



**QORTI CIVILI  
PRIM' AWLA**

**ONOR. IMHALLEF  
JOSEPH ZAMMIT MC KEON**

Seduta tat-28 ta' Gunju, 2012

Rikors Numru. 50/2011

**Michael Debono (bil-Karta tal-Identita` Numru  
240268M) nominat b`digriet tal-Qorti Civili (Sezzjoni  
ta` Gurisdizzjoni Volontarja) tat-18 ta` Settembru, 2009  
bhala trustee ta` "The J. Saliba Trusts" u Mary Saliba  
(ID. 2855G)**

*kontra*

**Mario Debono (BIL-Karta tal-Identita` 385366M) f`ismu  
proprju u kif ukoll bhala segretarju u direttur ghan-  
nom u in rapprezentanza tas-socjetajiet The Village  
Pharmacy Limited (C29487) u Karizia Company  
Limited (C8001)**

**Il-Qorti :**

## I. Preliminari

Fir-rikors promotorju, ir-rikorrenti jaghmlu riferenza ghall-Art.402 tal-Kap.386 u jiddikjaraw illi *bhala "membri"* tal-kumpanniji intimati The Village Pharmacy Limited (C29487) u Karizia Comany Limited (C8001) *jixtiequ jipprevalixxu ruhhom mir-rimedji li taghtihom il-ligi taht l-istess artikolu u jitolbu l-protezzjoni* tal-qorti ghax isostnu li l-intimat Mario Debono *x`aktarx ser jirrekalhom pregudizzju b`mod ingust (unfairly prejudicial)*. Fir-rikors, ir-rikorrenti taw ir-ragunijiet taghhom u ndikaw ir-rimedji.

L-intimat pro et noe pprezenta risposta guramentata fejn ikkontesta l-pretensjonijiet tar-rikorrenti u ta r-ragunijiet tieghu. Mar-risposta, kienet prezentata kontrotalba.

Fir-risposta taghhom ghall-kontrotalba, ir-rikorrenti kkontestaw ir-regolarita` ta` l-presentata ta` kontrotalba fi procedura skond l-Art.402 tal-Kap.386 u wiegbu wkoll ghall-istess kontrotalba b`kontestazzjoni fil-mertu.

Fl-udjenza tat-3 ta` Mejju 2011 din il-Qorti dderigiet lill-partijiet sabiex jittrattaw il-kwistjoni tar-regolarita` tal-kontrotalba.

Hekk sar fl-udjenza tad-29 ta` Settembru 2011. Minn hemm il-kawza thalliet ghal provvediment.

Il-provvediment inghata fid-29 ta` Settembru 2011 fejn *inter alia* l-Qorti ddikjarat nulla u bla effett il-kontrotalba, astjeniet milli tiehu konjizzjoni ulterjuri tar-risposta tar-rikorrenti ghall-kontrotalba, u ordnat lill-intimati sabiex sa zmien ghoxrin (20) jum jissostitwixxu r-risposta "guramentata" b`risposta mhux guramentata.

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Illi fl-udjenza tas-7 ta` Frar 2012, l-intimat pro et noe tira l-ewwel eccezzjoni ghall-istanza tar-rikorrenti, u fl-istess waqt talab illi jressaq eccezzjoni ulterjuri. Il-Qorti laqghet it-talba.

Illi fl-eccezzjoni ulterjuri jinghad hekk –

*Illi in linea preliminari, ir-rikorrent m`ghadux il-locus standi necessarju fl-azzjoni proposta stante li ma jikkwalifikax bhala 'membru' tas-socjetajiet The Village Pharmacy Limited u Karizia Company Limited ai termini tal-Artikolu 402 tal-Kap.386 tal-Ligijiet ta` Malta u konsegwentement m`huwiex intitolat u m`ghandux dritt jippromwovi tali azzjoni skond l-istess Artikolu. Ghalhekk ir-rikors tar-rikorrenti huwa mproponibbli u ghandu jigi michud bl-ispejjez.*

Illi fl-udjenza tat-3 ta` April 2012, il-partijiet in kwantu ghal dawk illi huma provi dwar l-eccezzjoni ulterjuri rimettew ruhhom ghall-atti.

