



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

**ONOR. IMHALLEF
JOSEPH ZAMMIT McKEON**

Illum il-Hamis 18 ta` Marzu 2021

**Kawza Nru. 4
Rikors Nru. 25/2018 JZM**

Naico Ltd (C-59675)

kontra

Rosa Limited (C-62861)

**Ahmed Hamruni (Passaport Libjan
bin-numru 249507) qua azzjonist
u direttur tas-socjeta` Rosa
Limited u b` digriet tad-19 ta`
Frar 2019 gew nominati l-Avukat
Dr Mark Mifsud Cutajar LLD u l-
Prokuratur Legali Katrina Zammit
Cuomo bhala kuraturi deputati**

**Fairuz EI Hamruni (Karta tal-
Identita` bin-numru 111056A) fil-
kwalita` taghha ta` direttrici tas-
socjeta` Rosa Limited.**

Il-Qorti :

I. Preliminari

Rat ir-rikors li kien prezentat fit-13 ta' Novembru 2018 li jaqra hekk :-

1. INTERESS TAL-PARTIJIET

1.1 *Illi l-esponenti hija wahda mit-tliet azzjonisti tas-socjeta` intimata Rosa Limited u ghandha partecipazzjoni ta` hamsa u ghoxrin fil-mija (25%) tal-ishma fl-istess socjeta` (kopja tal-istatut tas-socjeta` intimata anness bhala "Dok. A")*

1.2 *Illi z-zewg azzjonisti l-ohra fis-socjeta` intimata Rosa Limited huma l-intimat Ahmed Hamruni li ghandu partecipazzjoni komplessiva ta` hamsin fil-mija (50%) tal-ismha kollha fl-istess socjeta` Piccinino Franchising International Limited (C-59672) li ghandha partecipazzjoni ta` hamsa u ghoxrin fil-mija (25%) tal-ismha fis-socjeta` intimata u li mhix parti f`din il-kawza.*

1.3 *Illi l-intimat Ahmed Hamruni ilu azzjonist u direttur tas-socjeta` intimata sa minn meta l-istess socjeta` giet kostitwita fil-15 ta` Jannar tas-sena 2014.*

1.4 *Illi l-intimata Fairuz El Hamruni hija oht l-intimat Ahmed Hamruni u ilha tokkupa l-kariga ta` direttrici tas-socjeta` intimata sa mit-8 ta` Mejju tas-sena 2015 u dan hekk kif tindika l-`Form K` relattiva annessa u mmarkata bhala "Dok B",*

2. IL-BAZI TAT-TALBA

2.1 Illi dan huwa rikors a tenur l-Artikolu 402 tal-Att dwar il-Kumpanniji (Kap. 386 tal-Ligijiet ta' Malta) li permezz tiegħu l-esponenti tillanja illi l-intimati Ahmed Hamruni u Fairuz El Hamruni qed jiggestixxu s-socjeta' intimata b'mod li qed jigi kkawzat pregudizzju serju, mhux gust u irrimedjabbli lis-socjeta' esponenti qua azzjonista tas-socjeta' intimata.

2.2 Illi, kif se jigi ppruvat fil-mori tal-proceduri odjerni, l-istess intimati qed jiggestixxu s-socjeta' intimata kif jaqbel lilhom, b'mod li huwa insostenibbli, frawdolenti, u kontra l-interess tal-istess socjeta' u tas-socjeta' esponenti bhala azzjonista tagħha, u sahansitra l-intimati mexxew u qed imexxu l-kumpannija intimata bi vjolazzjoni tad-doveri imposti mill-Artikolu 136A tal-Att dwar il-Kumpanniji,

3. IL-FATTI FIL-QOSOR

3.1 Illi s-socjeta' intimata giet kostitwita f'Malta fil-15 ta' Jannar 2014 bl-ghan li, fost affarijiet ohra, tiggestixxi n-negozju ta' "importers and exporters, wholesalers and retailers, dealers, brokers, franchise and/or sub-franchise holders, distributors and agents of any and all items of all types of merchandise in general and of any and all items of clothing, apparel, garment, fashion wear, fashion accessories, leather and similar material goods and any such other ancillary or associated item, accessory or complementary goods, in any part of the world" (vide Dok. A).

3.2 Illi effettivamente l-iskop tas-socjeta' intimata kien li topera bhala joint venture bejn is-socjeta' esponenti, s-socjeta' Piccinino Franchising International Limited (numru ta' registsrazzjoni C59672) u s-socjeta' Libjana Al Akhwein Alebia for Clothes Import Company (numru ta' registrazzjoni Libjana 4523423) sabiex bil-kontribut mogħti minn kull wahda mill-partijiet jinfethu numru ta' hwienet gewwa l-Libja.

3.3 Illi s-socjeta` Libjana Al Akhwein Alebia for Clothes Import Company hija rapprezentata minn Omar Hamruni li jigi missier l-intimati Ahmed Hamruni u Fairuz El Hamruni.

3.4 Illi permezz ta` Memorandum of Understanding bejn is-socjeta` esponenti u s-socjeta` Piccinino Franchising International Limited il-partijiet kienu ftehm u illi, filwaqt li l-imsemmi Omar Hamruni kien se jiffinanzja wiehed u hamsin fil-mija (51%) tal-ispejjez relatati mal-ewwel hanut li kellu jinfetah gewwa l-Libja, l-esponenti kellha tinvesti f`dan il-progett billi thallas erbgha u disghin fil-mija (49%) tal-istess spejjez u cioe` spejjez necessarji għall-"fixtures and fittings for the retail outlet, structural and/or internal works required to be performed on the said retail outlet, advance rental payments for the first financial year, and the initial cash flow required to commence operation as per projections discussed between n the Parties" .

3.5 Illi skont l-istess Memorandum of Understanding, kwalunkwe ammont mahrug mis-socjeta` esponenti kellu jigi ritornat lilha fil-forma ta` dividend fl-ahhar tal-tielet sena finanzjarja tas-socjeta` intimata, b`dana illi s-socjeta` esponenti ma tkun intitolata tircievi l-ebda hlas jekk ma jkunx hemm bizzejjed distributable profits.

3.6 Illi fuq is-suggeriment tal-intimat Ahmed Hamruni, li fiz-zmien in kwistjoni kien kemm azzjonist kif ukoll direttur tas-socjeta` intimata, l-azzjonisti tas-socjeta` intimata qablu li l-propjeta` bl-indirizz `Almancia, Ben Ashour District, Tripoli` tinkera mis-socjeta` intimata versu l-kera ta` LYD 13,000 sabiex tintuza bhala l-ewwel hanut fil-Libja.

3.7 Illi kwalunkwe nformazzjoni rigwardanti n-negozjati tal-kirja tal-istess hanut dejjem għaddiet lis-socjeta` intimata, u lis-socjeta` esponenti bhala azzonista tagħha, minn Ahmed Hamruni stante li f`dan il-perjodu s-socjeta` esponenti u s-socjeta` intimata fdaw lil Ahmed Hamruni u ma ddubitawx il-veracita` ta dak li ntqal minnu.

3.8 Illi, kif se jigi ppruvat fil-mori tal-proceduri odjerni, s-socjeta` esponenti mxiet fuq il-ftehim milhuq u nefqet ammont konsiderevoli ta` flus f`ghamara, dwal, madum u diversi xoghlijiet u ameljoramenti ohra biex ikun jista` jibda jopera n-negozju tas-socjeta` intimata mill-hanut hawn fuq imsemmi,

3.9 Illi kif se jigi wkoll ippruvat fil-mori ta` din il-kawza, l-esponenti ghamlet diversi pagamenti ta` kera biex b`hekk kopriet ukoll il-kirja dovuta ghall-perjodu minn Lulju 2013 sa Dicembru 2013.

3.10 Illi matul is-snin inqalghu diversi problemi fl-operat tas-socjeta` intimata, hekk per ezempju, stock mitluf, diskrepanzi fil-kont bankarju tas-socjeta` intimata mizmum gewwa l-Libja, kif ukoll nuqqas kbir ta` bejgh. Nonostante diversi tentattivi da parti tas-socjeta` esponenti sabiex in-negozju tas-socjeta` intimata jerga` jqum fuq saqajh, is-sitwazzjoni kompliet tiddeterjora u ghaldaqstant is-socjeta` esponenti waslet ghall-konkluzjoni li n-negozju ma kienx sostennibbli u li kien ikun fl-ahjar interess ta` kulhadd li l-hanut jinghalaq u kwalunkwe ftehim bejn il-partijiet involuti jigi xjolt.

3.11 Illi minn-naha tagghom, l-intimati Ahmed Hamruni u Fairuz El Hamruni dejjem sostnew illi l-problemi fl-operat tas-socjeta` intimata kienu rizultat tat-tip u l-prezz tal-istock li beda jinbiegh u li l-ghazla tal-hanut bhala l-post li minnu kellu jigi gestit in-negozju ma kellha xejn x`taqsam ma` dawn il-fallimenti.

3.12 Illi wara ndagni li ghamlet is-socjeta` esponenti, l-intimata Fairuz El Hamruni gharrfet ghal ewwel darba lis-socjeta` intimata u lis-socjeta` esponenti illi l-hanut li minnu kienet tiggstixxi n-negozju s-socjeta` intimata kien jappartjeni lill-zewgha. Din l-informazzjoni nghatat lis-socjeta` intimata u lis-socjeta` esponenti wara li s-socjeta` esponenti tul iz-zmien kienet issaqsi kemm-il darba kemm lill-intimati Fairuz El Hamruni u Ahmed Hamruni dwar min kien il-propjetarju tal-hanut in kwistjoni.

3.13 Illi minkejja li kien l-intimat Ahmed Hamruni li ssuggerixxa, nnegojja u saħansitra ffirmat l-kuntratt ta' lokazzjoni fuq il-hanut hawn fuq imsemmi, mhux biss l-istess Ahmed Hamruni qatt ma nforma lis-socjeta' intimata u lis-socjeta' esponenti li l-propjeta' kienet tappartjeni lill-membru tal-familja tieghu izda meta mistoqsi dwar dan, ta informazzjoni skorretta b'risposta lis-socjeta' esponenti u lis-socjeta' intimata.

