



MALTA

**QORTI CIVILI**

**PRIM' AWLA**

**ONOR. IMHALLEF**

**JOSEPH ZAMMIT MC KEON**

Seduta tas-16 ta' Gunju, 2015

Rikors Numru. 29/2014

**Avukat Dr Simon Cachia (I.D. 434281M) bhala mandatarju specjali tal-assenti s-socjeta` A.G. Distribuzione S.r.l., socjeta` registrata Sqallija, l-Italja, ghan-nom u in rapprezentanza tal-istess ; u b`nota kongunta tat-23 ta` Gunju 2014 l-Avukat Dr Simon Cachia rrinunzja minn mandatarju specjali, u assumma bhala mandatarju specjali minfloku l-Avukat Dr Alessandro Lia**

*kontra*

**Ancams Limited (C-19060)**

**Il-Qorti :**

**I. Preliminari**

Rat ir-rikors prezentat fil-15 ta' Jannar 2014 li jaqra hekk –

*Illi permezz ta' sentenza ta' din l-Onorabbli Qorti tal-24 ta' April 2012 (citazz numru 842/2011 SM), id-decizjonijiet tat-Tribunale ta' Modica datati 5 ta' Frar 2009 u 13 ta' Dicembru 2010 [li permezz taghhom is-socjeta` intimata kienet giet kanonizzata bhala debitrice tar-rikorrenti nomine fis-somma ta' €23,868.19, oltre l-imghaxijiet u taxxi relatati hemm ukoll indikati, u l-ammont ta' €680.25 spejjez ai termini tal-istess], gew dikjarati bhala esegwibbli u enforzabbli fil-gurisdizzjoni Maltija, kif jirrizulta mill-kopja tas-sentenza hawn annessa u mmarkata bhala Dok. "SC1".*

*Illi fit-30 ta' Awwissu 2011, kontestwalment mar-rikors promotur li wassal ghall-fuq imsemmija sentenza ta' din l-Onorabbli Qorti tal-24 ta' April 2012, ir-rikorrenti nomine kien ukoll ipprezenta mandat ta' sekwestru kawtelatorju (numru 1215/2011) kontra s-socjeta` intimata, izda l-ebda ammonti ma gew iddepositati mis-sekwestratarji, kif ukoll mandat ta' qbid kawtelatorju (numru 1217/2011) kontra s-socjeta` intimata li pero` ma giex esegwit fl-ufficju registrat tas-socjeta` intimata.*

*Illi qabel ma gie ntavolat ir-rikors promotur li wassal ghall-fuq imsemmija sentenza ta' din l-Onorabbli Qorti tal-24 ta' April 2012, ir-rikorrenti nomine kien ukoll interpella lis-socjeta` intimata permezz ta' ittra ufficjali datata 17 ta' Gunju 2011 (kopja hawn annessa u mmarkata bhala Dok. "SC2") sabiex thallas l-ammonti fuq imsemmija. Id-direttrici tas-socjeta` intimata kienet wiegbet ghal din l-ittra ufficjali permezz tal-ittra li kopja taghha tinsab hawn annessa u mmarkata bhala "Dok. SC3". F'din l-ittra responsiva, id-direttrici tas-socjeta` intimata stess tiddikjara illi ghall-inqas mis-27 ta' Gunju 2011 is-socjeta` intimata ma kinitx ghadha topera. Ai termini tal-Artikolu 214(2)(a)(i) tal-Kap.*

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386, il-Qorti ghandha diskrezzjoni li tordna x-xoljiment ta' socjeta` jekk in-negozju tal-kumpannija jkun sospiz ghal perjodu bla waqfien ta' erbgha u ghoxrin xahar. Di piu`, kuntrarjament ghal dak mistqarr fl-istess ittra responsiva tas-27 ta' Gunju 2011, is-socjeta` intimata ma bdiet l-ebda proceduri ghax-xoljiment taghha.

Illi fit-3 ta' Ottubru 2013, ir-rikorrenti nomine ntavola mandat ta' qbid ezekuttiv [numru 1513/2013] kontra s-socjeta` intimata in ezekuzzjoni tas-sentenza tal-24 ta' April 2012 (citazz numru 842/2011SM) hawn fuq imsemmija, kif jirrizulta minn kopja tal-istess mandat hawn anness u mmarkat bhala "Dok. SC4", liema mandat gie esegwit (vide digriet ta' din l-Onorabbli Qorti datat 29 ta' Ottubru 2013 li jifforma parti mid-"Dok. SC4" hawn anness) izda ma setghet issir l-ebda elevazzjoni (vide l-istess Dok. "SC4").

Illi kif jidher mir-rikors tar-rikorrenti nomine datat 28 ta' Ottubru 2013 ipprezentat fl-atti tal-mandat ta' qbid ezekuttiv surriferit u ghad-digriet relattiv ta' din l-Onorabbli Qorti datat 29 ta' Ottubru 2013 (vide d-Dok. "SC4"), is-socjeta` intimata u r-rapprezentanti, azzjonisti u mpjegati taghha wettqu manuvri illegali u abbuzivi [inkluz billi fixklu l-marixxall fl-ezekuzzjoni tal-mandat, bl-uzu ta' socjetajiet ohra bhal Tuttofood Limited, Belber Limited u Ancams Marketing Limited (Dok. "SC5"), u bdil fl-ufficj registrat] bi pregudizzju ghar-rikorrenti nomine.

Illi sa llum baqa` ma sar ebda pagament mis-socjeta` intimata lir-rikorrenti nomine.

Illi qed jigu wkoll hawn annessi l-accounts ghas-snin 2010, 2011 u 2012 (Dok. "SC6", "SC7" u "SC8" rispettivament) ipprezentati mis-socjeta` intimata lir-Registru tal-Kumpanniji.