**Illi fl-istess udjenza saru sottomissjonijiet, imbaghad il-Qorti halliet il-kawza ghal-lum ghal provvediment dwar l-eccezzjoni ulterjuri.**

**Ikkunsidrat :**

## **II. Provi**

Fuq l-iskorta tal-atti akkwiziti, jirrizulta hekk –

Il-kumpanniji The Village Pharmacy Limited u Karizia Company Limited kienu registrati mar-Registratur tal-Kumpanniji ghall-fini tal-Kap.386 fl-istess jum u cioe` fis-16 ta` Mejju 2005.

Joseph Saliba miet fil-25 ta' Settembru 2007. Huwa kien mizzewweg lir-rikorrenti Mary Saliba. Kien id-detentur ta' ghaxart elef (10,000) sehem (*fully paid up*) fil-kumpanija The Village Pharmacy Limited (C29487) ghall-valur, kull sehem, ta' zewg euro punt tlieta tnejn disgha tlieta sebgha tlieta centezmi (€2.329373). Kien ukoll id-detentur ta' elfejn u hames mitt (2,500) sehem (*fully paid up*) ghall-valur, kull sehem, ta' zewg euro punt tlieta tnejn disgha tlieta sebgha tlieta centezmi (€2.329373) fil-kumpanija Karizia Company Limited (C8001).

Is-successjoni ta' Joseph Saliba kienet regolata b'testament li sar fit-18 ta' Settembru 2007 fl-atti Nutar Dottor Pierre Attard (Dok.D). Julius Nehorai kien nominat u istitwit bhala eredi uniku u universali sabiex jircievi u jzomm l-assi ereditarji tieghu on trust bhala trustee ta' "The J. Saliba Trust". Fit-18 ta' Settembru 2009, ir-rikorrent Michael Debono b'effett mit-23 ta' Jannar 2009 kien mahtur bhala t-trustee il-gdid ta' "The J. Saliba Trust" in sostituzzjoni ghall-imsemmi Julius Nehorai.

Fl-14 ta' Lulju 2010, l-intimat de proprio u bhala azzjonista taz-zewg kumpaniji intimati baghat zewg ittri fejn iddikjara illi ma kienx qieghed japprova r-registrazzjoni ta' l-eredi ta' Joseph Saliba bhala membru fiz-zewg kumpaniji u nvoka l-istatut taz-zewg kumpaniji sabiex l-ishma ta' Joseph Saliba jigu offruti lilu sabiex jekk ikun il-kaz jakkwistahom hu.

Mhux kontestat illi meta saret il-kawza fid-19 ta' Jannar 2011, l-ishma ta' Joseph Saliba fiz-zewg kumpaniji baqghu registrati f'ismu.

**Ikkunsidrat :**

### III. Dritt

Din il-Qorti sejra taghmel riferenza fit-test bl-Ingiliz ghal dawk id-disposizzjonijiet tal-Kap.386 illi fil-fehma taghha huma rilevanti ghall-fini tal-provvediment tal-lum. Sejra ticita t-test tal-ligi bl-Ingiliz unikament ghall-fini komparattiv propju ghaliex `il quddiem sejra tirreferi ghal-ligi u l-gurisprudenza tar-Renju Unit.

Ir-rikorrenti ntavolaw l-azzjoni taghom abbazi tal-Art.402 tal-Kap.386 illi fl-ewwel subinciz ighid illi *any member of the company who complains ...*

“*Member*” huwa definit fl-ewwel subinciz tal-Art.2 tal-Kap.386 fis-sens illi “*except where otherwise specifically defined, means a shareholder of a company and a partner in any other commercial partnership.*”

Fl-istess subinciz, “*shareholder*” huwa definit bhala “*a person entered in the register of members of a company pursuant to article 123 or the bona fide holder of a share warrant referred to in article 121*”

Ghall-fini tal-Art.402, il-legislatur ried iwessa` t-tifsira ta` “*member*” ghall-fini ta` dik id-disposizzjoni billi fis-subinciz (6) qal illi “*member*” *includes a person entitled at law to represent the interests of a deceased member, a person to whom shares in the company have lawfully devolved by way of testate or intestate succession, and a trustee, as defined in article 127, who holds shares in the company.*

L-intimat qieghed jikkontendi illi z-zewg rikorrenti ma jikkwalifikawx bhala “*member*” u ghalhekk ma setghux jintavolaw azzjoni skond l-Art.402. Bil-maqlub, ir-rikorrenti jsostnu illi t-tnejn ghandhom *locus standi*. L-argumenti tal-

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partijiet jirrizultaw mit-traskrizzjoni tas-sottomissjonijiet taghhom u din il-Qorti sejra taghmel riferenza `il quddiem ghal dak li nghad mill-partijiet.