3.14 Illi l-agir abbużiv tal-intimati kkawza u qed jikkawza pregudizzju qawwi u danni irrimedjabbli kemm lis-socjeta' esponenti kif ukoll lill-istess socjeta' intimata u fl-umli opinjoni tas-socjeta' esponenti, kif se jigi ppruvat fil-kawza odjerna, jezistu ragunijiet gravi bizzegjed li jiggustifikaw li dina l-Onorabbli Qorti taghti dawk l-ordnijiet li huma necessarji, xierqa u opportuni a tenur tal-precitat Artikolu 402 tal-Att dwar il-Kumpanniji.

3.15 Illi minkejja diversi interpellazzjoniet da parti tas-socjeta' esponenti, inkluz permezz ta' ittra ufficjali datata l-4 ta' Gunju 2018 (annessa u mmarkata bhala "Dok C"), l-intimati jew min minnhom qeghdin jirrifjutaw li jagħmlu tajjeb għad-danni konsistenti fit-telf finanzjarju li sofriet u li għadha qed issofri l-esponenti konsegwenza ta' ksur lampanti da parti tagħhom tal-obbligi mposti fuqhom bhala diretturi tas-socjeta' intimata.

3.16 Illi s-socjeta' esponenti jidhrilha li hija intitolata illi kumpannija li tagħha tkun azzjonista titmexxa b'mod serju, car u trasparenti u anke li tali tmexxija ma tkunx oppressiva, diskriminatorja kontra s-socjeta' esponenti u li l-istess socjeta' esponenti ma ssofri minn pregudizzju mhux gust.

4. IT-TALBIET

4.1 In vista tas-suespost, is-socjeta' esponenti titlob bir-rispett illi dina l-Onorabbli Qorti jogħgħobha :-

4.1.1 Taghti dawk id-direttivi, provvedimenti u ordnijiet kollha li jidhrilha xierqa u opportuni a tenur tal-precitat Artikolu 402 tal-Att dwar il-Kumpaniji (Kap, 386 tal-Ligijiet ta` Malta) bil-ghan li l-precitati atti oppressivi, diskriminatorji u pregudizzjali jigu rrimedjati minnufih.

Bl-ispejjez u bl-interessi.

Rat il-lista tax-xhieda.

Rat id-dokumenti li kienu prezentati mar-rikors.

Rat ir-risposta li pprezentat Fairuz el Hamruni f` isimha propju u ghan-nom tas-socjeta` Rosa Ltd. fl-10 ta` Dicembru 2018 li taqra hekk :-

Hija qed tirrispondi ghall-kumpanija Rosa Ltd. b`riserva Gre esibit dokument li mar-Registratur tal-Kumpaniji isimha huwa rregistrat li hija direttrici tas-socjeta` u dan b`effett mill-2015. Filfatt riserva gejjja ghar-raguni li hi qatt ma ffirmat jew accettat li tkun direttrici tas-socjeta` fl-2015 jew wara.

Inoltre skont il-memorandum and articles tas-Socjeta` Rosa Ltd. id-diretturi jinhatru u jibqghu diretturi sa ma jkun hemm Annual General Meeting skont il-paragrafu I Appointment of Directors kwalunkwe direttur sussegwenti ghal dawk originali t-terminu tagghom jispicca mal-ewwel Annual General Meeting. Hija qatt ma pproponiet ruhha jew accettat li tkun nominate sussegwentement.

Illi konsegwentement hija tqajjem il-kwistjoni tal-gurisdizzjoni ta` dawn il-qراطي ghal dak li jirrigwarda l-ftehim u kuntratti li saru gewwa l-Libja, bl-esekuzzjoni gewwa l-Libja u dan peress li kif jirrizulta

l-partijiet ikkuntrattaw għall-iskop ta' esekuzzjoni gewwa l-Libja u ma' socjeta' differenti minn dik li hija ntimata, u inoltre dik il-kumpanija l-oħra Libjana bl-ebda mod ma hija nvoluta f'dawn il-proceduri meta l-allegati fatti principalment jikkoncernaw lil dik is-socjeta' Libjana. Il-kumpanija rikorrenti qieghda tallega frodi min-naha tal-istess Fairuz li lanqas hija shareholder fil-kumpanija, u għalhekk ma jista' jkollha l-ebda interess favur tagħha. Illi tali allegazzjoni trid tigi ppruvata u mhux sempliciment allegata. Kif jingħad fil-paragrafu 3.2 tar-rikors promotur, l-iskop kollu kien li jkun hemm joint venture bejn Naico Ltd., Rosa Ltd. u Piccinino Franchising International Ltd. u dan mas-socjeta' Libjana Al Akhwein Alebia for Clothes Import company u dan bl-iskop li jinfethu hwienet gewwa l-Libja.

Minn dan jidher car li l-kwistjonijiet kollha huma dwar ftehim li kien qieghed jolqot esekuzzjoni gewwa pajjiz barrani u għalhekk il-gurisdizzjoni hija ta' dak il-pajjiz. Huwa inutli li Naico Ltd. tipprova thawwad il-borma billi tghid li l-kumpanija Libjana hija rappreżentata minn Omar Hamruni li jigi missier l-intimati Ahmed Hamruni u Fairuz El Hamruni.

Suppost li huwa principju magħruf internazzjonalment li kumpanija għandha persunalita' guridika differenti u s'issa ma tistax kumpanija ggib it-tfal fid-dinja. Li għalhekk din il-kawza hiia għal kollox barra minn lokha fejn tidhol Fairuz el Hamruni.

Illi kif jingħad fir-rikors promotur, il-kumpanija Naico Ltd. Dahlet f'arrangament illi tohrog flus biex isiru dawn il-hwienet gewwa l-Libja u kellha tithallas lura bħala dividends wara tliet snin u bil-kundizzjoni wkoll li jekk wara tliet snin m'hemmx dividends allura ma jsir l-ebda hlas lilha. Dan hu manifestament operat ta' self ta' shareholder lill-kumpanija tiegħu u kumpaniji oħrajn biex isir proġett u għalhekk il-pozizzjoni tal-kumpanija rikorrenti tkun bħala ta' kreditrici u xejn aktar.

Fl-istess fatti fil-qosor fir-rikors promotur jingħad li kienu l-azzjonisti li kienu qablu bejniethom li jieħdu l-post Almancia Benashur District Tripoli bħala l-ewwel hanut. Jigi rilevati li certament Fairuz el

Hamruni ma kinetx wahda minn dawh l-azzionisti ghax qatt ma kienet azzjonist f'xi socjeta` minnhom u ghalhekk assolutament ma kellha x`taqsam xejn.

L-istess rikors promutur jaghmel allegazzonijiet fil-konfront ta` Ahmed el Hamruni u bl-ebda mod ma jindikaw li Fairuz el Hamruni tkellmet jew dahtet f'xi negozjati fuq l-operat kollu li qieghed jissemma`. Ghalhekk l-allegazzjonijiet kontra taghha huma palezement infondati mill-istess rikors promutur. Illi l-kwistjoni li l-kumpanija Naico Ltd. hallset kirjiet bein Lulju u Dicembru 2013, jerga` jinghad hija kwistjoni ta` kreditu.

Interessanti mbaghad pero` li l-istess rikors promutur jghid li nqalghu diversi problemi fl-operat tal-progett li kien ta` sitwazzjoni fil-Libja, nuqqas ta` bejgh u dan certament ma jistax ikun imputabbli lil Fairuz el Hamruni. Fairuz el Hamruni qatt ma hbiet il-verita` u ghalhekk ma jistax jinghad avolja ma kinetx involuta direttament fis-socjeta` jew kellha x`interess, li hbiet xi informazzjoni li ma kellhiex taghti. Il-kwistjoni ta` min kien proprjetarju tal-post li nkera certament ma taghmel l-ebda differenza jew jirrapprezenta xi qerq ghaliex meta jinkera hanut ghall-kummerc fi kwalunkwe parti tad-dinja l-importanza hija li dan il-post ikun idoneju ghan-negozju.

Tissemma t-trasparenza hawn. Veru kien hemm it-trasparenza f'dan il-kaz, ghax il-post ta` ma` genb il-hanut intlaqat b`missila, u l-hanut gie jidher aktar.

Illi hawnhekk ukoll jerga` jigi ribadit in-nuqqas ta` gurdizzjoni tal-qradi li jinvestigaw operat bhal dan ghaliex kollox jidher li jikkoncerna ftehim li l-esekuzzjoni u l-holqien tieghu kien fil-Libja. Illi dak li qed jinghad li huwa agir abbuziv min-naha ta` Ahmed el Hamruni li m`ghandu x`jaqsam xejn u ma jistax jirrifletti fuq Fairuz el Hamruni ghax inzertat ohtu ghax kwistjonijiet bhal dawn mhumix trasmissibbli bil-genetika.

Ghandu jinghad ukoll li kif jirrizulta mill-memorandum and articles, Ahmed el Hamruni kien jghix anke dak il-zmien il-Libja u baqa` jghix il-Libja u l-esponenti m`accettatx in-notifika tieghu u b`dan anke kienu mgharrfin l-avukati ta` Naico Ltd. wara l-ittri ufficjali minnhom mibghuta u ghalhekk in-notifika hi m`accettatx u ma tista` taccetta ebda notifika ghax huha ma kienx joqghod maghha hawn Malta.

Illi finalment it-talba li qed issir hija ghall-kwistjoni ta` trasparenza u biex jinghataw direttivi minn din il-Qorti. Dak li huwa zgur peress li saret taf bih illum huwa li l-esponenti bihsiebha ghal kull buon fini tirrizenja minn direttrici, jekk jirrizulta li saret regolarment u bil-kunsens taghha, u jekk ma saritx bil-kunsens taghha, kif fil-fatt hu l-kaz, xorta wahda ghal kull buon fini, tnehhi isimha bhala direttrici minn fuq ir-Registru tal-Kumpaniji.

Rat ir-risposta li pprezentaw il-kuraturi deputati li kienu mahtura biex jirraprezentaw lill-assenti Ahmed Hamruni fil-25 ta` Marzu 2019 li taqra hekk :-

1. Illi l-esponenti mhux edotti mill-fatti u qed jirrizervaw id-dritt li jipprezentaw risposta ulterjuri wara li jigi edotti mill-fatti.

Rat il-lista tax-xhieda.

Semghet ix-xhieda u rat il-provi li tressqu fil-kors tal-kawza.

