



COURT OF CRIMINAL APPEAL

**THE HON. MR. JUSTICE
MICHAEL MALLIA**

Sitting of the 1 st March, 2012

Criminal Appeal Number. 471/2009

**The Police
(Major John Engerer)**

Vs

Kenneth William Donaldson

The Court,

Having seen the charge brought against the appellant Bright Solomon before the Court of Magistrates (Malta) as a Court of Criminal Judicature with having in his capacity as director and/or judicial representative of the company Health Managers (Malta) Ltd (C35429) registered under the address 1, Techno Buildings, Testaferrata Street, Gzira, and/or being the person responsible and appointed by the said company to pay outstanding wages, he has failed to pay all outstanding wages, bonus, and vacation leave to Ms. Louisa Fenech ex-employee of the above cited company and whose employment terminated on 7th

February, 2007 in the sum amounting to LM696.38c being equivalent to €1622.63.

Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 2nd December, 2009, by which, after that Court had seen articles 5, 22, 23, 45 and 46 of Chapter 452 of the Laws of Malta and Regulation 8(1) of Legal Notice 247 of 2003 declared the accused guilty as charged and condemned him a fine of two hundred thirty two Euros (€232).

Moreover in terms of Section 45(1) of Chapter 452 of the Laws of Malta, the Court ordered the appellant within two months to pay Louisa Fenech the sum of one thousand, six hundred and thirty three Euros and sixty three Euro cents (€1633.63).

Having seen the application of appeal filed by appellant on the 14th December, 2009, wherein he requested this Court to annul and revoke the appealed judgement and consequently acquit him from the charges brought against him, and this under those conditions that this Court deems fit and proper.

Having seen the records of the case.

Now duly considers.

That the grounds of appeal of appellant can be briefly summarised as follows:-

Whereas the grievance concerns the identification of the person responsible in this case, at the time of the offence.

Whereas a warrant of prohibitory injunction numbered 19/2007 was issued by the First Hall of the Civil Court on 8th January 2007 following an application filed by Nita Gavin and Tania Galea in terms of Article 873 of Chapter 12 of the Laws of Malta.

Whereas therefore with this prohibitory injunction the appellant was stopped from acting as a director or as a legal or judicial representative of the company.

Whereas following such warrant, the appellant was restrained from doing anything whatsoever which might

be prejudicial to the person suing out the warrant, and any act that he may carry out as a Director and/or Judicial Representative would constitute a breach of a Court Order.

Whereas the employment of Ms. Louisa Fenech was terminated on 7th February 2007, on which date the warrant was already in force and therefore the appellant was already refrained from acting as a director or legal or judicial representative of the company due to this warrant. Whereas as a result the appellant could not be held responsible for failure to pay all outstanding wages, bonus and vacation leave to Ms. Louisa Fenech since he was prohibited from acting as a director or judicial representative of the company.

Whereas consequently the appellant was not the person responsible and appointed by the said company to pay outstanding wages because of the Court orders given against him.

Whereas therefore the action should not have instituted against the appellant since he is not the person responsible to pay.

Whereas furthermore this warrant is still in force and thus till this day the appellant is prohibited to act as a director or legal or judicial representative of the company, and furthermore the appellant no longer occupies the post of Director and/or judicial representative of the company, Health Managers (Malta) Ltd.

Considers:

According to the evidence, on the 18th of October 2007, charges were brought against the appellant and Nita Mari Gavin that as directors and/or judicial representatives of the company Health Managers Malta limited, failed to pay outstanding wages, bonus and vacation leave to Ms. Louisa Fenech to the amount of €1,622.63. According to a note verbal of the 1st of July 2008, the charges against Nita Mari Gavin were dropped because they were declared time barred (fol 12) and the case continued solely against appellant who had 50% share holding of the company. Other share holders were Nita Mari Gavin 15%, Tania Galea 25% and Richard Cranston 10%.

Louisa Fenech was employed by the company Health Managers Malta limited on the 11th of December 2006 as an Administrative Assistant (fol 34) on full time in definite contract. Her employment was terminated on the 2nd of February 2007 (fol35). Louise Fenech stated before this Court that she was never paid during her period of employment with the company and to date she is still owed the sum of €1,622.63. The appellant acknowledges that this amount is due. However, he states that he was not in a position to do so because the other share holders, namely Nita Mari Gavin and Tania Galea had issue a Warrant of Prohibitory Injunction, which was upheld by this Court, whereby he was prohibited from acting on behalf of the company.

Considers:

The Court examined in detail the evidence and documents filed in this case and it results that the Warrant of Prohibitory Injunction was first filed on the 8th of January 2007 requesting the Court to prohibit the appellant from acting as a director or legal representative of the company Health Managers Limited. The Warrant also targeted the company. The Warrant was provisionally upheld by the Court and finally decreed on the 22nd of February 2007 but only in so far as it effected appellant Ken Donaldson and was rejected in so far as it concerned the company. It is interesting to note that in its reasoning, the Court stated that it was satisfied that the company was being run in a very amateurish way that created prejudice, for example in the way funds were transferred from one account to the other, payment of debts which did not result documented.