Hija l-fehma ta` din il-Qorti illi ghall-ahjar interpretazzjoni tal-ligi taghna ghandha ssir riferenza ghas-sources tal-ligi taghna.

Fis-sentenza taghha tad-9 ta` Marzu 2007 fil-kawza "**Vella vs Vella Brothers Limited et**", il-Qorti tal-appell qalet espressament u *senza mezzi termini* illi l-Art.402 kien infassal fuq l-Art.459 tal-UK Companies Act 1985.

L-Art.459 kien imhassar bl-Art.994 tal-UK Companies Act 2006. Pero` id-dispizzjoni baqghet l-istess.

Din il-Qorti sejra tirriproduci l-Art.402 taghna u l-Art.994 tar-Renju Unit ghal finijiet komparattivi.

**L-Art.402 shih jaqra hekk –**

***(1) Any member of a company who complains that the affairs of the company have been or are being or are likely to be conducted in a manner that is, or that any act or omission of the company have been or are or are likely to be, oppressive, unfairly discriminatory against, or unfairly prejudicial, to a member or members or in a manner that is contrary to the interests of the members as a whole, may make an application to the court for an order under this article.***

*(2) Where the Registrar has received a report on a company under article 410 and it appears to him that the company's affairs are being or have been conducted in a manner falling within the meaning of subarticle (1), he*

*may make an application to the court for the issue of an order under this article.*

*(3) If on an application made in terms of subarticle (1) or (2), the court is of the opinion that the complaint is well-founded and that it is just and equitable to do so, the court may make such order under such terms as it thinks fit –*

*(a) regulating the conduct of the company's affairs in the future ; or*

*(b) restricting or forbidding the carrying out of any proposed act ; or*

*(c) requiring the company to do an act which the applicant has complained it has omitted to do ; or*

*(d) providing for the purchase of the shares of any members of the company by other members of the company or by the company itself and, in the case of a purchase by the company, for the reduction accordingly of the company's issued share capital ; or*

*(e) directing the company to institute, defend, continue or discontinue court proceedings, or authorising a member or members of the company to institute, defend, continue or discontinue court proceedings in the name and on behalf of the company ; or*

*(f) providing for the payment of compensation by such person as may have been found by the court responsible for loss or damage suffered as a result of the act or omission complained of, to the person suffering the said loss or damage ; or*

*(g) dissolving the company and providing for its consequential winding up.*

*(4) When an order is made for the dissolution of a company in terms of subarticle (3)(g), the company shall be deemed to have been dissolved on the date when the*

*order is made and the provisions of Sub-Titles I and III of Title II of Part V of this Act regulating the winding up of companies shall apply.*

(5) *An order made under this article may require a company not to make any amendment, or to make such amendment as may be required, in its memorandum or articles.*

**(6) *In this article, the term "member" includes a person entitled at law to represent the interests of a deceased member, a person to whom shares in the company have lawfully devolved by way of testate or intestate succession, and a trustee, as defined in article 127, who holds shares in the company.***

(enfasi u sottolinear ta` din il-qorti).

**L-Art.994 tal-UK Companies Act 2006 shih jaqra  
hekk –**

**1) *A member of a company may apply to the court by petition for an order under this Part on the ground—***

*(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or*

*(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.*

**(2) *The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.***



(3) *In this section, and so far as applicable for the purposes of this section in the other provisions of this Part, “company” means—*

(a) *a company within the meaning of this Act, or*

(b) *a company that is not such a company but is a statutory water company within the meaning of the Statutory Water Companies Act 1991.*

(enfasi ta` din il-qorti)

Ghall-fini ta` kompletezza ta` analizi, trid issir riferenza ukoll ghall-**Art.112 tal-UK Companies Act 2006** li jaghti tifsira ta` “member”. Id-disposizzjoni taqra hekk –

(1) *The subscribers of a company’s memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members.*

(2) *Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company.*

**Ikkunsidrat :**

#### **IV. Risultanzi**

Qabel ma tesprimi ruhha dwar il-mertu tal-ecezzjoni ulterjuri fil-kaz tal-lum, din il-Qorti sejra, **ghall-fini ta` kompletezza**, tirreferi ghal kif id-dottrina Maltija u dik Ingliza, **b`mod generali**, ittrattat il-kwistjoni ta` min ghandu jedd jittenta l-azzjoni skond l-Art.402 (fil-kuntest Malti) u skond l-Art.994 (fil-kuntest Ingliz). Partikolarment fid-dottrina Ingliza, hemm riferenza ghal gurisprudenza li accenna ghaliha d-difensur tar-rikorrenti waqt it-trattazzjoni finali.