Illi ai termini tal-Artikolu 214(2)(a)(ii) tal-Kap. 386, il-Qorti ghandha diskrezzjoni li tordna x-xoljiment ta' socjeta` jekk tali socjeta` ma hijiex f'pozizzjoni li thallas id-djun taghha.

Illi ai termini tal-Artikolu 214(5) tal-istess Kap. 386, socjeta` hija meqjusa li ma hijiex f'pozizzjoni li thallas id-djun taghha jekk debitu tas-socjeta` jibqa` ma jigix imhallas fi zmien erbgha u ghoxrin gimgha minn meta jkun gie esegwit mandat ezekuttiv kontra s-socjeta` jew jekk ikun ippruvat ghas-sodisfazzjon tal-qorti li l-kumpannija ma tkunx tista` thallas id-djun taghha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpannija.

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*Illi ai termini tal-Artikolu 214(2)(b)(ii) tal-Kap. 386, kumpannija ghandha tkun xolta bil-Qorti jekk il-Qorti tkun tal-fehma li hemm ragunijiet gravi bizzejjed li jiggustifikaw ix-xoljiment u konsegwentement l-istralc tal-kumpannija. Fil-fehma umli tar-rikorrenti nomine, is-suespost kollu jikkostitwixxi wkoll ragunijiet gravi bizzejjed li jiggustifikaw ix-xoljiment u konsegwentement l-istralc tas-socjeta` intimata.*

*Ghaldaqstant ir-rikorrenti nomine jitlob bir-rispett lil dina l-Onorabbli Qorti sabiex :-*

*1. Tordna x-xoljiment u l-istralc konsegwenzjali tas-socjeta` intimata Ancams Limited (C-19061) ai termini tal-Artikolu 214(2)(a)(i) u/jew l-Artikolu 214(2)(a)(ii) u / jew l-Artikolu 214(2)(b)(iii) tal-Kap. 386 ; u*

*2. Taghti kull provvediment opportun sabiex jinhatar stralcjarju u jigi kondott ix-xoljiment u l-istralc konsegwenzjali skont id-disposizzjonijiet tal-Kap. 386 u kull provvediment iehor li din l-Onorabbli Qorti jidhrilha xieraq u opportun.*

*Bl-ispejjez kollha kontra s-socjeta` intimata.*

Rat id-dokumenti li kienu prezentati flimkien mar-rikors promotur.

Rat ir-risposta prezentata fit-30 ta` April 2014 li taqra hekk :-

*Illi preliminarjament is-socjeta` intimata tichad kull allegazzjoni maghmula mir-rikorrenti fil-premessi taghha, partikolarment dawk allegazzjonijiet kollha li jirreferi lejn ingann, malafede, u manuvri illegali u abusivi mill-istess Socjeta` intimata u tirrispingihom bhala nfondati fil-fatt u fid-dritt ;*

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*Illi se mai kienet l-istess Socjeta` rikorrenti illi ppruvat a tempo vergine u qabel il-proceduri fit-Tribunal ta` Modica tisfrutta l-pozizzjoni taghha bhala kreditur meta permezz ta` ittra ufficjali talbet ghal somma ferm aktar minn dak li kien allegatament dovut ;*

*Illi minkejja dan kollu, is-socjeta` Ancams Limited ma ghandha l-ebda oggezzjoni li jinghata bidu ghax-xoljiment taghha u dan ghaliex l-istess socjeta` ma baqghetx topera u dan skont l-istess dikjarazzjoni tas-socjeta` intimata permezz ta` ittra tas-27 ta` Gunju 2011, annessa mal-att promotur u mmarkata Dok SC3 ;*

*Illi minkejja l-istess dikjarazzjoni u kif jista` jirrizulta, kien hemm xi fatturi li tawwlu xi ftit il-process ta` xoljiment volontarju, minkejja li s-socjeta` waqfet ghal kollox milli topera ;*

*Ghaldaqstant, is-socjeta` intimata ma ghandha l-ebda oggezzjoni li jinghata bidu ghax-xoljiment, azzjoni li kienet ser tiehu minn jeddha l-istess socjeta`, u dan skont dawk il-provvediment li jidhrilha xierqa din l-Onorabbli Qorti.*

Rat il-verbal tal-udjenza tat-8 ta` Mejju 2014 fejn id-difensur tal-intimata filwaqt li kkonferma dak li nghad fir-risposta u cioe` illi n-negozju tal-intimata kien wieqaf ghal kollox, zied illi l-kumpannija ma kellha l-ebda hsieb li tkompli n-negozju.

Semghet ix-xiehda ta` Saviour Micallef, Carmen Micallef u Malcolm Mifsud fl-udjenza tal-21 ta` Mejju 2015 u rat id-dokumenti li kienu prezentati bhala prova fl-istess udjenza.

Semghet is-sottomissjonijiet li ghamlu d-difensuri tal-partijiet fl-udjenza tal-25 ta' Mejju 2015.

Rat id-digriet li tat fl-istess udjenza fejn halliet il-kawza ghas-sentenza ghal-lum.

Rat l-atti l-oħra tal-kawza.

## II. Sintesi tal-provi

Xehed bil-procedura tal-affidavit, **Graziano Tidona**, li kien l-accountant tal-mandanti tar-rikorrent fiz-zmien meta kienet taghmel negozju mas-socjeta` intimata. Sal-2006 in-negozju bejn it-tnejn kien tajjeb hafna. Ighid pero` li s-socjeta` intimata waqfet thallas lejn l-ahhar tal-2006. Kien fadlilha thallas bilanc min-negozju ta` €23,868.19 ; dan kien il-prezz ta` forniture ta` prodotti alkolici, li skond Ancams Limited kienet sfat maqbuda mill-awtoritajiet Maltin. Billi Ancams baqghet ma hallsitx dan il-bilanc, is-socjeta` fornitrici istitwiewt proceduri gudizzjarji fit-Tribunal ta` Modica li kienu decizi favur taghha.