This Court therefore, comes to the conclusion that with the above mentioned decree, the appellant was prohibited from acting as a director and legal representative of the company. He was not however, removed from being a director nor were the company funds frozen or impounded, which means that the company could technically still operate. In fact, on the 6th of March 2007, the company received the first letter from the Department of Industrial and Employment Relations requesting the

payment of €1,622.63 to Ms. Louisa Fenech. The letter was addressed for the particular attention of William Donaldson and Nita Gavin. On the 21st of June 2007, the appellant wrote to the manager of the Bank of Valletta Mosta, on letter heads of the company to pay Louisa Fenech the amount of Lm 652 from a particular account. It does not result whether the account pertained to the company or to him personally. However, it seems that the account pertained to the company because the manager refused to pay that amount without the signature of Nita Gavin. It is interesting to note that appellant sent this letter when he had already resigned as director from the company, on the 21st May 2007 (Form K fol 44).

Considers:

The appellant is claiming that once Louisa Fenech was employed by the company on the 11th of December 2006, her first monthly salary became due on the 11th of January 2007. However, the Warrant of Prohibitory Injunction was filed and provisionally upheld on the 8th of January 2007 after which date he was not allowed as a director or legal representative of the company. This put him in a situation where he could not satisfy the demands of Ms. Louisa Fenech and although he did his very best to make sure she got paid, he could not get the permission from Nita Gavin who refused to cooperate and back his request to the Bank of Valletta to pay Louisa Fenech her dues. This placed him in an impossibility to carry out his obligations which impossibility should mitigate in his favour and should not therefore be held responsible criminally for the lack of payment.

The Court however, does not agree with this submission. There is no doubt that the appellant was originally a director of Health Manager Malta Limited together with Nita Gavin and Tania Galea. On the 11th of December 2006, the company employed Louisa Fenech on a full time basis with a definite contract as an Administrative Assistant. This employment was terminated on the 7th of February 2007. Appellant was prohibited from acting as a director of the company as from the 8th of January 2007. He was not however, removed from that position nor were the company funds impounded or frozen. This means

therefore that in order for the director not to be held responsible for any dues that the company should have paid, he has to show that he was not aware of the shortcomings of the company and if he were, he did his at most in order to make sure that the company was in line with the law.

The Court is of the opinion the appellant failed on both counts. First of all he was well aware that Louisa Fenech was employed by the company of which he was a director and as such she should be paid her wages, bonus and entitled to vacation leave. Secondly, he did not do his best to make sure that the company would not remain in a state of illegality and Louisa Fenech to be paid her dues. As stated, the Warrant of Prohibitory Injunction was first filed and provisionally upheld on the 8th of January 2007. This did not however, remove appellant from the directorship. In fact, he continued acting as a director on behalf of the company even after that date, when on the 21st of June 2007, after he had already resigned from the company (21st May 2007 fol 44) he sent a letter to the manager of the Bank of Valletta Mosta requesting the bank to pay Louisa Fenech her dues. This in the opinion of the Court was not enough. In spite of the fact, that appellant was served with a Warrant of Prohibitory Injunction, he could easily have requested the Court to order the release of funds which were still available to the company to have Louisa Fenech pay her dues. This could have been done even in the light of an objection which might and might not have been raised by the other share holders Nita Gavin or Tania Galea.

Anthony Buttigieg, on behalf of the Department of Industrial and Employment Relations, said that he had various contacts with appellant and that he did want to cooperate and was ready to pay his share of the salary. However, the other share holder Nita Mari Gavin refused to cooperate and would hang up the phone every time he tried to make contact. Mr. Buttigieg finished his evidence saying that appellant would have liked to pay but the account was frozen.

This Court remarks that this is where appellant is wrong. The Court never froze or impounded any money

belonging to the company but only prohibited appellant from acting as a director or judicial representative of the company. This would not however, have impeded him even in his own personal capacity as he would have been responsible as a director to request the Court to realise funds so that Louisa Fenech could have been paid. This however, he did not do. And to this day Louisa Fenech has still not been paid her dues. And for this appellant should be held responsible as concluded by the first Court. Now the Court of Criminal Appeal will not substitute for the discretion of the first Court in the consideration of the evidence but will reappraise the evidence and see whether the first Court could have been reasonable in reaching its conclusions. This Court has done that and come to the conclusion that the first Court on the evidence before it, could have legally and reasonably arrived to the conclusions that it did. Thus, the first judgment should not be disturbed. For this reasons, the Court dismisses the appeal and upholds the judgment awarded at first instance.

< Final Judgement >

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