In kwantu ghal dottrina Maltija, **Andrew Muscat** fil-**"Principles of Company Law"** (MUP) Pg 962 et seq ighid hekk –

*The requirement for a "member" to have been entered into the register of members can well prove to be a stumbling block to the successful exercise of the action ...*

*Art.402(6) does not however cater for the situation where shares have been transferred or transmitted by operation of law other than by intestate succession. Thus, for example, in the case of a division of a company, if shares held by the company to be divided are allocated to a particular recipient company, that recipient company will need to be registered in the register of members of the company in which the shares are held if such recipient company is to have locus standi to file an action under article 402.*

In kwantu ghad-dottrina Ingliza, **Mayson, French & Ryan** fil-ktieb taghhom "**Company Law**" (26<sup>th</sup> Edition – OUP) Pg 565 ighidu hekk –

*Under CA 2006, s. 994(1) a petition for relief of unfairly prejudicial conduct of a company's affairs may be presented by a member of the company ...*

*A person to whom shares in a company have been transferred or have been transmitted by operation of law but who is not a member of the company (because of not being on the register of members) is treated as a member for the purposes of CA 2006 s.994(1) and reference to a members or members must be construed accordingly [s 994(2)].*

*The word "transferred" in s 994(2) requires at least that a proper instrument of transfer should have been executed and delivered to the transferee or the company*

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*in respect of shares in question. It is not sufficient that there is an agreement for transfer (Re c Company (No 003160 of 1986) [1986] BCLC391 ; Re Quickdome Ltd (1988) BCLC 370).*

*The phrase “transmitted by operation of law” in s 994(2) refers to a legal process by which the legal title passes and does not cover the creation of an equitable interest for example under a trust (Re a Company (No 007828 of 1985) (1985) 2 BCC 98,951).*

*A nominee shareholder, holding shares as a bare trustee, may petition under s 994 because the interests of such a shareholder include the economic and contractual interests of the beneficial owners of the shares (Atlasview Ltd vs Brightview Ltd (2004) EWHC 1056 (Ch) (2004) 2 BCLC 191.*

Tal-istess fehma huma **Gower and Davies** fil-**“Principles of Modern Company Law”** (Eight Edition – Sweet & Maxwell) Pg 682 u **Sealy** fil-**“Cases and Materials in Company Law”** (Ninth Edition – OUP) Pg. 651-652.

Hija l-fehma ta` din il-Qorti illi **specifikament** ghallfini tal-azzjoni skond l-Art.402, il-*locus standi* ta` rikorrent ma jistax jitqies biss fuq il-kriterju generali li fit-tifsira skond is-subinciz (1) tal-Art.2 ta` *member* tfisser *shareholder* li skond l-istess subinciz ifisser *a person entered in the register of members of a company*. Jekk il-persuna jkollha ishma registrati f`isimha allura huwa ben ovvju illi tista` tittenta l-azzjoni skond l-Art.402. Ghar-rigward ta` dawk il-persuni li ma jidhlux fit-tifsira stretta ta` *member* u *shareholder* skond is-subinciz (1) tal-Art.2 hemm imbaghad it-tifsira ta` *member* illi l-legislatur ried illi tkun tghodd fil-kaz ta` azzjoni skond l-Art.402 u li evidentement ghandha firxa aktar wiesgha.

Fil-kaz tal-lum, mhuwiex kontestat illi z-zewg rikorrenti *ut sic* ma jirrizultax illi huma *persons entered in the register of members*. Li sejra taghmel din il-Qorti huwa illi tqis il-posizzjoni ta` kull rikorrent biex tara jekk jikkwalifikawx bhala *member* ghall-fini tal-azzjoni skond l-Art.402.