Rat illi l-kawza hija differita ghal provvedimenti ghal-lum.

Rat l-atti l-ohra tal-kawza.

II. Provi

Fairuz El Hamruni tressqet bhala xhud mir-rikorrenti.

Xehdet illi ghalkemm jisimha Fairuz, ir-ragel taghha isejhilha Rosa. Spjegat illi Rosa Ltd u Andre Piccinino huma msiehba fin-negozju flimkien ma` huha Ahmed El Hamruni. Andre Piccinino fetah hanut gewwa Benashur qrib Tripli fil-Libja ghall-bejgh ta` abbiljament intimu tan-nisa. Konsegwenza tal-gwerra civili fil-Libja ma kienx hemm lant ghan-negozju u l-hanut ghalaq wara li kien ilu madwar tlieta jew erba` xhur miftuh qabel bdiet il-gwerra. In-negozju tant kien batut illi missierha u huha kien jitolbuha zzomm lura qabel thallas il-kera. Fil-fatt tghid illi tul il-ftit zmien li l-hanut dam miftuh qatt ma thallset kera. Meta bdiet il-kirja tal-hanut dan kien gebel u saqaf u kien missierha stess illi ghammar il-hanut.

Kompliet tixhed illi meta giet tghix Malta kienet diga` faqqghet il-gwerra fil-Libja. Konsegwenza ta` dan l-Universita` Amerikana tal-Libja ghalqet. Hija giet Malta sabiex tkompli bl-istudji taghha. Dak iz-zmien ma kellha ebda involviment fit-twaqqif tas-socjeta` intimata jew fin-negozju u n-negozjati jew ftehim illi saru bejn Piccinino, huha u missierha. Spjegat ukoll illi ghalkemm il-hanut li fetah Piccinino fi Tripli huwa tar-ragel taghha, l-arrangamenti ghal ftuh ta` dan il-hanut saru kollha minn huha. Hija nvolviet ruhha f`Rosa Ltd bhala *manager* sabiex tiehu hsieb il-bejgh. Spjegat illi ix-xoghol taghha kienet taghmlu minn Malta bit-*telephone* u kienet tmur il-Libja fis-sajf biss.

Cahdet illi qatt okkupat il-kariga ta` direttrici fi hdan is-socjeta` intimata. Spjegat illi hija qatt ma ffirmat karti u lanqas taf x`kien ghaddej. Id-direttur tas-socjeta` intimata kien huha Ahmed El Hamruni li jghix il-Libja u kull arrangement dwar in-negozju sar minnu.

Kompliet tixhed illi l-hanut fi Tripli li fetah qabel bdiet il-gwerra kien sitwat f`post centrali izda minhabba l-gwerra ma kienx hemm lant ghan-negozju u fil-fatt ank n-negozju ta` missierha ha daqqa `l isfel.

Tghid illi ma tafx jekk l-imsejbin fin-negozju kienux jafu li l-propjeta` fejn kien il-hanut kienet tar-ragel taghha ghaliex dak iz-zmien hija ma kellha ebda involviment f` Rosa Ltd.

Ippreciza li l-gwerra li qeghda tirreferi ghalha fil-Libja hija l-gwerra tal-port li bdiet fl-2014.

Illum il-hanut jinsab mikri lil xi Libjani li minflok il-hanut tal-hwejjeg fethu *supermarket*. Tghid illi ma setghux ihallu l-hanut vojt ghaliex huma ghandhom bzonn il-flus tal-kera sabiex ikomplu jghixu Malta.

Fil-kontroezami kkonfermat illi hija qatt ma ffirmit karti sabiex tkun direttur ta` Rosa Ltd.

Alfred Camilleri wiehed mid-diretturi tas-socjeta` intimata xehed illi kien hemm ftehim bejn Naico Ltd ("**Naico**"), Rosa Ltd, Piccinino Franchising International ("**Piccinino**") u xi partijiet ta` nazzjonalita Libjana. Huwa dahal fil-ftehim sabiex jirrapprezenta l-azzjonat ta` Piccinino f` Rosa Ltd. Ir-rwol tieghu kien illi jghin lil Piccinino sabiex ikabbru l-operat taghhom barra minn Malta u ghalkemm kien involut f` kull fazi tan-negozju huwa kkoncentra l-aktar fuq il-logistika ta` kif kellu jsir in-negozju. Rosa Ltd kienet involuta sabiex tikkonsolida l-*partnership* illi kien hemm bejn Naico u Piccinino vis-a-vis negozjanti Libjani. Qatt ma ttrattat hi direttament. Ir-rwol taghha kien limitat ghar-rapprezentanza tal-ftehim li kien hemm bejn il-partijiet kollha. Din l-istruttura kellha tirrifletti l-istruttura li kien hemm il-Libja.

Stqarr illi Piccinino ma kellhom ebda gharfien dwar is-suq Libjan. Ghalhekk ghall-habta tal-2014/2015 tkellmu ma` Naico li diga` kellha esperjenza f` negozju iehor. Kienet Naico li pproponiet illi jsir negozju mal-Libjani. Id-diskussjonijiet damu ghaddejjin bejn sitta u disgha xhur. Meta ntlahaq ftehim il-partijiet telghu diversi drabi l-Libja sabiex fost l-ohrajn jidentifikaw il-hanut minn fejn kellu jsir in-negozju.

Piccinino xtaqu post centrali f`wahda miz-zewg toroq l-aktar maghrufa ghax-xiri. Esploraw diversi proposti dwar hwienet f`postijiet differenti biss dejjem kien jinqala` xi ntopp, jew ghaliex il-prezz kien gholi, jew ghax il-post kien zghir jew mhux ideali. Il-Libjani bdew jinsistu li l-hanut jinfetah fi triq sekondarja u peress illi huma kellhom gharfien ahjar tas-suq Libjan. Ghalhekk Rosa Ltd qaghdet fuq il-fehma tagghom. Il-post illi kien maghzul ghall-hanut kien fi stat ta` gebel u saqaf. Ix-xogholijiet kollha damu madwar sena sabiex tlestew u l-hanut fetah. Piccinino garrbet piz finanzjarju sostanzjali ghaliex fuq parir tal-Libjani akkwistat kwantita` kbira ta` stock sabiex tbieghu mill-hanut fil-Libja.

Kompla stqarr illi l-ftehim kien jinvolvi illi Piccinino tipprovdi l-gharfien tan-negozju, il-*franchise*, l-isem u d-disinn tal-hanut. Naico kellha tpoggi l-investment kapitali u l-investment inizzjali sabiex jitlesta l-hanut u jibda n-negozju. Il-Libjani kellhom jaghtu l-gharfien tagghom tas-suq Libjan. Il-flus ghat-tghamir u t-tlestija tal-hanut thallsu kollha minn Naico. It-thejjija ghall-ftuh tal-hanut u l-akkwist tal-istock sar fiz-zmien ta` bejn meta Gaddafi tilef il-poter u li kien attakkat l-ajruport ta` Tripoli. Il-hanut infetah f`Gunju imbaghad ghalaq ghall-habta ta` nofs Lulju meta bdiet il-gwerra. Konsegwenza tal-glied kien anke ggarraf xi hgieg tal-hanut. Ghall-habta ta` Ottubru meta s-sitwazzjoni kkalmat il-hanut rega` fetah izda n-negozju kien miexi bl-iskossi ghaliex kien ghad fadal diversi problemi bhal qtugh kontinwu fil-provvista tad-dawl. Sabiex tigi rizolta din id-diffikulta` Naico kienu baghtu flus il-Libja sabiex jinxtara generatur tal-elettriku izda l-Libjani baqghu qatt ma akkwistawh.

Xehed illi sakemm kien ghadu sigur ghac-cittadini Maltin illi jmorru l-Libja, ir-rapprezentanti ta` Rosa Ltd setghu jaraw illi l-hanut kien finished fi stat tajjeb hafna inkluz lest sabiex jopera. Il-post kien gie rrangat u maqsum f`zewg livelli sabiex livell minnhom iservi bhala mahzen. Kien fih l-ghamara, arja kondizzjonata, *cash point* u kull taghmir li wiehed isib f`hanut. Kien jonqos biss il-*cameras* ta` s-sigurta` li ghalkemm Rosa Ltd insistiet dwarhom, dawn baqghu qatt ma gew installati fil-post. L-ispejjez kollha nvoluti thallsu minn Naico.

Kompla jixhed illi meta ntlaħaq qbil dwar il-proprjeta` li kellha tinkera, il-Libjani pprezentaw kuntratt ta` kera li kien miktub bil-Libjan. Peress illi Rosa Ltd kellha fiducja shiha fil-partners Libjani qagħdet fuqhom. Ghalkemm kien magħruf li s-sid tal-hanut kien cittadin tal-Libja, ma kenitx magħrufa l-identita` tieghu. Kien biss waqt wahda mill-aħħar laqgħat tal-bord tad-diretturi ta` Rosa Ltd illi waqt telefonata ma` Ahmed El Hamruni, Fairuz El Hamruni, li kienet direttur tirrappresenta l-interessi Libjani f`Rosa Ltd fejn ingħad li l-hanut li Rosa Ltd kienet kriet kien proprjeta` tar-ragel ta` Fairuz. Zied jgħid illi n-negozjati saru ma` Ahmed El Hamruni biss meta dan kien ikun il-Libja. Fairuz El Hamruni li tigi oħt Ahmed El Hamruni kienet tattendi għal-laqgħat tal-bord in rappresentanza ta` huha.

Carmen Piccinino xehdet illi J. Piccinino Ltd ilha fin-negozju tal-bejgh tal-abbiljament intimu tan-nisa għal dawn l-aħħar 40 sena. J. Piccinino Ltd giet avvicinta minn Naico sabiex jifthu hanut fil-Libja u jbieghu minn hemm dak it-tip ta` abbiljament. Piccinino la kellha l-gharfien u anqas il-kapacita` li tiftah negozju barra minn Malta. Mill-banda l-oħra Naico kienu aktar familjari mas-suq Libjan u kienet Naico stess li ntroducieta lil Piccinino ma` Ahmed El Hamruni.

