



MALTA

**QORTI CIVILI
PRIM' AWLA**

**ONOR. IMHALLEF
GEOFFREY VALENZIA**

Seduta tas-27 ta' Frar, 2009

Rikors Numru. 270/2008/1

**Dietmar Mansfeld
Vs
Ganymede Limited, John Biagini
u ghal kull interess li jista' jkollu Benjamin Golub**

Il-Qorti

Rat ir-rikors tal-attur Dietmar Mansfeld li permezz tieghu ppremetta u kkonferma:

1. Illi l-attur kien direttur fis-socjeta' konvenuta minn April 2004 sa Frar 2008, liema socjeta' kellha bhala azzjonisti l-konvenuti Biagini u Golub;
2. Illi tul il-perjodu fuq indikat l-attur qatt ma gie kompensat ghas-servizzji tieghu lis-socjeta' konvenuta, u cioe' dawk is-servizzi inerenti mal-karigi ta' direttur u *company secretary* tas-socjeta' konvenuta;

3. Illi l-attur kien innegozja dritt ta' elf sitt mija u tletin Ewro sitta u hamsin centezmi tal-Ewro (€1,630.56), ossia seba' mitt Lira Maltin (Lm700) fix-xahar mal-azzjonisti tas-socejta' konvenuta u cioe' mal-konvenuti Biagini u Golub;

4. Illi z-zewg azzjonisti tas-socejta' konvenuta kienu jassikuraw lill-attur li ladarba tinbiegh l-unika asset li kellha s-socjeta' attrici huma kienu ser jikkompensaw lill-attur tal-karigi li kien qed jokkuupa u tas-servizzi minnu rezi;

5. Illi oltre ghall-hlas miftiehem mill-konvenuti Biagini u Golub, l-attur kien gie mwieghed li ser jinghata hamsa fil-mija (5%) tar-rekavat mill-bejgh tal-unika asset tas-socjeta', tali assikurazzjoni kienet inghatat miz-zewg konvenuti ndividwalment, u b'hekk l-attur gie mwieghed kompressivament ghaxra fil-mija (10%) mir-rekavat tal-bejgh tal-opra tal-bahar li kienet tappartjeni lis-socjeta' konvenuta;

6. Illi fil-15 ta' Frar 2008, il-konvenut Golub ittrasferixxa l-ishma kollha li kellu fis-socjeta' konvenuta lil-konvenut Biagini u lil certa Linda Case Young;

7. Illi sussegwentement ir-registrazzjoni tal-opra tal-bahar giet imhassra mir-Registru tal-Vapuri mal-Malta Maritime Authority, a bazi ta' dikjarazzjoni minghand is-sidien li l-opra tal-bahar inbieghet;

8. Illi konsegwentement l-attur talab li l-ammonti dovuti lilu kemm bhala drittijiet ta' direttur u *company secretary*, kif ukoll is-*success commission* jigu saldati, izda l-konvenut Biagini ma qabilx mal-ammont li kien qed jigi mitlub mill-attur;

9. Illi minkejja diversi nterpellanzi minghand l-attur il-konvenut Biagini baqa' nadempjenti.

Jghidu l-konvenuti jew min minnhom ghaliex m'ghandhiex din l-Onorabbli Qorti:

1. Tiddikjara li l-konvenuti in solidum jew min minnhom huma debituri tal-attur fis-somma ta' elf sitt mija u tletin

Euro sitta u hamsin centezmi tal-Ewro (€1,630.56), ossia seba' mitt Lira Maltin (Lm700) fix-xahar għall-perjodu minn April 2004 sa Frar 2008 ammontati għal hamsa u sebghin elf u hames Ewro u sitta u sebghin centezmu (€75,005.76) ossia tnejn u tletin elf u mija disgha u disghin Liri Maltin sebgha u disghin centezmu (Lm32,199.97) rapprezentanti drittijiet dovuti lill-attur;

2. Tordna lill-konvenuti in solidum ihallsu lill-attur is-somma ta' hamsa u sebghin elf hames Ewro u sitta u sebghin centezmu (€75,005.76) ossia tnejn u tletin elf mija disgha u disghin Liri Maltin seba' u disghin centezmu (Lm32,199.97);

3. Tiddikjara li l-konvenuti in solidum jew min minnhom huma debituri tal-attur f'ammont rapprezentanti success commission fuq il-bejgh tal-opra tal-bahar maghrufa bhala Elin li precedentement kellha n-numru tar-registrazzjoni 08085 mal-Merchant Shipping Directorate, fil-Malta Maritime Authority, fil-percentwali ta' ghaxra fil-mija (10%) fuq il-prezz tal-imsemmi bejgh;

4. Tillikwida s-success commission dovut mill-konvenuti in solidum jew min minnhom lill-attur fuq il-bejgh tal-opra tal-bahar maghrufa bhala Elin li precedentement kellha n-numru tar-registrazzjoni 08085 mal-Merchant Shipping Directorate, fil-Malta Maritime Authority;

5. Tordna lill-konvenuti in solidum ihallsu lill-attur is-somma hekk kif likwidata minn din l-Onorabbli Qorti rapprezentanti success commission, fuq il-bejgh tal-opra tal-bahar maghrufa bhala Elin.

