MALTA

QORTI CIVILI
PRIM' AWLA

ONOR. IMHALLEF
LINO FARRUGIA SACCO

Seduta ta' l-10 ta' Ottubru, 2007

Citazzjoni Numru. 185/2006

Dr. Edward Gatt f'isem u in rapprezentanza tal-assenti Ali Abdalla Ali Gtesha Zentani
vs
TRM Limited (Malta)

Il-Qorti,

A. RIKORS:
Rat ir-rikors tar-rikorrent li bih esponna:

Illi s-socjeta` intimata kienet dahlet f'arrangament mas-socjeta` estera Veba Oil Operations BV fil-Libya sabiex l-istess socjeta` intimata tbiegh u tikkonsenja "Language Laboritories" lis-socjeta` Libica imsemmija.

Illi l-ftehim bejn r-rikorrenti nomine u s-socjeta` intimata kien illi l-rikorrenti nomine kien intitolat ghal somma flus ta' "commission" talli huwa laqqa' lill-istess socjeta` intimata mas-socjeta` estera hawn fuq imsemmija u susegwentement sehh in-negozju kif indikat.

Illi l-ftehim bejn ir-rikorrent nomine u s-socjeta` intimata kien illi r-rikorrenti nomine kien intitolat mis-socjeta` intimata tal-inkarigu minnu moqdi s-somma ta’ Euro 34,000.

Illi s-socjeta` intimata kemm-il darba anke permezz ta’ korrispondenza assikurat lir-rikorrenti nomine li hija kienet sejra thallas dina s-somma hawn fuq indikata.

Illi minkejja dan l-obbligu tas-socjeta` intimata l-istess baqghet inadempjenti minkejja li diversament interpellata fosthom bl-ittra legali datata 27 ta’ Settembru 2005.

Illi dana d-debitu huwa cert likwidu u dovut u fl-imli opinjoni tar-rikorrent nomine u s-socjeta` intimata ma kellhiex risposta x’taghti.

Ir-rikorrent talab lill-Qorti:

1. Taqta’ u tiddeciedi a tenur tal-Artikoli 167 sa 170 tal-Kap 12 tal-Ligijiet ta’ Malta u cioe` bid-dispensa tas-smiegh.

2. Tikkundanna lis-socjeta` intimata thallas is-somma ta’ l-ekwivalenti ghal Euro 34,000 f’valuta legali, lokali ossia s-somma ta’ tlettax-il elf, disa’ mija u sebgha u hamsin liri Maltin (Lm13,957) dovuti kif fuq inghad.

Bl-ispejjez u bl-imghax, kontra s-socjeta` intimata li giet ingunta ghas-subizzjoni.

Rat il-lista tax-xhieda prezentata mir-rikorrent nomine.

B. RISPOSTA:

Rat ir-risposta tas-socjeta` intimata li biha esponiet

1. Is-socjeta` intimata tinsab fi proceduri ta’ stralc, liema proceduri gew intavolati minn socjeta` ohra, Biochemicals International Limited bin-numru tar-rikors 955/2004GC, u liema proceduri differiti ghas-smiegh ghat-18 ta’ Mejju 2006.

2. Fl-istess proceduri fuq imsemmija, Paul Hili Direttur ta’ TRM Limited ikkonferma li gie mahtur amministratur provvizjoru fid-9 ta’ Mejju 2006.

3. Preliminarjament, skond l-artikolu 224 (2) ta’ l-Att dwar il-Kumpaniji, ir-rikorrent nomine kellu, qabel jipprezenta l-proceduri odjerni kontra s-socjeta` intimata, jitlob il-permess tal-Qorti sabiex jipprezenta l-istess proceduri, liema, permess, sa fejn tkun taf is-socjeta` intimata, ma ntalabx.

4. Preliminarjament ukoll u minghajr pregudizzju ghas-suepost, jinghad illi l-kumpanija intimata ser titlob il-waqfien ta’ dawn il-proceduri ai termini ta’ l-artikolu 220 ta’ l-Att dwar il-Kumpaniji u dan permezz ta’ rikors ipprezentat kontestwalment ma’ din ir-risposta.

5. Minghajr pregudizzju ghas-suepost, u dwar il-mertu ta’ dawn il-proceduri, is-socjeta` intimata ma kenitx taqbel illi l-ftehim mar-rikorrenti nomine kien kif deskritt fit-tieni paragrafu tar-rikors promotur u ssostni li l-hlas lill-attur nomine kellu jsir hekk kif appena s-socjeta` intimata tithallas mis-socjeta` estera Veba Oil Operations BV fil-Libja, liema hlas sal-lum ghadu ma sarx.