Komplet tixhed illi hi u t-tfal tagħha marru Tripli sabiex jaraw xi proprjetajiet fejn setghu jifthu l-hanut. Insistiet li l-hanut kellu jkun ikun f`post centrali għan-negozju. In-negozju kellu jkun frott ta` ftehim bejn Piccinino, Naico u El Hamruni. Waqt illi Piccinino kellha tipprovdiet l-*knowhow* tagħha fis-settur tal-ilbies intimu kif ukoll l-istock tal-hwejjeg, El Hamruni kellu joffri l-gharfien tieghu tas-suq Libjan sabiex jinstab post tajjeb fejn jinfetħ il-hanut. Tgħid illi fuq suggeriment u insistenza ta` El Hamruni intgħazel post illi ma kienx centrali, anzi kien vicin skola u għalhekk ma kienx f`pozizzjoni tajba sabiex in-negozju jirnexxi. Wara li nstab il-post u nfetħ il-hanut El Hamruni baqa` nvolut fin-negozju u kien imur il-hanut sabiex isegwi l-andament tan-negozju.

Dwar Fairuz El Hamruni xehdet illi din gieli marret tagħti daqqa t`id meta kienu qegħdin jarmaw. Il-hanut tlesta u tghammar b`mod eccellenti. Piccinino pprovdiet l-istock, il-pupi u l-ghamara u qatt ma

thallset lura ta` dan. Billi l-hanut kien kbir hafna, fih tpogga hafna stock. Madanakollu n-negozju ma bediex sejjer tajjeb. Gara wkoll illi fil-frattemp is-sitwazzjoni fil-Libja marret ghall-aghar minhabba glied u tensjonijiet interni u l-hanut ghalaq wara biss ftit xhur. L-istock u t-taghmir kollu li kien hemm fil-hanut baqa` ghand Ahmed El Hamruni.

John Naudi u **Andrei Pace** xehdu illi lejn l-ahhar tal-2012 Piccinino wriet ix-xewqa illi tiftah hanut fi Tripli izda ma kinitx lesta tassumi riskju finanzjarju. Naico ddiskudiet il-potenzjal tan-negozju u pproponiet li n-negozju jsir bi shab mal-Libjani sabiex b`hekk is-sogru jinqasam nofs bin-nofs bejn il-Maltin u l-Libjani. Ghalhekk twaqqfet Rosa Ltd li l-azzjonisti taghha kienu El Hamruni fi kwota ta` 50% u Naico u Piccinino fi kwota ta` 25% kull wiehed.

Andrei Pace spjega illi skont il-ftehim Naico kellha tkopri l-investment kapitali u Piccinino kellha tforni l-istock kontra garanzija bankarja mill-azzjonisti Libjani.

Pace u Naudi xehdu illi waqt illi kienu ghaddejjin in-negozjati ma` Piccinino huma bdew ifittxu socju Libjan li kien interessat jidhol bi shab magghom fil-progett. Gew avvicinati diversi persuni izda l-aktar wiehed illi wera nteress kien Omar Hamruni, negozjant ta` stoffa li kellu diversi interessi fi hwienet fil-Libja. Hamruni kien l-agent ta` diversi ditti fil-Libja fosthom NIKE u Celio. Wara li ntlahaq il-ftehim bejn il-partijiet, l-azzjonisti Maltin marru l-Libja sabiex isibu post ghall-hanut. Piccinino u Naico esprimew ix-xewqa taghhom li l-hanut ikun f`post centrali u fdaw lil Ahmed El Hamruni sabiex isib post ideali billi huwa kellu gharfien tajjeb tas-suq Libjan. El Hamruni informa lill-partners illi kien sab post vicin l-ufficcju tal-Prim Ministru tal-Libja. Ghalkemm ma kienx fil-postijiet li Naico u Piccinino ndikaw bi preferenza, il-hanut xorta kien f`post tajjeb. Il-post kien gebel u saqaf.

Ghalkemm ma kienux konvinti bl-ghazla tas-sit, Naico u Piccinino qaghd u fuq l-gharfien tal-ishab Libjani. **Naudi u Pace** rragunaw li fl-

ahhar mill-ahhar il-Libjani ma kienx jaqblilhom jaghzlu lokalita` hazina ghan-negozju.

Pace zied ifisser illi wara l-proposta ta` Ahmed El Hamruni, fl-24 ta` Marzu 2013 Steve Piccinino u Alfred Camilleri marru l-Libja sabiex jaraw il-post propost. Iz-zjara kienet pozittiva. El Hamruni infurmahom illi kien lahaq ftehim mas-sid sabiex Rosa Ltd thallas sitt xhur kera bil-quddiem mal-iffirmar tal-kuntratt tal-kera. Rosa Ltd kellha taghmel tajjeb ghall-ispejjez kollha sabiex tlesti l-hanut u in kambju dawk l-ispejjez kellhom jinqatghu mill-kera. El Hamruni ffirmat kuntratt ta` kera ta` ghaxar snin. Piccinino u Naico baqghu qatt ma raw kopja tal-kuntratt. Sahansitra Pace jammetti li *"ghal xi zmien twil mhux hazin insejna bih li kien ghadu ma wasalx ghandna"*.

Il-progett tal-hanut beda fl-2013 u x-xogholijiet damu ghaddejjin ghal aktar minn sena. Il-hanut infetah fil-21 ta` Gunju 2014 u dam jopera ghal ftit gimghat biss. Konsegwenza tat-tensjonijiet fil-Libja, il-hanut inghalaq minn Awwissu sa Ottubru tal-2014 Meta s-sitwazzjoni kkalmat il-hanut rega nfetah.

Pace xehed illi ftit taz-zmien wara li nfetah il-hanut bdiet tidher certa telqa u nuqqas ta` nteress da parti tal-Libjani. Il-bejgh kien baxx hafna u t-tmexxija mil-Libjani ma kinitx kif mixtieqa ghaliex id-dhul mill-bejgh flok illi kien jigi depozitat il-bank kien qieghed jintuza sabiex jithallsu persuni li hadmu fil-hanut. Matul iz-zmien illi l-hanut kien maghluq Fairuz El Hamruni uriet ix-xewqa illi tkun involuta fin-negozju u ssuggeriet illi tkun appuntata bhala *manager* fil-hanut kif ukoll bhala direttur ta` Rosa Ltd sabiex tirrapprezenta l-interess ta` huha Ahmed El Hamruni meta dan ikun il-Libja. L-azzjonisti lkoll qablu dwar dan u hatru lil Fairuz El Hamruni bhala manager u direttur.

Meta rega` fetah il-hanut f`Ottubru in-negozju ma kienx sejjer tajjeb. **Pace** u **Naudi** komplew jithassbu meta raw li kumpannija ohra li kienet fethet hanut fi Tripli fl-istess linja tan-negozju taghhom kellha andament tan-negozju tajjeb. Piccinino u Naico raw illi kien aktar ghaqli li jinghalaq il-hanut biex jevitaw aktar telf. Ghalhekk saru

diversi laqghat tal-bord ta` Rosa Ltd sabiex l-istock li kien ghad fadal jigi ritornat lil Piccinino u jinbieghu l-assi ta` Rosa Ltd. Suspettużi mill-imgieba tal-Libjani, Piccinino u Naico talbu kopja tal-kuntratt tal-kera tradotta għall-Malti. Waqt laqgħa tal-bord sar kuntatt bit-telefon ma` Ahmed El Hamruni. Wara li Ahmed u Fairuz tkellmu bejniethom bl-Għarbi, Fairuz spjegat illi l-hanut li kien inkera minn Rosa Ltd kien proprjeta` tar-ragel tagħha. Li kieku kien magħruf li l-hanut kien proprjeta` tar-ragel ta` Fairuz, l-investment ma kienx isir. Bil-mod kif imxew l-affarijiet, waqt illi Naico nefqet hafna flus fil-hanut, il-Libjani ma għamlu ebda spiza. B`hekk Naico garrbet d-danni, waqt li l-Libjani spiccaw b`hanut mghammar u lest biex jerga` jinkera.

Alexander Agius xehed illi huwa l-awditur ta` Naico sa minn mindu kienet iffurmata fl-14 ta` Marzu 2013. Naico tinsab f`sitwazzjoni ta` insolvenza. Spjega illi Naico hija kreditrici ta` Rosa Ltd fl-ammont ta` €167,882. Huma spejjeż kapitali li thallsu minn Naico u ammont ta` €9,000 huwa self li nġhata lil Rosa Ltd. Is-self kien marbut ma` *management fee* li Rosa Ltd hallset lil Piccinino. Rosa Ltd qatt ma pprezentat *accounts* għalkemm ipprezentat *annual returns*. Bhala fatt, Naico hija insolventi fl-ammont ta` €16,000 u waqfet topera. L-iskop kollu ta` Naico kien li tinvesti kapital f`Rosa Ltd. Għalhekk, jekk tigi xjolta Rosa Ltd jispicca l-iskop li għalih twaqqfet Naico. Jekk Naico tibqa` ma` tithallasx minghand Rosa, Naico mhux ser tkun f`pozizzjoni illi trodd lura l-flus illi ssejlfet minghand l-azzjonisti tagħha ossia Andrei Pace u John Naudi.

III. L-eccezzjonijiet preliminari

Fairuz El Hamruni tikkontesta l-validita` tal-hatra tagħha bhala direttur ta` Rosa Ltd. Tghid illi hija qatt ma tat il-kunsens tagħha u qatt ma ffirmat xejn sabiex ikun hemm din il-hatra. Cio nonostante, fl-istess waqt tagħmilha cara illi r-risposta minnha pprezentata għat-talbiet attrici saret kemm de proprio kif ukoll għal Rosa Ltd. Il-qorti hija perplessa b`din il-kontradizzjoni għaliex jekk Fairuz El Hamruni qegħda tikkontendi li qatt ma kienet direttur ta` Rosa Ltd allura kellha tispjega għalfejn dehret biex tirrappreżenta lil Rosa Ltd. Fin-nuqqas

ta` prova f`dan is-sens, l-eccezzjoni taghha fil-vesti rapprezentattiva taghha ma taghmel ebda sens ghax hija nsostenibbli.

L-istess intimata eccepjet li mhijiex il-legittima kontradittur tar-rikorrenti peress illi hija qatt ma dahlet f`ebda ftehim maghha.

Kien eccepjet in-nuqqas ta` gurdizzjoni ta` din il-qorti ghax tikkontendi li ladarba l-ilment tar-rikorrenti jolqot ftehim illi kellu jigi ezegwit fil-Libja, il-gurdizzjoni tispetta lill-qrati tal-Libja.