Bl-ispejjez kontra l-konvenuti, nkluzi dawk tal-mandat ta' sekwestru kawtelatorju numru 319/08 u bl-imghax legali mid-data ta' meta kienu dovuti d-drittijiet lill-attur u minn meta sehh il-bejgh tal-opra tal-bahar maghrufa bhala Elin li precedentement kellha n-numru tar-registrazzjoni 08085 mal-Merchant Shipping Directorate, fil-Malta Maritime Authority sad-data tal-hlas effettiv, u l-konvenuti minn issa ngunti in subizzjoni.

Rat ir-risposta tas-socjeta' Ganymede Limited u ta' John Biagini a fol. 38-39 tal-process li permezz taghha wiegbu:

Illi t-talbiet attrici huma kompletament infondati fil-fatt u fid-dritt u ghandhom jigu michuda bl-ispejjez kontra l-attur ghar-ragunijiet segwenti:

1. Illi m'huwix minnu li kien hemm xi ftehim fejn gie accettat u debitament konkluz li l-attur jithallas seba' mitt lira (Lm700) fix-xahar bhala drittijiet kif qed jallega l-attur – xejn m'huwa dovut f'dan is-sens lill-attur kif qed jippretendi;

2. Illi ebda *success commission* m'hija dovuta lill-attur mill-eccipjenti Ganymede Limited jew John Biagini stante li ma hemm ebda ftehim f'dan is-sens bejn il-kontendenti u ma hemm ebda bazi legali ohra li jintitola lill-attur ghas-*success commission* pretiza minnu;

3. Illi m'huwix minnu li l-attur 'ta servizz' lis-socjeta' eccipjenti kif qed jigi allegat mill-attur fir-rikors guramentat tieghu, hlief li ismu kien jidher bhala direttur u *company secretary* tas-socjeta' eccipjenti ghall-perjodu msemmi fir-rikors guramentat. Il-fatt li l-attur kemm 'sellef' ismu sabiex jidher bhala direttur/*company secretary* tas-socjeta' eccipjenti ma jintitolax lill-attur ghad-drittijiet minnu pretizi jew ghal *success commission*;

4. Illi minghajr pregudizzju ghas-sueccepit, matul il-perjodu li l-attur ghamel bhala direttur u *company secretary* tas-socjeta' eccipjenti, l-attur ma wettaq xejn mill-obbligi tieghu anzi, addirittura, ippropona lill-eccipjent John Biagini li jsiru atti frawdolenti sabiex il-konvenut l-iehor (Benjamin Golub) jinhareg il-barra mis-socjeta' eccipjenti Ganymede Limited kif sejjer jigi spjegat ahjar fil-mori tal-kawza. Kwindi in vista ta' l-agir u n-nuqqasijiet kommessi da parti ta' l-attur, abbazi tar-regola tal-pactum commissarium tacitum, xejn m'huwa dovut lill-attur (artikolu 117 tal-Kodici Kummercjali, Kap. 13). Minhabba n-nuqqasijiet ta' l-attur, l-eccipjenti sofrew danni u ghalhekk, mhux talli l-attur ma haqqu ebda hlas, talli l-

istess attur huwa obligat ihallas hu lill-eccipjenti dawk id-danni sofferti mill-eccipjenti; ghaldaqshekk, flimkien ma' dina r-risposta, l-eccipjenti qeghdin jintavolaw talba rikonvenzjonali kontra l-attur sabiex jirkupraw d-danni minnhom sofferti;

5. Illi subordinarjament u minghajr pregudizzju ghas-sueccepit, jekk huwa minnu li jezisti xi forma ta' ftehim ma' l-attur kemm ghar-rigward tad-drittijiet pretizi minnu u anke b'referenza ghas-*success fee* irid jigi stabbilit ma' min mill-konvenuti sar tali ftehim; f'kaz, *ex ipotesi*, jirrizulta li jezisti ftehim bejn l-attur u l-konvenut l-iehor Benjamin Golub, dan il-ftehim m'huwiex a konoxxenza ta' l-eccipjenti u wisq anqas ikkonfermat minnhom u kwindi fil-konfront taghhom huwa *res inter alios acta* u ma jorbot la s-socjeta' eccipjenti u lanqas l-eccipjent;