Fil-5 ta` Frar 2009 u fit-13 ta` Dicembru 2010, it-Tribunal ta` Modica fi Sqallija ppronunzja ruhu fis-sens illi ddikjara li s-socjeta` intimata hija debitrici tal-mandanti tar-rikorrent.

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Fis-17 ta' Gunju 2011, ir-rikorrent noe pprezenta ittra ufficjali kontra s-socjeta` intimata fejn, wara li ghamel riferenza ghad-decizjonijiet tat-Tribunal ta` Modica, interpellaha sabiex thallas is-somma ta` €39,541.68 skond kif imfisser fl-att gudizzjarju (Dok SC2).

Fis-17 ta' Gunju 2011, Carmen Micallef ghas-socjeta` intimata kitbet lir-rikorrent noe fejn avzatu illi Ancams Limited ma kenitx ghadha topera u kellha tigi likwidata (Dok SC3).

B`sentenza moghtija minn din il-Qorti diversament presjeduta fl-24 ta` April 2012 (Dok SC1), li minnha ma kienx hemm appell, kien iddikjarat illi *d-decizjonijiet tat-Tribunal ta` Modica tal-5 ta` Frar 2009 u tat-13 ta` Dicembru 2010* li kienu decizi kontra l-intimata *huma ezegwibbli u enforzabbli fil-gurisdizzjoni Maltija*.

Fit-3 ta` Ottubru 2013, ir-rikorrent noe pprezenta Mandat ta` Qbid Ezekuttiv kontra s-socjeta` intimata (Dok SC4) ghal sorte ta` €23,868.19. Mir-referta tal-Marixxalli tad-9 ta` Ottubru 2013 (fol 20) ma jirrizultax illi kien hemm ezekuzzjoni tal-Mandat ghar-ragunijiet li kienu ndikati.

Ghar-ragunijiet li kienu ndikati mir-rikorrent noe f`rikors li pprezenta fit-28 ta` Ottubru 2013 (fol 24) din il-Qorti diversament presjeduta tat digriet fid-29 ta` Ottubru 2013 (fol 23) fejn iddikjarat illi fid-9 ta` Ottubru 2013, il-Mandat kien ezegwit fl-indirizz 'Demef', Mdina Road, Zebbug, li f`dik id-data kien ghadu l-ufficju registrat tas-socjeta` intimata, kif ukoll ordnat lill-ufficjal ezekuttiv sabiex iwettaq l-ezekuzzjoni, u jekk mehtieg jikseb l-intervent tal-Pulizija.

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A fol 46 kienu prezentati l-***abridged financial statements*** tas-socjeta` intimata ghas-sena li ghalqet fil-31 ta` Dicembru 2010 (Dok SC6). Igibu l-firma tal-awditur Hector Spiteri ghal *Busuttil & Micallef – Certified Public Accountants*. Huma ffirmati wkoll miz-zewg diretturi : Carmen Micallef u Saviour Micallef.

Skond dawn il-*financial statements*, fi tmiem is-sena 2010, il-kumpannija kellha *current assets* ta` €81,613 li minnhom €81,606 kienu *receivables* u cioe` ammonti dovuti lill-kumpannija ; kellha *share capital* ta` €104,822 ; kellha *accumulated losses* ta` €1,290,926 ; u *current liabilities* ta` €1,372,539 li minnhom €1,351,865 kienu *interest-bearing borrowings*. Sa tmiem l-2010, is-socjeta` intimata *comprehensive loss* ta` €100,152 meta l-*comprehensive loss* fi tmiem l-2009 kien ta` €80.774. Fi tmiem l-2010, *its total liabilities exceeded its total assets*. Sa tmiem dik is-sena, jirrizulta li s-socjeta` intimata kienet ghadha *a good concern*. Skond l-awdituri, *the company`s shareholders will continue to provide financial support to the company in the foreseeable future*.

A fol 59 kienu prezentati l-***abridged financial statements*** tas-socjeta` intimata ghas-sena li ghalqet fil-31 ta` Dicembru 2011 (Dok SC6). L-istess awdituri ffirmaw l-audit. It-telf baqa` jidher matul l-2011 fis-sens illi kien registrat telf ta` €70,595. Anke fil-kaz tal-2011, l-*audit* thejja *on a going concern basis*.

A fol 66 kienu prezentati l-***abridged financial statements*** tas-socjeta` intimata ghas-sena li ghalqet fil-31 ta` Dicembru 2012. Anke dawn kienu ffirmati mill-istess awdituri. It-telf ghal din is-sena kien ta` €93,604 bit-*total liabilities* jaqbzu t-*total assets*, kif kien il-kaz fl-2011. Bhal fil-kaz tas-sena ta` qabel, l-*audit* thejja *on a going concern basis*.