Il-qorti tosserva illi l-intimati ghazlu li ma jittrattawx dawn l-eccezzjonijiet ta` natura preliminari b`mod distint u distakkat mill-eccezzjonijiet fil-mertu.

Tqis ukoll illi l-intimati hadu rwol passiv.

Maghmula dawn l-osservazzjonijiet, il-qorti tqis illi una volta sollevati, dawn l-eccezzjonijiet ghandhom jigu trattati u decizi.

Il-qorti sejra qabel xejn tittratta l-eccezzjoni tal-gurdizzjoni.

L-eccezzjonijiet l-ohra ghandhom jigu trattati fit-trattazzjoni tal-mertu tal-azzjoni skont l-Art 402 tal-Kap 386.

L-Art 741(1)(a) tal-Kap 12 ighid illi *l-eccezzjoni tal-inkompetenza tal-qorti tista` tinghata - ... meta l-kawza ma tkunx ta` gurdizzjoni tal-qrati ta` Malta.*

L-Art 742(1) tal-Kap 12 ighid kif hija regolata l-gurdizzjoni tal-qrati civili. Id-disposizzjoni ghandha seba` paragrafi minn (a) sa (g). Wara li qieset id-deposizzjoni ta` Fairuz El Hamruni, u kif svolga

l-iter tal-kawza fejn l-eccezzjonijiet kienu trattati mal-mertu, minn ezami ta' kull wiehed minn dawn is-seba' paragrafi, fejn jirrigwarda l-intimata Fairuz El Hamruni, din il-qorti ghandha guriidizzjoni abbazi tal-paragrafi (b), (c), (d), (f) u (g). **L-eccezzjoni tal-guriidizzjoni qeghda tkun respinta.**

IV. L-Art 402 tal-Kap 386

Il-qorti sejra taghmel riferenza ghal dawk mis-subartikoli tal-Art 402 li tqis rilevanti ghall-istanza tal-lum :-

(1) Kull membru ta' kumpannija li jilmenta li l-affarijiet tal-kumpannija jkunu tmexxew jew qed jitmexxew jew aktarx jitmexxew b`mod li, jew li xi att jew ommissjoni tal-kumpannija kienu jew huma jew x`aktarx se jkunu, oppressivi b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju, ghal membru jew membri jew b`mod li jkunu kontra l-interessi tal-membri in generali, jista` jaghmel rikors lill-qorti ghal ordni taht dan l-artikolu.

...

(3) Jekk dwar rikors maghmul skond is-subartikolu (1) ... il-qorti tkun tal-fehma li l-ilment ikun bazat sewwa u li jkun gust u ekwu li hekk taghmel, il-qorti tista` taghmel ordni taht dawk il-kondizzjonijiet li jidhrilha xierqa -

(a) li jirregola t-tmexxija tal-affarijiet tal-kumpannija fil-futur ; jew

(b) jirrestringi jew jipprojbixxi l-ghemil ta` xi att propost jew

(c) jehtieg lill-kumpannija li taghmel xi att li r-rikorrent ikun ilmenta li kienet naqset li taghmel ; jew

(d) *jipprovdi ghax-xiri tal-azzjonijiet ta' xi membri tal-kumpannija minn membri ohra tal-kumpannija jew mill-kumpannija nnifisha u, f'kaz ta' xiri mill-kumpannija, ghat-tnaqqis li jkun mehtieg fil-kapital azzjonarju mahrug tal-kumpannija ; jew*

(e) *jordna lill-kumpannija li tibda, tiddefendi, tkompli jew ma tkomplix procedimenti tal-qorti, jew jawtorizza lil membru jew membri tal-kumpannija li jibdew, jiddefendu, ikomplu jew ma jkomplux procedimenti tal-qorti f'isem u ghan-nom tal-kumpannija ; jew*

(f) *jipprovdi ghall-hlas ta' kumpens minn dik il-persuna li tista' tkun instabet responsabbli mill-qorti ghal telf jew danni li jkunu ggarrbu minhabba att jew nuqqas li dwaru jkun sar ilment lill-persuna li tkun garrbet dak it-telf jew danni ; jew*

(g) *ixolji l-kumpannija u jipprovdi ghall-istralc konsegwenzjali taghha.*

(4) *Meta jsir ordni ghax-xoljiment ta' kumpannija skond is-subartikolu (3)(g), il-kumpannija ghandha titqies li tkun xoljiet fid-data meta jkun sar l-ordni u d-disposizzjonijiet tas-Sub-Titoli I u III tat-Titolu II tat-Taqsima V ta' dan l-Att li jirregolaw l-istralc ta' kumpanniji ghandhom japplikaw.*

(5) *Ordni maghmul taht dan l-artikolu jista' jehtieg lil kumpannija biex ma taghmilx xi emenda, jew li taghmel emenda mehtiega, fil-memorandum jew fl-istatut taghha.*

Ghalkemm id-dicitura tal-Art 402(1) ittiehdet testwalment minn disposizzjoni simili li tirrizulta fil-Companies Act ta' New Zealand, tajjeb jinghad illi l-ligi ta' New Zealand segwiet l-izvilupp legislattiv tar-Renju Unit. Fl-Ingilterra, id-disposizzjoni li kienet tirregola l-*unfair prejudice action* fil-Companies Act 1985 kienet Sec 459. Meta saret il-Companies Act 2006, l-azzjoni bdiet tigi regolata b' Sec 994(1) fis-sens

illi Sec 459 thassret ghal kollox mill-Companies Act 1985 u dahlet ezatt kif inhi f` Sec 994(1) tal-Companies Act 2006.

Fil-pag 485 tal-ktieb **Company Law** (Fourth Edition – 2016 – OUP) **Brenda Hannigan** tghid :-

"Where the court is satisfied that a petition under s. 994 is well founded, it may make such order as it thinks fit for giving relief in respect of matters complained of [s 996(2)]"

Sabiex tinghata ordni skont kif previst fis-subartikoli (3), (4) u (5) tal-Art 402, hija tassattiva l-prova tal-att li minnu jkun qed jilmenta r-rikorrent. Dan ifisser illi jekk abbazi tal-provi, il-qorti tkun sodisfatta li jirrizulta dak previst fis-subartikolu (1), allura tghaddi mbaghad biex taghti l-ordni li jidhrilha opportuna skont is-subartikoli l-ohra. Jekk il-prova tkun insodisfacjenti ghaliex ma jkunx irrizulta dak previst mis-subartikolu (1), allura l-qorti ghandha tieqaf hemm, u m`ghandhiex tapplika s-subartikoli l-ohra. Ghalhekk il-prova tas-sussistenza legali u fattwali ta` dak li jipprovdi s-subartikolu (1) huwa pregudizzjali ghall-prosegwiment tal-azzjoni.

V. Il-prova

Fil-Pag 1317 ta` **Principles of Maltese Company Law** (Volume Three : Second Edition : MUP : 2019) **Andrew Muscat** ighid illi fuq ir-rikorrent jistrieħ il-piz tal-prova li l-att jew omissjoni lamentata jaqa` fl-ambitu tas-subartikolu (1) :-

"This wording (tal-subartikolu 1) clearly suggests that the member need only prove one effect of the conduct, act or omission, that is, that such conduct, act or omission, has been, is or is likely to be "oppressive" or "unfairly discriminatory" or "unfairly prejudicial" (to a member or

members) or contrary to interests (of the members as a whole)."

Fis-sentenza li tat il-Prim`Awla tal-Qorti Civili fit-30 ta` Jannar 2008 fil-kawza "**Cutajar pro et noe et v. S.C. & Company Limited et**" inghad hekk :-

Illi l-prova biex tirnexxi dina l-azzjoni tispetta lir-rikorrenti li ressqu dina l-azzjoni. Huma jridu jippruvaw li (a) l-affarijiet tal-kumpanija jkunu tmexxew jew qed jitmexxew jew aktarx jitmexxew b`mod li... (b) jew li xi att jew ommissjoni tal-kumpanija kienu jew huma jew x`aktarx se jkunu, oppressivi b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju, ghal membru jew membri jew b`mod li jkunu kontra l-interessi tal-membri in generali.

Il-ligi taghna ma taghtix spjegazzjoni ta` x`inhu oppressiv b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju. Kull kaz ghalhekk irid jigi trattat u deciz fuq il-mertu tieghu proprju, u dana kaz b`kaz. L-iskop tal-ligi hu biex il-Qorti tkun tista` tintervjeni f`dawk il-kazijiet fejn hemm bzonn li jinghata rimedju minhabba unfair dealing fejn jigi pruvat li kien hemm azzjonijiet jew ommissjonijiet li ma kienux gusti u li kienu ta` pregudizzju jew li l-affarijiet tal-kumpanija mhux qed jitmexxew sew.

Fil-pag 492 ta` **Company Law** (Fourth Edition - Oxford) **Brenda Hannigan** tirrimarka :-

"Whether the company`s affairs are being or have been conducted in a manner which is unfairly prejudicial to the petitioner`s interest is an objective, not a subjective, matter. The prejudice must be real, rather than merely technical or trivial, and the petitioner does not have to show that the persons controlling the company have acted deliberately in bad faith or with a conscious intent to treat him unfairly.

The conduct complained of must be prejudicial in the sense of causing prejudice or harm to the relevant interest of the member (usually, but not limited to financial damage) and also unfairly so (usually connoting some breach of company law or the constitution but not limited to that) and it is not sufficient if the conduct satisfies only one of these tests."

VI. Legittimu Kontradittur

Fil-"**Principles of Maltese Company Law**" (op. cit.) **Andrew Muscat** jitttratta l-kwistjoni ta' kontra min tista' tkun promossa azzjoni ta' din ix-xorta. Fil-pag. 995 tal-ktieb ighid :-

The Companies Act does not specify the person or persons against whom an action under article 402 is to be brought. It does well not to do so. The reason is that the choice of the defendant or defendants depends on the facts of the case and on the type of relief sought.

... the persons responsible for the conduct complained of would typically vary from the current or past majority shareholder to the managing director or the controlling directors acting on behalf of company. Control may also be vested in a shadow director, a provisional administrator, a liquidator, an official receiver and even the pledgee of shares in the company, who, in terms of the pledge agreement, may exercise the shareholder's voting rights or appoints directors on the board.