6. Illi minghajr pregudizzju ghas-suespost, id-drittijiet pretizi mill-attur huma *in ogni caso eccessivi* u minfuha (*inflated*) stante illi bl-ebda mod ma jirriflettu x-xoghol u l-kontribut li l-attur ta lis-socjeta' eccipjenti u, fir-rigward tas-*success commission*, tali kommissjoni m'hijiex mehuda fuq il-prezz tal-bejgh nett tal-*yacht*;

7. Illi inoltre, minghajr pregudizzju ghas-sueccepit, ma hemm ebda bazi legali ghal solidarjeta' bejn il-konvenuti u, kwindi, jekk xi dritt ta' *success commission* jirrizulta dovut lill-attur, irid jigi stabbilit min mill-konvenut huwa obligat jaghmel tali hlas.

8. Salvi eccezzjonijiet ulterjuri permessi mill-Ligi.

Rat it-talba Rikonvenzjonali tal-konvenuti Ganymede Limited u John Biagini kontra l-attur a fol. 43 fejn espona bir-rispett :

1. Illi l-attur rikonvenzjat gie nominat direttur u *company secretary* tas-socjeta' konvenuta ghall-perjodu msemmi fir-rikors guramentat;

2. Illi l-attur naqas milli jwettaq l-obbligi legali tieghu bhala direttur u *company secretary* u/jew bhala direttur u

company secretary agixxa b'mod negligenti u traskurat b'konsegwenza li sofrew danni kemm il-konvenut John Biagini u dan fil-kwalita' tieghu ta' azzjonista tas-socjeta' Ganymede Limited u anke l-istess Ganymede Limited stante li l-attur kien direttur u *company secretary* taghha;

3. Illi fost affarijiet ohrajn, l-attur rikonvenzjonat naqas milli jirregistra l-*yacht* in kwistjoni f'isem is-socjeta' konvenuta wara li din kienet xtrat l-istess *yacht*, ipprova jfixkel il-bejgh ta' l-istess *yacht* mis-socjeta' konvenuta lil Mohammed A. Ghandour, naqas milli jaqdi l-obbligazzjonijiet ordinarji ta' direttur tas-socjeta' konvenuta fosthom li jsejjah laqghat u jzomm minuti taghhom, kif ukoll sfratta r-relazzjoni tas-socjeta' konvenuta ma' l-awdituri taghha KPMG;

4. Illi fost affarijiet ohrajn, l-attur addirittura ppropona u heggeg lill-konvenut John Biagini jagixxi b'mod illi kien sejjer jippregudika l-interessi ta' l-azzjonista l-iehor fis-socjeta' Ganymede Limited;

5. Illi ghad-danni illi sofrew, qed isofru u li jistghu jsufu l-konvenuti esponenti, jrid jirrispondi l-attur;

6. Illi t-tentattivi sabiex tintlahaq tranzazzjoni bejn il-partijiet kontendenti ma wasslu mkien;

Ghaldaqstant jghid l-attur il-ghaliex m'ghandhiex dina l-Qorti:

1. Tiddeciedi u tiddikjara li l-attur naqas milli jwettaq l-obbligi tieghu bhala direttur u *company secretary* tas-socjeta' Ganymede Limited fil-perjodu li kien igawdi minn tali karigi u/jew li matul l-istess perjodu agixxa b'mod negligenti u traskurat u per konsegwenza l-konvenuti esponenti sofrew danni ngenti;

2. Tillikwida d-danni dovuti lill-konvenuti esponenti mill-attur skond it-talba precedenti;

3. Tikkundanna lill-attur ihallas lill-konvenuti esponenti dik is-somma hekk likwidata skond id-domanda precedenti.

Bl-ispejjez kontra l-attur li huwa minn issa ngunt ghas-subizzjoni.