A fol 166 kienu prezentati l-***abridged financial statements*** tas-socjeta` intimata ghas-sena li ghalqet fil-31 ta` Dicembru 2014. L-awditur kien Malcolm Mifsud. Jinghad hekk a fol 174 :- *As at 31 December 2014, the company had net liabilities of EUR 105,628 (2013 : EUR 1,552,544). The shareholders of the company will continue to support the company to continue as a going concern. These financial statements have therefore been prepared using the underlying assumption that the company is a going concern and will continue in operation in the foreseeable future.*L-audit thejja *on a going concern basis*. A fol 176 bhala *Trade and Other Receivables* ghall-2014 ma jidher xejn pero` tinghata spjegazzjoni fis-sens illi : *In the financial year 2014, the shareholders settled their balance due to the company by personally settling bank financing due by the company. This payment in full and final settlement with the bank was made through the sale of personal immovable property and represented an amount bigger in valuer to what was due by them. For this purpose, and as of 2014, the shareholders became creditors of the company for the remaining balance paid by them to settle the bank financing.* A fol 177 jinghad illi *the amount due to the shareholders is unsecured, interest free and repayable on demand.*

Minn dokumenti dwar is-socjeta` intimata li kienu esebiti (a fol 189 et seq) jirrizulta li fit-8 ta` April 2015, id-diretturi tas-socjeta` intimata kienu Carmen u Saviour konjugi Micallef, li kellhom ukoll ir-rapprezentanza legali u gudizzjarja taghha. Carmen Micallef kienet is-Segretarju. L-azzjonisti huma tlieta : George Demanuele ; Carmen Micallef u Saviour Micallef. L-ishma huma kollha Ordinary Shares, huma kollha fully paid up, ghandhom valur nominali ta` €2.329373 kull sehem u huma 45,000 fl-ghadd, bil-konjugi Micallef jippossjedu ndaqs bejniethom 44,400-il sehem u l-bilanc ta` 600-il sehem ta` George Demanuele.

**Saviour Micallef** – direttur ta` Ancams Limited – xehed li Ancams Limited kienet timporta prodotti tal-ikel ghall-bejgh fil-merca. Kellhom sales-persons impjegati maghhom li jgibu l-ordnijiet ; imbaghad impjegati ohra taghhom kienu jaghmlu l-konsenji fil-hwienet b`vetturi tal-kumpannija. L-inkwiet fin-negozju ra l-bidu tieghu fis-sena 2000 meta ghalqu supermarkets kbar bhas-Supermaster, il-Priceclub u ohrajn ghaliex kellhom jigbru hafna flus minghandhom. Mill-Priceclub wahdu kellhom jiehdum mal-Lm 100,000. Dawn il-fatti tawhom daqqa kbira `l isfel. Minn hawn u minn hemm anke bl-ghajnuna

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tal-bank u ta` xi fornituri baqghu ghaddejjin ghalkemm b`diffikulta`. Minghand A.G. Distribuzioni kienu jixtru prodotti tal-merca. F`xi zmien importaw minghandhom anke xorb alkaliku li nqabad mid-Dwana. Lit-Taljani ma hallsuhomx tax-xoghol li nqabad.

Kompla jixhed illi l-vannijiet li bihom kien jitqassam ix-xoghol ma baqghu ghand Ancams Limited ghaliex marru ghand kumpannija ohra Tuttofood Limited, li tappartjeni lit-tfal tieghu, u dan qabel kienet istitwita l-kawza tal-lum.

Stqarr illi illum Ancams Limited m`ghadhiex taghmel negozju. Waqfet ghal kollox min-negozju. U ilha wieqfa ghal kollox certament ghal aktar minn sentejn. Ma kenitx xjolta b`mod volontarju ghaliex kien ghad kellhom kredituri. Illum l-uniku dejn li ghandhom huwa ma` A.G. Distribuzioni. Ippruvaw jaslu magghom bonarjament billi joffrullhom il-hlas ta` nofs l-ammont pretiz ; l-ewwel kienu accettaw imbaghad ta` barra dawru kollox u ma accettawx.

**Carmen Micallef** – direttur iehor ta` Ancams Limited – ikkonfermat id-deposizzjoni ta` zewgha Saviour Micallef. Xehdet illi hija kienet tiehu hsieb l-amministrazzjoni tal-kumpannija. Fl-audits, l-ewwel darba li dehret il-figura dovuta lil A.G. Distribuzioni kien fl-2013 wara li kienet deciza s-sentenza go Malta fl-2012. Sa dakinhar kien ghad hemm 'dispute'. Ix-xoghol li kien akkwistat fl-2006 qatt ma dahal fl-imhazen taghhom. Il-kawza saret fi Sqallija fl-2009 u kienet deciza fl-2011.

Kompliet tixhed illi l-Mandat ta` Qbid qatt ma gie ezegwit kontra Ancams Limited. Qabel kienet deciza l-kawza tal-2012 fil-Qrati Maltin u cioe` fl-2011, kien sar Mandat ta` Sekwestru izda kollox waqaf hemm.

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Stqarret illi Ancams Limited hallset id-dejn inkluz tas-CIR hlief A.G. Distribuzioni li ma accettax il-hlas ta` 50% ghas-saldu. Biex seta` jithallas id-dejn kellhom ibieghu d-dar tagghom.

Fissret illi l-kumpanija waqfet min-negozju fix-xhur ta` Lulju jew Awwissu tal-2007. L-ahhar fattura li baghtet A.G. Distribuzioni kienet fl-2007. Assi m`ghandha xejn. Fadal id-dejn ta` A.G. Distribuzioni, kif ukoll dejn maghha u ma` zewgha ta` €68,000.