*Moreover, as will be noted in the following pages, the forms of relief that may be granted by the court are considerably wide-ranging; a court order could be issued against a number of persons, typically the company itself and one or more shareholders. In **Joseph Calleja vs Vincent Calleja**, an article 402 was filed only against one of the shareholders. The company itself was not a party. The defendant pleaded*

that the company itself were wrongly instituted, as the action had to be filed against the company and not against himself as a member. The Court, in a judgement in parte, considered article 402 to provide a flexible and equitable remedy and agreed with the applicant's submissions that an article 402 action had to be instituted against the person or persons who were allegedly responsible for the wrongdoing and that the court's order need not in all cases be issued against the company itself. The Court remarked that as the applicant's allegations of wrongdoing were directed towards the defendant, it was clear that the defendant was a proper party to the proceedings. It also stated that the fact that the action was not also filed against the company did not nullify the proceedings.

... Given the fundamental principle of Maltese procedural law that no person can be bound by a court's decision or judgement unless he is a party to the relative proceedings, it is important for the complainant to carefully identify the person or persons against whom the action is to be filed.

Fil-Pag 218 tal-Kap 6 tal-ktieb **Minority Shareholders : Law, Practice and Procedure, Victor Joffe** jikteb :-

The petitioner will be the member seeking relief, and the company of which he is a member and in relation to whose affairs he alleges unfairly prejudicial conduct will be made a respondent. Additionally, every member of the company (other than the petitioner) whose interests might be effected by the relief sought should be joined as a respondent, whether or not allegations of unfairly prejudicial conduct are made against him: in the case of a small private company, this will usually mean that every member ought to be joined as a respondent to the petition. The category of potential respondents (other than the company) is not, however, limited to members of the company. In an appropriate case, relief may be sought against a non- or former member. The width of the category of potential respondents is indicated by Lowe vs Fahey ((1996) 1 BCLC 262), where it was held that if

the unfairly prejudicial conduct alleged was a diversion of corporate funds, a petitioner could seek relief not only against members and former members, but also against directors involved or third parties who knowingly received or improperly assisted in the diversion. Even a person who is not actively involved in the conduct of the affairs of the company complained of may be made a respondent, at least if he would be affected by the relief sought.

Tenut kont tal-ilmenti ta` Naico, il-qorti tqis illi l-intimati hekk kif imharrka huma legittimi kontraditturi taghha ghall-finijiet u effetti kollha tal-ligi. Tajjeb jinghad illi fl-eventwalita` li ssir il-prova tar-rekwiziti tal-Art 402(1), u allura l-qorti tkun trid tipprovdi skont l-Art 402(3), il-provvediment taghha jolqot ukoll lill-intimati qua diretturi u/jew azzjonisti tas-socjeta` intimata.

VII. L-Art 402(1) tal-Kap 386

1. Gurisprudenza

Fis-sentenza li tat il-Qorti ta` Ghawdex (Gurisdizzjoni Superjuri) fl-4 ta` Frar 2009 fil-kawza "**Ellis v. Ellis**" inghad hekk :-

Jibda biex jinghad li dan il-provvediment jista` jigi nvokat mill-membri kollha, u mhux biss minn membri minoritarji u m`hemmx dubju li d-diskrezzjoni u l-poteri moghtija lill-qorti f`dan il-kuntest huma wesghin. Minn dan il-provvediment hu evidenti li :

(a) Dan il-provvediment japplika wkoll f`kaz ta` att jew ommissjoni izolata ;

(b) Ir-rimedju jista` jinghata kemm ghal dak li jkun gara fil-passat u wkoll xi att propost li jsir fil-futur ;

(c) *L-ilment jrid ikun fuq it-tmexxija tal-affarijiet tal-kumpannija jew fuq att jew ommissjoni tal-kumpannija.*

Fis-sentenza tagħha tad-9 ta' Marzu 2007 fil-kawza "**Vella et v. Vella Brothers Ltd et**", il-Qorti tal-Appell qalet hekk :-

... l-Artikolu 402 tal-Att dwar il-kumpaniji jagħti diskrezzjoni pjuttost wiesa' lill-Qrati u dan għaliex dawn il-provvedimenti għandhom l-għan li jissalvagwardjaw u jipprotegu lill-azzjonisti ta' socjeta' kummercjali, partikolarment lil dawk li huma minoritarji u li għalhekk qeghdin fl-impossibilita' li jirregolaw il-mod li bih tkun qed titmexxa s-socjeta' li fiha huma jkollhom interess

...

*din id-disposizzjoni, li hija bbazata fuq l-Art.459 tal-Companies Act (1985) Ingliza, hija ispirata fuq principji ta' ekwita' aktar milli minn drittijiet strettament legalistici biex ikun jista' jigi mogħti rimedju. Dak li hu necessarju hu li l-azzjonista jipprova li minhabba l-gestjoni tas-socjeta' partikolari hu qed isofri, jew ukoll jista' jsufri, pregudizzju ta' natura oppressiva, ingusta jew diskriminatorja. Tali gestjoni tista' tirreferi semplicement għal xi att specifiku jew xi ommissjoni tal-kumpanija. Il-pregudizzju jista' jirreferi għall-azzjonist li qed jippromwovi l-proceduri, għal xi azzjonist iehor jew għall-interess in generali tal-azzjonisti. Ma hemmx għalfejn li huwa jipprova li huwa zgur ser isofri xi pregudizzju fil-futur. Tali prova tista' ssir fuq bazi ragjonevoli ta' possibilita' ("**Vincent Monreal et v. Lino Delia noe**" deciza mill- Prim`Awla tal-Qorti Civili fit-13 ta' Mejju,1999). Infatti gie deciz mill-Qrati Inglizi fil-kawza in **re Bovey Hotel Ventures Ltd** [(1983) B.C.L.C. 290] li `the Court will not give a list of situations when this remedy may be resorted to however one principle remains clear. A shareholder may make use of this article when his shareholding in the company has been seriously diminished at least seriously jeopardized by reason of a course of conduct or the part of*

those who have the de facto control of the company, which has been unfair to the member concerned”.

...

*Fid-decizjoni **O`Neill v Phillips** moghtija mill-House of Lords fl-20 ta` Mejju 1999, gie ritenut illi l-legislatur ried illi biex jinghata rimedju taht l-artikolu jigi kkunsidrat il-kriterju ta` dak li huwa `fair`. Izda Lord Hoffman izid ighid li - “Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used ... The requirement that prejudice must be suffered as a member should not be too narrowly or technically construed.”*

Fid-decizjoni **In Re Bovey Hotel Ventures Ltd.** (1983) Slade J ighid hekk dwar *unfair prejudice* :-

The test for unfairness must, I think, be an objective, not a subjective, one. In other words it is not necessary for the petitioner to show that the persons who have de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith ; the test, I think is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner`s interests.

Fis-sentenza “**Monreal et vs Delia noe**” (op. cit.) inghad :-

Dawn il-provedimenti huma ta` salvagwardja u ta` protezzjoni ghall-azzjonisti ta` socjeta` kummercjali, b`mod partikolari ghal dawk li huma minoritarji. Ir-rimedji li johorgu minn dawn il-provedimenti huma moghtija lil kull azzjonist ta` socjeta` kummercjali. Kull azzjonist, anke jekk hu minoritarju, ta` socjeta` kummercjali, anke jekk hi pubblika, jista` jitlob li jinghataw l-ordnijiet kollha necessarji u

opportuni, f`kaz li jirnexxielu jipprova illi minhabba l-gestjoni tal-istess socjeta` huwa qed isofri jew ukoll jista` jsofri xi pregudizzju ta` natura oppressiva, ingusta jew diskriminatorja. Tali gestjoni tista` tirreferi semplicement ghal xi att specifiku jew xi ommissjoni tal-kumpanija. Il-pregudizzju jista` jirreferi ghall-azzjonist li qed jippromuovi l-proceduri, ghal xi azzjonist iehor jew ghall-interessi in generali tal-azzjonisti. In vista ta` dan kollu jista` jinghad li hu bizzejjed li l-azzjonista jipprova li huwa qed isofri jew eventwalment jista` jsofri xi pregudizzju minhabba xi agir tas-socjeta` li taghha huwa jippossjedi xi ishma. Ma hemmx ghalfejn li huwa jipprova li huwa zgur li ser isofri xi pregudizzju fil-futur. Tali prova tista` ssir fuq bazi ragjonevoli ta` probabbilita`. Inoltre, skond dak li hemm provdut fis-subartikolu (3) tal-istess artikolu 402, il-Qorti tista` tipprocedi biex taghmel kull ordni necessarja u opportuna skond dawn il-provedimenti, jekk jirrizulta li l-ilment tal-azzjonista hu sewwa bbazat u jekk il-Qorti thoss li huwa ekwu u gust li taghmel.

Fis-sentenza taghha tal-31 ta` Jannar 2003 fil-kawza "**Ellul v. Ellul pro et noe**", il-Qorti tal-Appell qalet illi :-

... Fil-ligi Ingliza (ara Art 459 tal-Companies Act, 1985) jinstab rimedju simili li hu maghruf bhala "The Unfair Prejudice Remedy". Il-Qorti tal-Appell Ingliza stabbiliet fil-kaz "**in Re Saul D. Harrison & Sons plc** ([1995]) 1BCLC 14)" il-linji ta` gwida dwar kif kellu jkun l-operat biex ikun jista` jigi kkwalifikat bhala, "unfairly prejudicial" (fit-test tal-Ligi Maltija din il-frazi hi tradotta "b`mod mhux gust ta` pregudizzju"). Wiehed kellu, fl-ewwel lok, jara jekk dak l-operat kienx jew le skond l-istatut tal-kumpanija. Izda fl-applikazzjoni tal-imsemmija dispozizzjoni - ispirata fuq principji ta` ekwita` aktar milli minn drittijiet strettament legali - il-Qorti tiehu in konsiderazzjoni l-aspettattivi legittimi ("legitimate expectations") li r-rikorrent jista` jkollu u li sikwiet ikunu ferm aktar wiesgha mid-drittijiet strettament legali li johorgu mill-istatut ta-ssocjeta`. Dawn l-aspettattivi legittimi jitwiieldu

minn xi relazzjonijiet personali partikolari bejn l-azzjonisti. Fil-kaz **Ebrahimi vs Westbourne Galleries Ltd.** ([1973] AC 360) Lord Wilberforce elenka numru ta' sitwazzjonijiet fejn dan ir-rimedju jista' jinghata, sitwazzjonijiet dawn li x'aktarx jinstabu f' kumpaniji zghar privati li ta' sikwiet jissejhu "quasi partnerships", fosthom is-segwenti :-

"(i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company

(ii) an agreement, or understanding, that all, or some (for there may be "sleeping members") of the shareholders shall participate in the conduct of the business ;

(iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere".