6. Illi kif kien ser jigi ppruvat fil-mori tal-proceduri, l-ammont mitlub ma kienx jirrizulta li huwa dovut.

7. Salv risposti ulterjuri.

Rat il-lista ta’ xhieda prezentati mis-socjeta` intimata.

Rat l-atti kollha tal-kawza.

Semghet lix-xhieda bil-gurament.

Semghet l-abili difensuri.

Ikkunsidrat

C. PROVI:

Fil-31 ta' ottubru 2006 (fol 22) il-Qorti giet infurmata li Dr. Louis Cassar Pullicino kien gie nominat amministratur provvizorju u l-istess Dr. Louis Cassar Pullicino informa lill-Qorti li ma hemmx assi tangibbli tas-socjeta` konvenuta, gja ghandu lista ta' xi krendituri, il-kawza qedha quddiem din il-Qorti presjeduta mill-Onor. Imhallef Dr. Abigail Lofaro, jidher li l-kotba tal-kummerc ghal dawn l-ahhar 7 snin u audited accounts ma jezistux u hemm ordni tal-Qorti fil-proceduri tal-istralc biex jidhru personalment id-dirigenti tas-socjeta` u jaghtu rendikont lill-Qorti tad-dokumenti mitluba.

Fid-29 ta' Marzu 2007 Dr. Azzopardi nfurmat lill-Qorti li l-kawza ghall-istralc hija presjeduta mill-Onor. Imhallef Dr. Abigail Lofaro (Citazz. Nru. 955/04) li fiha hemm Dr. Louis Cassar Pullicino bhala amministratur u qed isiru l-provi.

D. KUNSIDERAZZJONIJIET:

Illi fl-eccezzjonijiet tas-socjeta` intimata (apparti l-fatt li ghalkem gie rilevat li l-isem tas-socjeta` huwa propjament TRM Limited u mhux TRM Limited (Malta) – ara verbal 9 ta' Mejju 2006, pagna 12) fit-tielet eccezzjoni gie sollevat il-Kapitolu 386 artikolu 224 (2). Dan l-artikolu jghid hekk:
"Meta jkun sar ordni ghal stralc jew ikun inhatar amministratur provvizorju, skond id-dispozizzjonijiet ta' l-artikolu 228, ma tista' tittiehed ebda azzjoni jew jinbdew xi proceduri kontra l-kumpanija jew il-proprjeta` taghha hlief bil-permess tal-qorti u taht dawk il-kondizzjonijiet li tista' timponi l-qorti".

Issa rrizulta li qabel ma giet appuntata l-kawza odjerna kienu gja mibdija u ghadhom pendenti proceduri quddiem din il-Qorti diversament presjeduta (Rikors Nru. 955/04GC) b'talba ghal stralc ta' TRM Limited. Irrizulta wkoll li kien gie mahtur amministratur provvizorju. Ghalhekk skond l-artikolu 224 ma setghet tittiehed ebda azzjoni biex jinbdew xi proceduri kontra l-kumpanija intimata hlief bil-permess tal-Qorti u taht dawk il-kundizzjonijiet li joghgobha taghmel il-Qorti izda tali permess ma gie pruvat b'ebda mod mill-attur. Irrizulta li l-proceduri li fihom it-talba ghall-istralc huma dokumenti pubblici u ghalhekk ir-rikorrent odjern seta' kien facilment

ha konjizzjoni taghhom. Ir-rikorrent ma aderixxiex ruhu ma' dan l-artikolu u ghalhekk hu car li taht dan l-aspett l-azzjoni attrici ma tistax tissussisti.

Is-socjeta` intimata wkoll talbet il-waqfien tal-proceduri odjerni ai termini tal-artikolu 220 tal-Kap 386 permezz ta' rikors prezentat fl-24 ta' Mejju 2006 fol 13. L-imsemmi artikolu jipprovdi li:
"F'kull zmien wara li jkun prezentat rikors ghal stralc, u qabel ma jinghata ordni ghal stralc, il-kumpanija, jew kull kreditur jew kontributorju, jistghu jaghmlu rikors lill-Qorti biex twaqqaf il-procedimenti gudizzjarji tal-Qorti pendenti kontra l-kumpanija, u l-Qorti tista' twaqqaf dawk il-procedimenti b'dawk il-kundizzjonijiet li jidhrilha xierqa."

Dan l-artikolu huwa intiz sabiex kredituri ohra, inkluz l-istess kredituri li potenzjalment intavolaw il-proceduri ghall-istralc, ma jigux ippregudikati fl-iggradwar taghhom minhabba f'azzjonijiet ta' kanonizzazzjoni ta' kreditu kontra l-kumpanija insolventi.