L-**Awditur Malcolm Mifsud** xehed illi huwa ghamel l-audits tas-socjeta` Ancams Limited ghas-snin 2013 u 2014. L-ewwel darba li tnizzel fl-audits tas-socjeta` l-ammont skond is-sentenza tal-Qorti ta` Malta kien fl-audit tal-2013. Meta beda x-xoghol hu, sab li l-kumpanija kellha dejn ta` €1,600,000 mal-bank. Kien hemm dejn mas-CIR. U dejn iehor izghar fl-ammont. Id-dejn tal-bank thallas mill-azzjonisti bi flus personali tagghom mir-rikavat tal-bejgh tad-dar tagghom. Mill-istess rikavat thallas ukoll is-CIR. Li fadal thallas il-kumpanija huwa d-debitu ta` A.G. Distribuzioni u tal-istess azzjonisti. Ix-xhud stqarr illi l-kumpanija ma toperax. U ilha ma topera sa minn qabel l-2012. Ma ghandhiex bejgh u kwindi lanqas dhul. Ipprezenta kopja tal-*full annual report u financial statements* ghall-2013 u l-2014,

### III. **Risultanzi**

#### 1) **It-talbiet**

Ir-rikorrent noe qiegħed jitlob ix-xoljiment u l-istralc ta' s-socjeta` intimata abbazi :

- (a) tal-**Art 214(2)(a)(i) tal-Kap 386** ;
- (b) tal-**Art 214(2)(a)(ii) tal-Kap 386** ; u
- (c) tal-**Art 214(2)(b)(iii) tal-Kap 386**.

Billi r-rikorrent noe huwa *kreditor* ta' s-socjeta` intimata għandu *locus standi* biex tippromwovi dan il-procediment skond l-**Art 218(1)(b) u (c) tal-Kap 386**.

- (a) **L-Art 214(2)(a)(i) tal-Kap 386**

Skond l-**Art 214(2)(a)(i) tal-Kap 386**, *kumpannija tista' xxolji u tkun stralcjata mill-qorti ... jekk in-negozju tal-kumpannija jkun sospiz għal perjodu bla waqfien ta' erbgha u ghoxrin xahar*.

Ir-rekwizit tal-**Art 214(2)(a)(i)** huwa s-**sospensjoni tan-negozju** tal-kumpannija għal perijodu **bla waqfien** ta' erbgha u ghoxrin **(24) xahar**. Il-prova tal-waqfien huwa materja ta' fatt. Jidher illi d-disposizzjoni kellha l-origini tagħha fl-**Art12(1)(d) tal-UK Insolvency Act 1986**, liema disposizzjoni Ingliza m'għadhiex tagħmel parti mill-Act, għax kienet superata b'legislazzjoni aktar ricenti.

Il-procediment tal-lum kien istitwit fil-15 ta' Jannar 2014.

Jirrizulta mill-assjem tal-provi li l-Qorti ghamlet riferenza ghalihom illi s-socjeta` intimata waqfet topera jew tinnegozja ghal kollox sa minn qabel il-15 ta' Jannar 2012.

Skond ix-xiehda ta` Carmen Micallef, li kienet tiehu hsieb l-amministrazzjoni tal-kumpanija, u li allura tista` oggettivament tghid aktar bil-preciz minn zewgha d-direttur l-iehor Saviour Micallef li kien jiehu hsieb l-imhazen, is-socjeta` intimata waqfet topera ghal kollox fl-2007. Wara dik is-sena, kemm ittentat thallas biss id-djun li kellha. Dan pero` ma sarx billi kien iggenerat dhul min-negozju izda bl-injezzjoni ta` fondi mill-azzjonisti stess biex jithallsu d-djun. Il-fondi gew mir-rikavat tal-bejgh tad-dar taghhom. L-uniku dejn li fadal huwa dak ta` A.G. Distribuzjoni li ma hemmx mnejn jithallas u dejn maghhom stess bhala *shareholders` loan*.

Il-Qorti trid tghid li l-***abridged financial statements*** kollha esebiti jitolqu mill-premessa li l-azjenda kienet *a going concern* u li l-azzjonisti kienu se jkomplu jzomm l-kumpanija ghaddejja bl-injezzjoni ta kapital. Dan premess l-istampa li jaghtu ma hija felici propju xejn ghaliex sena wara l-ohra kien registrat telf u sena wara l-ohra l-*liabilities* dejjem qabzu l-*assets*. Fl-***annual report and financial statements (full)*** ghas-snin 2013 u 2014 jikkonfermaw ix-xejra negattiva gravi tal-kumpanija intimata kif ukoll ighidu li *the company did not trade during the year under review*.

Mill-kumpless tal-provi, jirrizulta :- a) li s-socjeta` intimata mhux biss issospendiet in-negozju taghha izda waqfet ghal kollox ; b) li s-socjeta` intimata waqfet tinnegozja ghal habta tal-2007 ; c) li wara li waqfet tinnegozja ma regghetx ghamlet negozju ; u d) li dik hija s-sitwazzjoni anke llum.

Ma hemmx l-icken dubju li **jirrizultaw ippruvati** r-rekwiziti tal-Art 214(2)(a)(i) tal-Kap 386.

**‘Il quddiem il-Qorti sejra tesprimi ruhha dwar jekk ghandhiex tipprocedi bix-xoljiment u l-istralc tas-socjeta` intimata.**

**b) Art 214(2)(a)(ii) u l-Art 214(5)(a) u (b) tal-Kap 386**

Bl-**Art 214(2)(a)(ii) tal-Kap 386** il-ligi taghti lill-Qorti **diskrezzjoni** li xxolji u tistralcja kumpannija *jekk il-kumpannija ma tkunx tista' thallas id-djun taghha.*

Dan is-subinciz (ii) irid jinqara flimkien ma` l-**Art 214(5)** li jistabilixxi meta kumpannija skond il-ligi taghna ghandha titqies li ma tkunx tista` thallas id-djun taghha.

Il-Qorti tirrileva illi meta tfassal il-mudell ghal-ligi taghna l-gdida dwar il-kumpanniji, il-qafas maghzul kien dak tal-Companies Act Ingliza 1985. Fil-ligi Ingliza, ix-xoljiment u l-istralc ta` kumpanniji kien trattat f'legislazzjoni *ad hoc* u cioe` l-Insolvency Act 1986. Meta fl-1995 saret il-ligi taghna l-gdida dwar il-kumpanniji li hadet post il-Commercial Partnerships Ordinance 1962, id-disposizzjonijiet li jolqtu x-xoljiment u l-istralc kienu integrati fl-Att tal-1995.