Fid-decizjoni tal-Prim`Awla tal-Qorti Civili moghtija fis-7 ta` Ottubru 2016 fil-kawza **Av. Dr. Pio M. Valletta noe v. Jeno Torocsik et** inghad illi sabiex ikun hemm *unfair prejudice*, (a) *it-test irid ikun wiehed oggettiv* ; (b) *m`hemmx htiega li l-attur jipprova l-mala fede* ; (c) *m`hemmx htiega li l-attur jipprova li kien hemm intenzjoni li tikkawza pregudizzju* ; (d) *mhux gust ma jfissirx bilfors li l-agir irid ikun illegali* ; u (e) *l-agir irid ikollu effett negattiv fuq l-attur bhala azzjonist*.

Fid-decizjoni **Re Coroin Ltd** – 2012 – All ER (d) 58(Feb) – EWHC 129 (Ch) – moghtija mic-Chancery Division tal-Ingilterra – David Richards J. qal illi :-

"630. *Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is*

bound up with his position as a member ... The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section.

631. Where the acts complained of have no adverse financial consequences, it may be more difficult to establish relevant prejudice. This may particularly be the case where the acts or omissions are breaches of duty owed to the company rather than to shareholders individually. If it is said that the directors or some of them had been in breach of duty to the company but no loss to the company has resulted, the company would not have a claim against those directors. It may therefore be difficult for a shareholder to show that nonetheless as a member he has suffered prejudice ..."

2. Dottrina

Fil-pag. 449 ta` **Farrar`s Company Law** (Fourth Edition)
jinghad illi :-

A member`s interests are not necessarily limited, therefore, to his strict legal rights under the Articles and the Companies` Act but can extend also to legitimate expectations as to the conduct of the company`s affairs arising from the nature of the company and the agreements and understandings between the parties.

Fil-pag. 464 tat-Third Edition ta` **Farrar`s Company Law**
jinghad illi :-

... The position will vary greatly from the small private companies, commonly called quasi-partnerships, to public companies of considerable size. As a quasi-partnership, the company will usually have been formed or continued on the basis of a personal relationship involving mutual confidence. There may be an agreement or understanding that all or some of the shareholders are to participate in the conduct of the business. Restrictions on the transfer of shares will be the rule rather than the exception. The individuals involved may also have made relatively substantial capital contributions to the company. Shareholders in such companies will be a small close-knit group, actively involved in many instances in the daytoday operations and financially and personally committed to the company. Here the scope for legitimate expectations beyond their strict legal rights is obviously greatest.

*However, as Lord Wilberforce stressed in **Ebrahimi v Westbourne Galleries Ltd**, the case for giving effect to equitable considerations must be made in each instance and it is not sufficient simply to assert that the company is small or private, for in many cases the basis of the relationship will be adequately and exhaustively laid down in the articles. If it is so defined by the articles or, for example, by the articles supplemented by a shareholders` agreement, then there is little room for finding further legitimate expectations beyond those outlined in the documents.*

The interests of shareholders in larger private and public companies, on the other hand, are likely to be quite different from those of shareholders in quasi-partnerships and considerably more restricted. In these larger companies there is usually no underlying personal relationship, employment is rarely an issue and the shareholders are more interested in such matters as dividend yield and capital appreciation than involvement in the day-to-day running of the company. If they become dissatisfied, especially if it is a public company, they can sell their shares and withdraw from the company. Here the members rarely have expectations beyond their strict legal rights as provided by the articles.

"That is not to say that s.459 does not apply to larger private companies and public companies for the section is clearly not limited to quasipartnerships. The point is that it may be harder to establish conduct which is unfairly prejudicial to the interests of the members in such companies.

Fil-pag 409 ta` **Cases and Materials on Company Law** (Fifth Edition) l-awturi **Hicks and Goo** jirrimarkaw illi :-

*In the early days of S.459, it was thought that the petitioner must have unfairly suffered prejudice to an interest as a member only (and not eg. as a director). This requirement has never been relaxed in that the Court is prepared to recognise that members may have different interests having regard to their rights, expectations and obligations (**Re a company** (No 00477 of 1986 [1986 BCLC 376; **O`Neill v Phillips**. [1999] 1 WLR 1092). This is particularly so in quasi-partnership cases where a minority is excluded from management. But where the articles make detailed provision for any departing members to sell their shares at a fair price, the position may be different ...Section 459 has proved to be a powerful weapon for minority shareholders, particularly in the case of quasi-partnerships. In such companies, minorities who are excluded from management participation or who unfairly suffer loss as a result of wrongdoing by directors or majority shareholders may get relief under the section.*

Fil-pag 506 ta` **Company Law** (op. cit.) **Brenda Hannigan** tirrimarka li :-

"Mere deadlock between the parties who have lost trust and confidence in one another is insufficient then to merit relief under CA 2006, s 994, in the absence of prejudicial conduct."

Fil-pag 711 ta' **Boyle & Birds' Company Law** (Eight Edition – 2011 – Jordans) jinghad :-

"The term "unfair prejudice" whether analysed as a 'standard' or a 'concept' is a relatively more objective one which is concerned with running the company in a way that is clearly unfair in its consequences to the complaining shareholder, even if the respondents can claim to have acted in the best of good faith."

Fil-pag 691-692 tal-ktieb **Gower and Davies - Principles of Modern Company Law** (Eighth Edition – 2008 – Sweet & Maxwell) jinghad illi :-

*" ... the courts recognised that sec 994 protects expectations and not just rights. Borrowing from public law, it is sometimes said that the section protects the "legitimate expectations" of the petitioner, though more recently the courts have preferred the private law phrase "equitable considerations" [Qorti tal-Appell Ingliza fil-kawza "**Saul D Harrison & Sons plc**" – 1995 – għall-uzu tal-frazi "legitimate expectations" ; House of Lords – "**O'Neill vs Phillips**" – 1999 – għall-uzu tal-frazi "equitable considerations"] Whatever the language used, the difficult issue is to distinguish those expectations of the petitioner which are to be classified as "legitimate" or which considerations are to fall within the category of "equitable considerations" and so as deserving of legal recognition and protection from those expectations which the petitioner may harbour as a matter of fact but which the courts will not protect."*

Fil-pag 569-570 tal-ktieb **Company Law** (26th Edition – 2009/2010 – OUP) l-awturi **Mayson, French & Ryan** jgħidu hekk b'riferenza għad-decizjoni ta' *Re Saul D Harrison and Sons* citata aktar kmieni :-

"The words 'unfairly prejudicial' are general words and they should be applied flexibly to meet the circumstances of the particular case ... The conduct [being complained of] must be both prejudicial [in the sense of causing prejudice or harm to the relevant interest] and also unfairly so ; conduct may be unfair without being prejudicial or prejudicial without being unfair, and it is not sufficient if the conduct satisfies only one of these tests."

Ikomplu billi jaghmlu riferenza ghal "**O`Neill vs Phillips**" (op. cit.) in partikolari dwar l-ghazla li ghamel il-Parlament Ingliz –

"Parlament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief ... it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. Although fairness is a notion which can be applied to all kinds of activities its content will depend upon the context in which it is being used."

3. Risultanzi

Il-qorti sejra tqis jekk l-ilmenti tar-rikorrenti jissodisfawx il-vot rikjest fl-Art 402(1). Tajjeb li jkun ribadit illi sabiex ikun sodisfatt il-vot tal-ligi huwa bizzegjed jekk tirrizulta mqar wahda mic-cirkostanzi ndikati fid-dispozizzjoni. Tant hu hekk illi l-legislatur ghazel il-konguntiv jew mhux l-konguntiv u fid-dispozizzjoni. Ghalhekk ir-rekwiziti huma alternattivi mhux kumulattivi.

a) Sfond

Naico u Piccinino riedu jespandu n-negozju taghhom billi jesploraw is-suq Libjan. Piccinino ma kinitx disposta illi tiehu sogru finanzjarju izda kienet lesta tforni l-operazzjoni fil-Libja bi stock u taghmir mehtieg. John Naudi u Andrei Pace ikkonfermaw illi Naico kellha taghmel tajjeb ghall-investment kapitali sabiex isir il-finishing tal-post li kien identifikat bhala l-hanut minn fejn kellu jsir in-negozju li kien se jkun principalment dak ta' *lingerie*. Kienu Naudi u Pace li ghamlu kuntatt u ghazlu lill-familja El Hamruni bhala l-*partner* taghhom fil-Libja.

Mill-provi jirrizulta illi sabiex jibdw dan in-negozju, Naico u Piccinino kellhom bzonn l-involviment ta' negozjanti Libjani li setghu jaghtu kontribut tajjeb bl-gharfien taghhom tas-suq fil-Libja. Ghalkemm Naudi u Pace xehdu li ltaqghu ma' diversi negozjanti Libjani, ighidu wkoll li Omar El Hamruni kien l-aktar wiehed interessat. Fix-xieha taghhom Naudi u Pace jirreferu ghal Omar El Hamruni bhala negozjant ta' stoffa. Ma hemmx dubju illi da parti taghhom Naudi u Pace impressjonaw ruhhom b'Omar El Hamruni ghaliex dan kien negozjant li kien jirrapprezenta ditti rinomati esteri bhal Nike u Celio.

Mhux maghruf jekk sarx ezercizzju ta' *due diligence* jew *market research* dwar il-familja El Hamruni bil-ghan li tkun accertata s-solidita' u l-esperjenza taghhom fin-negozju. Lanqas ma jirrizulta li saru accertamenti dwar l-affidabilita' tal-intimati El Hamruni. Waqt li jibqa' mhux maghruf jekk sarux l-accertamenti tal-kaz minn Naico huwa fatt illi dak kollu illi kellu jitwettaq fi Tripli mill-ghazla tal-post fejn jkun il-hanut, il-kuntratt tal-kiri tal-post u l-ftuh ta' kontijiet ma' bank Libjan sar kollu minn Ahmed Al Hamruni.

