
- Il-kreditu tar-rikorrent noe baqa` ma thallasx.
- Fit-18 ta` Frar 2020, kreditur terz kiseb il-hrug tal-mandat ta` sekwestru ezekuttiv numru 168/2020 mill-Prim`Awla tal-Qorti Civili kontra l-intimata (ara Dok F). Il-mandat kien notifikat lis-sekwestratarju fl-20 ta` Frar 2020.
- \* Mid-deposizzjoni tal-Av. Dr. Veronica Spiteri, jirrizulta li wara l-ezekuzzjoni tat-mandat ezekuttiv, l-intimata ma hallset xejn minn dak li kellha taghti lill-kreditur.
- L-azzjoni odjerna kienet prezentata wara erbgha u ghoxrin [24] gimgha mill-ezekuzzjoni tat-titolu ezekuttiv tal-kreditur terz.

**Il-qorti hija tal-fehma li l-vot tal-Art 214(5)(a) tal-Kap 386 huwa sodisfatt.**

## **VI. Id-diskrezzjoni tal-qorti**

Il-qorti taghmel referenza ghall-pag. 913-914 ta' **Boyle & Birds` Company Law** (op. cit.) fejn inghad illi :-

*Unpaid creditors of a company may consider commencing winding-up proceedings against the company as an alternative to suing for payment. As a debt collection mechanism, winding up proceedings may be swifter and, for the individual creditor, less expensive than a claim that may come to trial for sometime ; on the other hand, winding up is a collective procedure for the benefit of creditors generally and it does not benefit specific creditors individually (F. Oditah "Winding Up Recalcitrant Debtors" 1995 LMCLQ 107) ...*

Fis-sentenza li tat fit-18 ta' Settembru 2009 fil-kawza "**Avukat John Refalo noe vs Garden of Eden Limited**" il-Qorti tal-Appell qalet hekk :-

*"L-Artikolu 214 tal-Att dwar il-Kumpaniji jiddetermina kif u meta kumpanija ghandha "titqies" ("shall be deemed" fit-test Ingliz) li ma tkunx tista` thallas id-djun taghha. Ir-regoli huma cari u ma jhallu ebda lok ghall-provi in kuntrarju. Jekk il-kumpanija ma thallasx fi zmien 24 gimgha, hija titqies li ma tistax thallas id-djun taghha, u jekk tirrizulta din ic-cirkostanza, il-Qorti tista` tipprocedi ghall-istralc taghha."*

**Brenda Hannigan** tghid hekk fil-ktieb **Company Law** (Lexis Nexis - Butterworths - 2003) :-

*"winding up or liquidation ... is the process by which the assets of the company are collected in and realised, its liabilities discharged and the net surplus, if there is one, distributed to the persons entitled to it. Only when this has been done is the company`s existence finally terminated by a process known as dissolution ... Insolvent winding up occurs essentially when companies are unable to pay their debts in full. When a company cannot pay its debts in full, difficult problems arise as to how the assets that are available should be distributed. In theory ... the law tries to maintain an equality between creditors so that assets are pooled and distributed pari passu ie rateably according to the size of each creditor`s claim."*

**L-awtrici** tirreferi ghall-Cork Committee Report dwar *good modern insolvency law.*

Kien specifikat li l-ghanijiet huma :-

*"... to recognise that the world in which we live and the creation of wealth depend upon a system founded on credit and that such a system requires, as a correlative, an insolvency procedure to cope with its casualties; ... to relieve and protect where necessary the insolvent, and in particular the individual insolvent, from any harassment and undue demands by his creditors ... at the same time, to have regard to the rights of creditors whose own position may be at risk because of the insolvency; ... to realise the assets of the insolvent which should properly be taken to satisfy his debts, with the minimum of delay and expense; to distribute the proceeds of the realisations among the creditors in a fair and equitable manner, returning any surplus to the debtor; to ensure that the processes of realisation and distribution are administered in an honest and competent manner, .... To recognise that the effects of insolvency are not limited to the private interests of the insolvent and his creditors, but that other interests of society or other groups in society are vitally affected by the insolvency and its outcome and to ensure that these public interests are recognised and safeguarded, ... to provide the means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country."*

Fil-pagna 216 tal-ktieb **Insolvency Law – Corporate and Personal** (op. cit.) jinghad hekk :-

*While a creditor is able to establish the fact that a company is unable to pay its debts ... it does not mean that a winding-up order will be automatically made ; the court has an unfettered discretion ... The company might be able to establish that it is solvent thereby rebutting the presumption of insolvency relied on by the creditor. Nevertheless a court may still make a winding up order if the company does not dispute the fact that it owes money to the creditor who has requested payment because non payment gives rise to a legitimate suspicion of inability to pay ...*

**Fuq l-iskorta tal-provi akkwiziti, il-qorti sejra tezercita d-diskrezzjoni taghha favur ix-xoljiment u l-istralc tal-kumpannija ntimata.**

## **Provvediment**

**Ghar-ragunijiet kollha premessi, il-qorti qeghda tipprovdi dwar it-talbiet tar-rikorrent noe billi :-**

**1. Tiddikjara li jirrizulta ppruvat ghas-sodisfazzjon taghha kull ma jiggustifika l-applikazzjoni tal-Art 214(2)(a)(ii) u tal-Art 214(5)(a) tal-Kap 386 tal-Ligijiet ta` Malta fil-konfront tal-kumpannija ntimata.**

**2. Tordna x-xoljiment u l-konsegwenzjali stralc tal-kumpannija ntimata b`effett mit-8 ta` Ottubru 2020.**

**3. Tahtar lir-Ricevitur Ufficjali bhala stralcjarju.**

**4. Taghti lill-istralcarju s-setghat u d-dmirijiet kollha li huma previsti fil-Kap 386 tal-Ligijiet ta` Malta.**

**5. Tordna lill-istralcjarju sabiex jipprezenta rapport tal-hidma tieghu sa zmien xahrejn (2) mil-lum.**

**6. Tordna li l-ispejjez u drittijiet kollha naxxenti minn dan il-procediment, inkluzi l-ispejjez kollha tal-istralc u l-ispejjez u d-drittijiet tal-istralcjarju - ghandhom jithallsu mir-rikorrent noe u mill-kumpannija ntimata *in solidum* bejniethom.**

**Thalli l-istralc ghall-udjenza ta` nhar il-Hamis 6 ta` Mejju 2021 fil-10.45 a.m.**

**Onor. Joseph Zammit McKeon  
Imhalef**

**Amanda Cassar  
Deputat Registratur**