**Rat is-statement of Defense of Dietmar Mansfeld
f'pagna 52 tal-process fejn qal :**

1. Whereas, by way of preliminary plea, and limitedly to the counter claim made by the Curators nominated by this Honorable Court in terms of Article 929 of Chapter 12 of the Laws of Malta to represent the absent John Biagini, do not have the authority and ability to table a counter claim in terms of Article 396 of Chapter 12 of the Laws of Malta;

2. Whereas, the respondent had carried out all the duties in respect of the post of Director and Company Secretary of the Company Ganymede Limited, and if there were any shortcomings it was due to the fact that the shareholders refused to deposit sufficient funds in the company so that all the expenses related to these duties;

3. Whereas at no time did the respondent act in a careless and negligent manner, in fact it was the shareholders of the same company who abandoned the limited liability company Ganymede Limited, with the consequence that any damages that were suffered were caused by the same shareholders Biagini and/or Golub;

4. Whereas the allegations made by the defendants in respect of the Yacht registration, the relationship between the company Ganymede Limited with Mohammed A. Ghandhour and KPMG, are all unfounded in fact and at law, as will be shown whilst the hearing of the case;

5. With the right to present other defenses as permissible by law.

Rat ir-risposta bl-Ingliz mahlufa minn Benjamin Golub a fol. 76 tal-process li permezz taghha wiegeb:

1. Whereas, the amount claimed by the plaintiff is not due by the respondent but by the other defendant Ganymede Limited;
2. Whereas, the respondent never had any contractual relationship with the plaintiff, and all dealings took place between the plaintiff and the defendant Ganymede Limited;
3. Whereas, the respondent holds no office and no interests in Ganymede Limited, and this since 15th February 2008, at which time the vessel, 'Elin' bearing the registration number of 08085 with the Merchant Shipping Directorate in the Malta Maritime Authority, still pertained to the defendant Ganymede Limited;
4. Whereas, part of the agreement that led to the share transfer between the respondent and defendant Biagini included the condition that all fees and commissions due to plaintiff will be settled by the defendants Biagini and Ganymede, due to the fact that after the said share transfer Biagini became the majority shareholder;
5. With the right to present other defenses as permissible by law.

Considers

By decree of the 23rd May 2008 (page 51) the Court ordered that the present proceedings be conducted in the English Language in terms of Article 4 of Chapter 189 of the Laws of Malta as both parties are English speaking.

Plea on the Counter-claim

The case has been adjourned for today for judgment on the preliminary plea of Dietmar Mansfeld on the counter-claim made by the curators on behalf of respondents Ganymede Limited and John Biagini.

Applicant Mansfeld submits that in terms of the law a curator represents and defends a person who is absent from the island, but if he decides to present a counter-claim on behalf of his represented, he is no longer acting as a curator but as a mandatory of the absent person, receiving orders from him.

On the other hand, respondent curators contend that according to article 936(1) of Chapter 12 of the Laws of Malta *the curators are bound to use their best diligence for the benefit of the interest which they represent. The duties of the curators shall include.... (b) to take all the necessary measures to safeguard the aforesaid rights.* Moreover in this case, the curators submit, they could present a counter-claim, as according to article 400 of Chapter 12 « *The defendant may not set up a counter-claim in a capacity other than that in which he has been sued, nor may he, in setting up the counter-claim, sue the plaintiff in a capacity other than that in which the plaintiff has claimed.* » .

Considers

According to article 929 of Chapter 12, curators are appointed (a) in the interest of absent persons ; (d) in the interest of a body of persons, if the person vested with their representation is absent from Malta. The Court, upon making an order for the appointment of curators, issues banns. Where any person appears and by a note signed by him, offers to accept the appointment, the court confirms as curator the person so appearing.

A person who so appears, « *funge la parte di gestore d'affari dell'interessato che esso si avanza a rappresentare* » (Vol. 27 p.1 p.1004), and so assumes the rights and duties of a *negotiorum gestor* (Article 1018 Chapter 16). It is accepted that « *l'ufficio del curatore alla lite e' simile a quello del procuratore ed i suoi poteri sono limitati dai termini del mandato* ». (Vol. V11 p.208). On the other hand in the case of curators appointed *ex officio*

by the Court they are indemnified by the person who sought their appointment.

A curator appointed in terms of article 933 of Chapter 12 has the duty according to article 936 to use his best diligence for the benefit of person he represents including taking all the necessary measures to safeguard his rights, in this case also presenting a counter-claim.

In the present case by a note filed on 16th April 2008 Legal Procurator Madeleine Firman accepted the banns to be appointed as curator of John Biagini and presented a reply which she confirmed on oath. In this reply, there is also a counter-claim in which respondent is submitting, that contrary to what applicant is claiming, Mansfeld failed in his legal obligations and acted negligently thus causing them damages which they asked the court to liquidate and condemn Mansfeld to pay. It is evident that respondents' claim is connected with the claim of applicants and they therefore could only set up the counter-claim in the capacity in which they had been sued.

Decides

The Court therefore decides the present issue by rejecting applicant's preliminary plea on the counter-claim made by the curators.

With costs against applicant.

Adjourns the case for the continuation of applicant's evidence for the 7th April 2009 at 11.00am.

< Sentenza In Parte >

-----TMIEM-----