Tajjeb jinghad illi r-rapprezentanti tal-kumpanniji azzjonisti Maltin ta' Rosa Ltd marru flimkien Tripli sabiex jaraw l-ambjenti u jsibu s-sit adattat biex iservi bhala hanut. Riedu post centrali ghall-kummerc. Cio' nonostante, kif jinsab ikkonfermat f'sensiela ta' e-

mails skambjati bejn il-partijiet, anke jekk ir-rapprezentanti Maltin ma kinux kuntenti bil-proposta ta' Ahmed El Hamruni dwar il-post li kellu jinkera, finalment huma ghazlu li joqghodu fuq il-parir tal-*partners* Libjani ghaliex dawn kellhom gharfien ahjar tas-suq Libjan.

Il-qorti tinnota illi dwar il-kirja ha hsieb kollox Ahmed El Hamruni. L-azzjonisti Maltin ma nsistewx illi jaraw il-kuntratt tal-kera qabel ikun iffirmit. Lanqas ma jirrizulta illi saru ricerki. Qaghdu ghal kollox fuq dak li kien qiegħed jigi riferut lilhom minn Ahmed El Hamruni. Il-qorti zzid tosserva illi anke jekk qabel il-firma tal-kuntratt xi rapprezentanti tal-Maltin marru jaraw il-post, iz-zjara kienet limitata għall-vizjoni tal-post.

Jirrizulta li l-kuntratt inkiteb bl-Gharbi u ma nghatax lill-azzjonisti Maltin ta' Rosa Ltd. Il-hanut kien fi stat ta' gebel u saqaf. Naico hallset l-ispejjez tal-*finishing* li kellhom jigu rifuzi mis-sid mill-kera li tithallas. In-negozju ma marx tajjeb u kellu hajja qasira hafna principalment minhabba l-għied li nqala' fi Tripli. Kemm ir-rikorrenti u kif ukoll ir-rapprezentanti ta' Piccinino xehdu illi s-sit fejn kien il-hanut ma kienx ideali. Skont Naudi u Pace il-Libjani mill-ewwel tilfu l-interess. Wara biss ftit gimghat mindu fetah, il-hanut kellu jingħalaq temporanjament kawza tal-għied u l-instabilita' fil-pajjiz. Meta s-sitwazzjoni kkalmat il-hanut rega' fetah sakemm ittiehdet id-decizjoni illi jingħalaq għal kollox sabiex l-azzjonisti ma jsofrux aktar telf. Fil-15 ta' Frar 2017 saret l-ahhar laqgħa tal-bord tad-diretturi ta' Rosa Ltd bil-ghan illi jibda l-process ghax-xoljiment tagħha. Kien biss f'dan il-kuntest illi Naico talbet id-dokumentazzjoni dwar il-proprjetarju tal-hanut.

Ir-rikorrenti qed tikkontendi kjarament bhala bazi tal-azzjoni skont l-Art 402(1) illi kieku kien magħruf min kien is-sid tal-hanut kienet tagħraf timxi mod iehor u ma kinitx tagħmel l-istess investment.

Tajjeb jingħad illi l-iprem obbligu generali ta' direttur ta' kumpannija jilhaq il-milja tiegħu fl-**Art 136A(1) tal-Kap 386** li jghid

illi kull direttur ghandu l-obbligu "li jagixxi b`onestà u bona fede fl-ahjar interessi tal-kumpannija".

F` **Howard v Herrigel** [1991(2) SA 660(A)] inghad illi :

"At common law, once a person accepts appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf. That is the general rule and its application to any particular incumbent of the office of director must necessarily depend on the facts and circumstances of each."

L-**Art 136A(2)** jistipola illi d-diretturi ghandhom "jippromwovu il-benessere tal-kumpannija u jkunu responsabbli ghal : (a) it-tmexxija generali tal-kumpannija u l-amministrazzjoni u l-immaniggjar taghha ; u (b) s-sorveljanza generali tal-affarijiet taghha."

Fir-risposta taghha, l-intimata Fairuz El Hamruni eccepjet il-validita` tal-hatra taghha qua direttur ta` Rosa Ltd. Tghid illi la ffirmat karti u wisq inqas tat il-kunsens taghha sabiex tinhatar fil-kariga. Fairuz El Hamruni ma ressqet ebda prova in sostenn tal-eccezzjoni taghha. Mill-provi tar-rikorrenti jirrizulta illi Fairuz El Hamruni saret direttur ta` Rosa Ltd b`effett mit-8 ta` Mejju 2015. Skont ma xehdu Andrei Pace u John Naudi kienet l-istess Fairuz El Hamruni illi talbet li tinvolvi ruhha fin-negozju tant li saret *manager* tal-hanut u direttur tal-kumpannija. Il-provi tar-rikorrenti mhux kontradetti.

L-ilment tar-rikorrenti huwa fis-sostanza illi Ahmed El Hamruni kera l-hanut minghand ir-ragel ta` ohtu Feiruz El Hamruni bla ma qal lill-azzjonisti Maltin fosthom lilha. Issostni li kawza ta` dik id-decizjoni garrbet pregudizzju li ssarraff` danni.

Abbazi tal-provi jidher illi n-negozju gestit mill-hanut ta' Tripli ma halliex id-dhul u allura l-profitt prospettat meta relatat mal-investment. Il-qorti tqis li tenut kont tal-generu tan-negozju i.e. lingerie, iz-zmien maghzul biex jinfetah il-hanut kien hazin mill-aspetti kollha. Fil-pajjiz diga` kien hemm instabilita`, diga` kien safa` maqtul Muammar Gaddafi u diga` kien hemm irvellijiet. Id-decizjoni li jinfetah il-hanut kien fi zmien fejn kienet donnha bdiet tirrenja l-kalma. L-istorja ppruvat li din kienet illuzjoni, imbaghad, il-qorti terga` tishaq, ghal negozju ta` lingerie. Ghaliex ftit gimghat biss wara li fetah il-hanut kellu jaghlaq. Mhux ghaliex il-post fejn kien ma kienx tajjeb izda ghaliex kien hem mil-glieda fit-toroq. L-azzjonisti Maltin hadu riskju gholi u l-falliment tan-negozju ma jistax jigi addebitat ghall-fatt li ma kinux jafu li l-hanut inkera minghand ir-ragel ta` Feiruz. Ma rrizultax li dan kien il-fatt li gab l-ghamla ta` pregudizzju li l-Art 402(1) ma jridx li jgarrab membru ta` kumpannija. Il-posizzjoni tal-hanut, il-mod kif saret il-kirja u ma` min ma kienux fatturi determinanti talli n-negozju ma marx tajjeb u ma jimpingu bl-ebda mod fuq ir-rekwiziti tal-Art 402(1).

Fix-xiehda taghhom Naudi u Pace jghidu li fdaw kollox f`idejn Ahmed El Hamruni. Konfortati mill-fatt li Ahmed El Hamruni kien jaf is-suq ta` Tripli u li bhala azzjonist kellu kull interess li jara li n-negozju jaqbad mill-ewwel u jmur tajjeb, Naico halliet f`idejh id-decizjoni dwar il-proprjeta` li kellha tinkera. Ma jirrizultax illi Naico qatt staqsiet dwar il-proprjetarju tal-hanut. Lanqas ma jirrizulta li qatt talbu li jiltaqghu personalment mas-sid. Mix-xiehda, kif ikkonfermata mill-korrispondenza kopjuza, johrog bic-car illi l-enfasi kienet kollha kemm hi fuq is-sit fejn ser jinfetah il-hanut. Ghalkemm Naudi u Pace xehdu illi talbu kopja tal-kuntratt tal-kera, tajjeb jinghad illi ma kien hemm ebda insistenza da parti ta` Naico illi tara l-kuntratt tal-kera qabel jigi ffirmat. Jirrizulta wkoll illi ghalkemm Naico u Piccinino qalu li ma kienux kuntenti bl-ghazla tas-sit, eppure baqghu ghaddejjin li jifthu n-negozju.

Il-qorti tqis illi l-ilment ta` Naico jdur mal-fatt illi ghamlet infieq sostanzjali fil-hanut. Billi n-negozju waqaf ghax il-hanut ghalaq, il-*finishes* li hallset ghalihom hi kienu sejr in jitgawdew mis-sid li kien relatat mal-familja el Hamruni. Naico tghid illi l-ispiza kapitali li

ghamlet fil-hanut saret b`self. Il-fatti juru xort`ohra. Jirrizulta li Naico obligat ruhha li thallas minn taghha ghall-ispejjez kapitali. Il-minuti tal-ewwel laqgha tal-bord li saret fl-4 ta` Dicembru 2012 ighidu car illi l-ispejjez ta` kull ma kien relatat mal-hanut kellu jsir bhala investiment fin-negozju. Imkien ma ssir referenza ghal *shareholders loan* minn Naico lil Rosa Ltd. Kemm Naico u kif ukoll Piccinino investew fin-negozju : Naico bl-ispejjez ghat-tlestija tal-hanut u Piccinino bil-fornitura ta` stock u pupi ghall-mostra. Ladarba n-negozju kien insuccess, l-investiment li diga` kien sogru sfaxxa. Ir-raguni ghall-insuccess ma kinitx il-parentela tas-sid mal-familja El Hamruni izda l-instabilita` u l-glied fi Tripli.

Abbazi tal-provi akkwiziti, ir-rekwiziti tal-azzjoni tar-rikorrenti kif intavolata skont l-Art 402(1) tal-Kap 386 mhumiex ippruvati sal-grad rikjest mil-ligi. Ghalhekk mhux il-kaz li l-qorti taghti ordni skont l-Art 402(3).

Provvediment

Ghar-ragunijiet kollha premessi, il-qorti qeghda tipprovdi billi, filwaqt li qeghda tichad l-eccezzjonijiet ta` natura preliminari, qeghda tilqa` l-eccezzjonijiet fil-mertu. Ghalhekk qeghda tichad it-talba tar-rikorrenti, spejjez ghar-rikorrenti.

**Onor. Joseph Zammit McKeon
Imhallef**

**Amanda Cassar
Deputat Registratur**