## Kopja Informali ta' Sentenza

Fil-ligi taghna, li *kumpanija ma tkunx tista' thallas id-djun taghha* ghandu sinjifikat preciz u definit mil-ligi stess fl-Art 214(5).

**Tnejn** huma c-cirkostanzi definiti mil-ligi :-

(a) *jekk id-dejn dovut mill-kumpanija jkun baqa' ma thallasx ghal kollox jew fparti wara erbgħa u ghoxrin gimgha mill-ezekuzzjoni ta' titolu eżekuttiv kontra l-kumpanija b`xi wiehed mill-atti eżekuttivi msemmijin fl-artikolu 273 tal-Kodici ta' Organizzazzjoni u Procedura Civili ; jew*

(b) *jekk ikun ippruvat għas-sodisfazzjon tal-qorti li l-kumpanija ma tkunx tista' thallas id-djun taghha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpanija.*

Fil-ligi Ingliza, il-posizzjoni hija aktar wiesgħa. Il-koncett ta` insolvenza fil-ligi taghna huwa aktar ristrett minn dak tal-ligi Ingliza għalkemm hemm *overlaps*.

Fit-Tmien Edizzjoni (2012) ta` l-ktieb **Boyle & Birds` Company Law** (pubblikat minn Jordans) pg 859 jingħad hekk –

*There are two principal, although not exclusive or exhaustive, tests of insolvency : a company is insolvent if it unable to pay its debts as they fall due (“cash flow insolvency”) ; it is also insolvent if its liabilities exceed its assets (“balance sheet insolvency”) ...*

(i) **L-Art 214(5)(a)**

B`mod aktar strett, fil-ligi taghna dak previst mill-Art 214(5)(a) jixbah il-koncett ta` *cash flow insolvency* fil-ligi Ngliza.

Fil-kaz ta` *cash flow insolvency* din il-Qorti tghid illi filwaqt fil-ligi taghna huwa specifikat **bil-preciz** x` m`ghandhiex taghmel kumpannija debitrice sabiex ma tkunx meqjusa li ma tistax thallas id-djun taghha, fil-ligi Ngliza il-kriterju huwa aktar generiku ghax ikun hemm dik it-tip ta` insolvenza *if it unable to pay its debts as they fall due*.

Fil-**Boyle & Birds` Company Law** (op. cit.) ikompli jinghad hekk –

*Failure to pay a debt which is due and not disputed amounts to evidence of cash flow insolvency. Thus a company which has a policy of late payment of bills could find itself the subject of a petition for a winding-up order or administration order. Such a petition will not be struck out at an early stage as a form of improper pressure and an abuse of the process of the court, because, as Staughton LJ explained in Taylor`s Industrial Flooring (1990. BBC 44 at 51) creditors, not late payers, are more worthy of insolvency law`s protection.*

*“Many people today seem to think that they are lawfully entitled to delay paying their debts when they fall due or beyond the agreed period of credit, if there is one ... This can cause great hardship to honest traders, particularly those engaged in small businesses recently started. Anything which the law can do to discourage such behaviour in my view should be done.”*

Fil-ktieb **Insolvency Law – Corporate and Personal** ta` Andrew Keay u Peter Walton (pubblikat minn Pearson Longman – 2003) pg 17 jinghad hekk dwar *cash flow insolvency* kif mifhuma fil-kuntest tal-Insolvency Act 1986 –



## Kopja Informali ta' Sentenza

*The court, in examining whether a company is suffering cash flow insolvency, will consider whether the company is actually paying its debtors. Courts must take into account what current revenue the company has as well as what the company can procure by realising assets within a relatively short time ... A company can rely upon money which might be obtained from the sale of assets or upon money which might be obtained on the strength of its assets ... It is possible that sometimes a debtor might be able to establish solvency by demonstrating that funds can be obtained through an unsecured loan. In considering whether a person or a company is insolvent, the debtor's whole financial position must be studied ... and a temporary lack of liquidity does not necessarily mean that the company is insolvent ...*

*At one time courts were rather strict on what they required to be established before they were willing to deem a person or a company insolvent, but in more recent times they have become more liberal as far as creditors are concerned and have held that a debtor is insolvent if a creditor is able to prove that he or she has not paid an undisputed debt after a demand has been made ... and this is the case even if there is other evidence which suggests that the value of the assets outweighs liabilities ...*

*Whether a company is cash flow insolvent is principally a question of fact and one which may be established in any number of ways, such as the existence of a large number of outstanding debts and unsatisfied judgments ... or there is lack of assets on which execution can be levied ...*

*It has been said that a debtor is not regarded as solvent just because if sufficient time were granted the debts could be paid off ...*

Dan premiss, il-Qorti tghid illi **fil-kaz tal-lum** ma rrizultawx ippruvati r-rekwiziti tal-Art 214(5)(a). Skond il-provi rrizulta li kienu prezentati zewg Mandati kontra s-socjeta` intimata : Mandat Kawtelatorju ta` Sekwestru u Mandat Ezekuttiv ta` Qbid. Ma jirrizultax ippruvat li l-Mandat Kawtelatorju sar Ezekuttiv skond il-ligi. Dwar il-Mandat ta` Qbid Ezekuttiv, irrizulta li ghalkemm prezentat il-Mandat ma kien ezegwit. L-erbgha u ghoxrin (24) gimgha li jsemmi l-Art 214(5)(a) jiddekorri mid-data tal-ezekuzzjoni tal-Mandat.