Il-Legislatur kellu interess biex jigi konservat l-assjem ta' l-assi tal-kumpanija li minnha l-likwidatur jista' jiddistribwixxi porzjonijiet fost il-kredituri kollha skond il-principju ta' pari passu, u propju dan huwa l-iskop wara l-artikolu 220 tal-Kap 386. Il-Legislatur ma riedx li kreditur jottjeni sentenza qabel il-kredituri l-ohrajn b'mod li jkun hemm tellieqa fil-qrati li fiha l-kredituri jikkompetu bejniethom sabiex jottjenu sentenza mill-qorti wiehed qabel l-iehor. Il-ligi ghaldaqstant taghti l-possibbilta` lill-gudikant li jwaqqaf il-proceduri li jinbdew ghall-kanonizzazzjoni ta' krediti u dan waqt li jibqghu ghaddejjin il-proceduri ta' l-istralc. Meta tigi xolta l-kumpanija mbaghad huwa l-kompitu tal-likwidatur li jigbor l-assjem ta' l-assi kollha u minnhom jiddistribwixxu lill-kredituri abbazi tal-principju ta' pari passu.

Kumpanija naturalment ghandha dejjem tagixxi fl-interess tal-azzjonisti. Kif jispjega l-awtur Davies:
"The traditional answer of the common law has been the classical one that the duties are owed to the members of the company as a whole, the members being the persons who created it or who have subsequently become

members, normally by buying shares in it. The usual justification for this way of defining 'the company' is that the shareholders stand last in line to receive the economic benefits of the company's activities and therefore have the strongest incentive of all the groups involved with the company to monitor the board effectively."

Izda meta jkun hemm il-proceduri tal-istralc tali interess tal-azzjonisti jrid icedi fl-interess tal-protezzjoni tal-kredituri. Infatti f'sentenza tal-Qrati Inglizi fl-ismijiet **Kinsela vs Russell Kinsela Pty Ltd** intqal precizament:
"In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise … But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration".

Ukoll fil-kawza **Gwyer & Associates Limited vs London Wharf Limited** (2002) intqal:
"In relation to an insolvent company, the directors when considering the company's interests must have regards to the interests of the creditors".

L-artikolu 220 tal-Kap 386 ghalhekk jaghti diskrezzjoni lill-Qrati li, sabiex jissalvagwardjaw il-principju fundamentali ta' pari passu u wkoll fl-interess tal-kredituri kollha, iwaqqfu l-proceduri izda l-Qorti li ghandha din id-diskrezzjoni trid tara kif tezercita tali diskrezzjoni. Huwa interessanti dak li jghid il-Professur Ian Fletcher ***f'The Law of Insolvency***, ***Third Edition***, ***page*** 957:
"In exercising their discretionary powers … the courts have evolved an approach which aspires to balance the collective interest against the relative hardship and

injustice, which may be experienced by the individual creditor, under circumstances where it is inevitable that any mitigation of that person's loss will be at the expense of the general body of greditors, and hence will amount to a judicially-sanctioned exception to the pari passu principle."

Ghalhekk huwa logiku li meta jkun hemm proceduri ghall-istralc il-Qorti mathallix proceduri ohra sakemm ma jkunx hemm ragunijiet sostanzjali. Hu interessanti dak li ntqal mill-Imhallef Pennycuick J. (fil kawza Redman (Builders) Limited – Chancery Division (1964) 1 All E. R. 851):
"The main purpose of the Act, as I understand it, is the collection and distribution of the assets of companies for the general benefit of their creditors, and amongst the creditors pari passu; and this discretion of the court ought, therefore, as I think, to be exercised, not for the benefit of any particular creditor or creditors but for the benefit of the general body of creditors interested under the Act."

Fil-fehma tal-Qorti ma hemmx ***special reason*** fl-agir tal-allegat kreditur rikorrent odjern. Huwa kull kreditur li ghandu interess u l-Qorti thoss li apparti dak li qalet fuq relativament ghall-artikolu 224(2) ghandha tezercita d-diskrezzjoni taht dak li hu provvdut taht l-artikolu 220 u twaqqaf il-procedimenti gudizzjarji odjerni. Dan kollu qieghed jintqal ghall-iskop li l-Qorti tiddeciedi t-tielet u r-raba' eccezzjoni anke ghal skopijiet ta' appell ghax fil-fehma taghha l-artikolu 224(2) tal-Kap 386 huwa sufficjenti biex ma tittiehed ebda azzjoni kontra l-kumpanija intimata.

E. KONKLUZJONIJIET:

Ghal dawn il-motivi tilqa' t-tielet u r-raba' eccezzjoni tas-socjeta` intimata.

Spejjez kontra r-rikorrent nomine.

< Sentenza Finali >

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