### 1) Ir-rikorrenti Mary Saliba

Hija l-fehma ta` din il-Qorti illi fil-kaz tar-rikorrenti Mary Saliba ssir rilevanti r-riferenza ghall-frazi “*includes*” tas-subinciz (6) tal-Art.402 tal-ligi taghna.

L-uzu tal-frazi “*includes*” minflok il-frazi “*means*” mhijiex intiza sabiex tiftah il-bieb berah ghal kulhadd illi jittenta l-azzjoni fuq il-pretest illi l-frazi “*includes*” ma taghtix l-idea ta` “*an exhaustive provision of law*”. Hija pero` intiza sabiex ma teskludi lil hadd minn dawk il-persuni li ghandhom jedd jiprocedu izda li b`interpretazzjoni stretta u distakkata ta` *member* u *shareholder* fis-subinciz (1) tal-Art.2 kienu jibqghu barra. Certament ma kienx dak ir-*ratio legis* fejn si tratta tal-Art.402.

Ir-rikorrenti Mary Saliba hija propju wahda minn dawn il-persuni li jaqghu taht il-kappa tal-frazi “*includes*”.

Fis-sottomissjonijiet finali taghhom, ir-rikorrenti ghamlu riferenza ghall-**Art.123(2) tal-Kap.,386** li jaqra hekk –

*Where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this Act, be treated as a single member ; and, unless otherwise provided in the memorandum or articles, the name of only one of such persons shall be entered in the register of members. Such person shall be elected by the*

*joint holders and shall for all intents and purposes be deemed vis-à-vis the company to be the member of the company in respect of all the shares so held.*

Din il-Qorti tghid illi din id-disposizzjoni tghodd ghall-konjugi fejn wahda minnhom tkun registrata bhala azzjonista. Mhux kontestat fil-kaz tal-lum illi l-ishma fiz-zewg kumpanniji kienu registrati f'isem Joseph Saliba. Mhuwix kontestat illi dawk l-ishma kienu jaghmlu parti mill-komunjoni tal-akkwisti illi kellu ma` martu r-rikorrenti Mary Saliba. Lanqas ma huwa kontestat illi ladarba dawk l-ishma kienu jaghmlu parti mill-komunjoni tal-akkwisti ta` bejn il-konjugi Saliba, huma kienu taghhom it-tnejn *jointly* u ghalhekk ghall-fini tal-Kap.386 kienu meqjusa bhala entita` wahda. Mal-mewt ta` Joseph Saliba u allura max-xoljiment tal-komunjoni tal-akkwisti Mary Saliba illi diga` kienet *member ope legis* baqghet *member* ghar-rigward tan-nofs taghha *de proprio* ta` dawk l-ishma. Ghalhekk certament ghall-fini tal-Art.402 Mary Saliba kienet kompriza fil-frazi "*includes*" u ma kellhiex il-htiega illi sabiex tipprocedi bl-azzjoni skond l-Art.402 tkun inserita fir-registru tal-membri.

## 2) Ir-rikorrent Michael Debono

Dwar Michael Debono, il-posizzjoni ta` dan ir-rikorrent fil-kwalita` illi biha ppromwova din il-kawza taghtih il-*locus standi* rikjest mill-Art.402. Il-wirt ta` Joseph Saliba kien jikkomprensi nofs l-ishma illi huwa u martu kellhom fiz-zewg kumpanniji u li kienu registrati f'ismu. L-eredi ta` Joseph Saliba hija "The J. Saliba Trust". Dan it-*trust* kien kostitwit bis-sahha tal-ahhar testment illi Joseph Saliba kien ghamel fit-18 ta` Settembru 2007 fl-atti tan-Nutar Dottor Pierre Attard. Michael Debono kien konfermat bhala *trustee* ta` "The J. Saliba Trust" b`digriet tal-Qorti Civili (Sezzjoni ta` Gurisdizzjoni Volontarja) tat-18 ta` Settembru 2009. Din il-Qorti tghid illi ghall-finijiet u effetti kollha tal-ligi Michael Debono fil-kwalita` tieghu

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premissa jaqa` taht it-tifsira ta` *member* skond l-Art.402(6).

**Ghar-ragunijiet kollha premissi, din il-Qorti qeghda tichad l-eccezzjoni ulterjuri bl-ispejjez kontra l-intimat *proprio et nomine*.**

**< Sentenza In Parte >**

-----TMIEM-----