## Kopja Informali ta' Sentenza

Li jfisser li l-presentata wahedha tal-Mandat ta` Qbid anke jekk Ezekuttiv ma kenitx bizzejjed biex tissoddisfa l-vot tal-ligi, izda kienet mehtiega wkoll l-ezekuzzjoni tal-Mandat, fatt li baqa` ma avverax ruhu.

### (ii) L-Art 214(5)(b)

Dak previst minn din id-disposizzjoni jabbina ruhu ma` *balance sheet insolvency*.

Dan l-abbinament jista` jsir minhabba d-dicitura tad-disposizzjoni rilevanti tal-Insolvency Act 1986 (li hija kwazi identika ghal taghna) u cioe` l-**Art 123(2)** li taqra hekk –

*A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.*

Fil-ktieb **Insolvency Law – Corporate and Personal** ta` Andrew Keay u Peter Walton (op. cit.) pg 19 jinghad hekk dwar *balance sheet insolvency* kif mifhuma fil-kuntest tal-Insolvency Act 1986 –

*In determining whether the assets are outweighed by the liabilities a court is able to take into account contingent and prospective liabilities, but not contingent and prospective assets [Byblos Bank SAL v. Al-Khudhairy (1986) 2 BCC99, 549 (CA)] It has been said that “liabilities” is a broadened term compared with “debts” [Re A debtor (No 17 of 1966) (1967) Ch 590 ; (1967) 1 All ER 668]. “Liabilities” is defined for the purposes of winding up in rule 13.12 (4) to mean “a liability to pay money or money’s worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution”. Then*

## Kopja Informali ta' Sentenza

*rule 13.12 (3) states that it is immaterial whether the liability is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion.*

*Clearly with this test it is only possible to take into account the assets owned by the company including the uncalled capital of the company [Re National Livestock Insurance Co (1858) 26 Beav 153 ; 53 ER 855 ...*

Dwar l-Art 214(5)(b) din il-Qorti diversament presjeduta (**PA/GV**) fis-sentenza taghha tat-28 ta` Meju 2003 fil-kawza “**Axel John International AB vs Aluminium Extrusions Limited**” qalet hekk –

*Din il-kondizzjoni tista' tigi verifikata permezz tal-balance sheets wara li jigi kunsidrat jekk l-assets are less than its liabilities. Izda ... it is not sufficient for the company to be able to meet its current obligations if its total liabilities can ultimately be met only by the realisation of its assets over a lengthy period (Re : European Life Assurance Society 1869 LR 9 Eq 122). Ghalhekk ma hemmx raguni ghaliex il-kredituri ghandhom joqghodu jistennew sakemm il-kumpannija tbiegh l-assets taghha biex forsi xi darba jithallsu.*

Fil-Pag 114 tar-Raba` Edizzjoni (2011) ta` **Principles of Corporate Insolvency Law** (ippubblikat minn Sweet & Maxwell) l-awtur Roy Goode ighid hekk –

*The idea underlying this test ... is that it is not sufficient for the company to be able to meet its current obligations if its total liabilities can ultimately be met only by the realisation of its assets and these are insufficient for the purpose ...*

Fil-Pag 130 ikompli hekk –

*The mere excess of liabilities over assets is not in itself determinative. What has to be shown is that by reason of the deficiency of its assets the company has reached the point of no return.*

Fil-Pag 134 ighid –

*To give the phrase “contingent liability” any meaning we must restrict it to a liability or other loss which arises out of an existing legal obligation or state of affairs but which is dependent on the happening of an event which may or may not occur. Many of the cases have stressed the need for the liability to arise out of an existing obligation.*

Fil-Pag 136 ighid –

*The phrase “prospective liability” is neither a legal nor an accounting term of art. It has been judicially defined as : “ ... a debt which will certainly become due in the future, either on some date which has already been determined or some date determinable by reference to future events.” ... it has been described ... as unmatured liability which will inevitably ripen into a debt with the passage of time. Such a definition encompasses all forms of debitum in praesenti, solvendum in futuro including an indisputable claim for unliquidated damages which remains only to be quantified and will result in a debt far more than a nominal amount. “Prospective liability” thus embraces both future debts, the sense of liquidated sums due, and unliquidated claims.*

Dan premiss, il-Qorti tirrileva illi mill-kontabilita` tas-socjeta` intimata jirrizulta li m`ghandhiex assi. Dwar id-djun, vera li thallas parti sewwa minnu, izda dan ma sarx minhabba l-attivit` ekonomika li ggenerat izda thallas ghaliex l-azzjonisti bieghu d-dar personali tagghom sabiex seta` jithallas id-dejn. Id-dejn

tar-rikorrent noe baqa` mhux sodisfatt ghaliex is-socjeta` intimata ppretendiet li s-socjeta` estera ggorr parti mill-piz tal-inkwiet li s-socjeta` intimata sabet ruhha fih billi taccetta li tithallas biss 50% tal-ammont dovut, u dan ghas-saldu. Ghax irrifjutat id-dejn baqa` mhux imhallas. Ir-rekwizit tal-Art 214(5)(b) jirrizulta ppruvat.

iii) **Id-diskrezzjoni tal-Qorti**

**Accertat illi jirrizultaw ippruvati r-rekwiziti tal-Art 214(2)(a)(i) u tal-Art 214(2)(a)(ii) limitatament fejn si tratta tal-Art 214(5)(b), il-Qorti sejra tara jekk fuq il-provi akkwiziti, ghandhiex hi tezercita d-diskrezzjoni taghha li tordna x-xoljiment u l-istralc tal-intimata.**

Il-Qorti taghmel riferenza ghal Pg 913-914 ta` **Boyle & Birds` Company Law** – 8<sup>th</sup> Edition – 2011 :

*Unpaid creditors of a company may consider commencing winding-up proceedings against the company as an alternative to suing for payment. As a debt collection mechanism, winding up proceedings may be swifter and, for the individual creditor, less expensive than a claim that may come to trial for some time ; on the other hand, winding up is a collective procedure for the benefit of creditors generally and it does not benefit specific creditors individually (F. Oditah “Winding Up Recalcitrant Debtors” 1995 LMCLQ 107) ...*

*Since winding up is a collective procedure for the benefit of creditors generally, one situation where the court may exercise its discretion against winding-up is where other creditors in the same class oppose the making of the order. In this regard the court will usually have regard to the majority of the creditors and will refuse the petition if its opposed by the majority.*

Fil-Palmer's Company Law (Edition 25 - Sweet & Maxwell) jinghad hekk –

*The court's jurisdiction is discretionary and the fact that the petitioner can establish this ground does not give him an automatic right to an order (re. Metropolitan Railway Warehousing Co. Ltd 1887.36.LJCh 827). The court has refused to make an order where there are good reasons for the delay and where the great majority of members desire that the company shall continue. An order may however be made in appropriate circumstances against the majority's wishes. Where the business has merely been suspended the court must be satisfied of an abandonment or inability to carry on. In ascertaining such intention the court will have regard to the opinion and wishes of the majority of shareholders whose names appear on the register. Merely abandoning one of several objects is insufficient (re. Norwegian Titanic Iron Co. (1866) 35 Beav.223).*

Dan premiss, hija l-fehma konsiderata tal-Qorti illi s-socjeta` intimata issa ilha s-snin ma taghmel propju xejn biex tinsorgi. Hija wieqfa ghal kollox mill-esercizzju tan-negozju li ghalih kienet kostitwita. L-istampa li tohrog mill-*financial statements* taghha hija negattiva ferm. Tul is-snin ma jirrizultax li l-azzjonisti ghamlu xi *fresh capital injection* biex igibu l-kumpannija fuq saqajha u allura *back in business*. L-intervent tal-azzjonisti kien limitat u cirkoskritt ghall-hlas tad-dejn tal-bank u tas-CIR presumibbilment ghaliex kienu esposti personalment ghall-hlas ta` dak id-dejn solidament mal-kumpannija. Socjeta` li ma taghmilx negozju hija entita` bla ruh. Ma tkunx qeghda taqdi l-ghanijiet taghha. Kumpannija li ma tiggerax attivita` ekonomika ma jistax ikollha dhul, u minghajr dhul, ma tista` qatt thallas id-dejn taghha, aktar u aktar meta fil-kaz tal-lum irrizulta bhala fatt illi l-azzjonisti wrew bic-car li m`ghandhom l-intenzjoni li jgib lura l-kumpannija fin-negozju. Ghal din il-Qorti, ix-xoljiment u l-istralc tal-intimata huwa inevitabbli.

c) L-Art 214(2)(b)(iii) tal-Kap 386

Billi l-Qorti qeghda tezercita d-diskrezzjoni taghha u qeghda tordna x-xoljiment u l-istralc tas-socjeta` intimata abbazi tal-Art 214(2)(a)(i), tal-Art 214(2)(a)(ii) u tal-Art 214(5)(b) tal-Kap 386, il-Qorti ma tarax il-htiega li tmur ghall-analizi ta` jekk l-Art 214(2)(b)(iii) tal-Kap 386 huwiex ippruvat ukoll fil-kaz tal-lum.

### **Provvediment**

**Ghar-ragunijiet kollha premessi, il-Qorti qeghda tipprovdi dwar it-talbiet tar-rikorrent noe u dwar l-ecezzjonijiet tas-socjeta` intimata billi :-**

**1) Tiddikjara li fir-rigward tal-kumpannija Ancams Limited (C-19060) jirrizultaw pruvati sal-grad rikjest mil-ligi r-rekwiziti tal-Art. 214(2)(a)(i) u (ii) u tal-Art. 214(5)(b) tal-Kap. 386 tal-Ligijiet ta` Malta.**

**2) A tenur tal-Art. 214(2)(a)(i) u (ii) u tal-Art. 214(5)(b) tal-Kap. 386 tal-Ligijiet ta` Malta, tordna x-xoljiment tal-kumpannija Ancams Limited (C-19060) b`effett mill-15 ta` Jannar 2014 skond l-Art. 223(1) tal-Kap. 386. Tordna wkoll l-istralc taghha.**

**3) Tastjeni milli tiehu konjizzjoni ulterjuri ta` dik il-parti tal-ewwel talba fejn kien rikjest ix-xoljiment u l-istralc tal-kumpannija intimata skond l-Art. 214(2)(b)(iii) tal-Kap. 386 tal-Ligijiet ta` Malta.**

4) Tipprovdi dwar it-tieni talba billi tahtar lir-Ricevitur Ufficjali bhala stralcjarju bis-setghat u d-dmirijiet kollha skond l-Art. 228 et seq tal-Kap. 386 tal-Ligijiet ta` Malta.

5) Tipprovdi dwar l-ispejjez billi :-

a) Tordna li l-ispejjez ta` dan il-provvediment sal-lum jithallsu mill-kumpannija intimata.

b) Tordna li l-ispejjez kollha tal-istralc, inkluzi d-drittijiet u l-ispejjez tar-Ricevitur Ufficjali fil-vesti tieghu ta` stralcjarju, jithallsu mir-rikorrent noe u mill-kumpannija ntimata *in solidum* bejniethom, u dan bl-applikazzjoni tal-Art. 236(2) tal-Kap. 386.

6) Thalli l-istralc ghall-udjenza ta` nhar il-Hamis 22 ta` Ottubru 2015 fid-9.00 a.m.

**< Sentenza Finali >**

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