



QORTI CIVILI PRIM`AWLA

**ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON**

Illum il-Hamis 28 ta` Settembru 2017

**Kawza Nru.
Rik. Nru. 356/16 JZM**

**Torsten Haake (ID Nru. 147127A)
f`ismu personali u bhala
Mandatarju Speċjali ta` Marina
Inge Haake (Passaport Germaniz
Nru. 475920385) u Lutz Wiese
(Passaport Germaniz Nru.
L7F0R1HV2)**

kontra

- 1. SOS IT Business GmbH (HRB
12122) ta` Kirchhellener Ring
74, D-46244
Bottrop-Kirchhellen, Germanja**
- 2. Voxbyte Holding Limited
(C60711);**
- 3. Ir-Registatur tal-Kumpaniji**

Il-Qorti :

I. Preliminari

Rat ir-rikors ipprezentat fit-3 ta` Meju 2016 li jaqra hekk :-

1. *Illi dan ir-rikors qed jigi intavolat ai termini tal-Artiklu 402 tal-Kap. 386 tal-Ligijiet ta` Malta;*

2. *Illi r-rikorrenti huma azzjonisti fis-socjeta` intimata, Voxbyte Holding Ltd (C60711), in kwantu Torsten Haake jippossiedi erba` mija u hamsin (450) sehem ordinarju, Lutz Wiese jippossiedi tliet mitt (300) sehem ordinarju u Marina Inge Haake tippossiedi mija u hamsin (150) sehem ordinarju, b`total ta` disa` mitt (900) sehem bejniethom, kollha tal-valur nominali ta` ewro-il (€1) wiehed (minn total ta` elf u mitejn (1,200) sehem ordinarju tal-valur nominali ta` ewro-il (€1) wiehed f`din is-socjeta` (vide Dok. A1);cccccc*

3. *Illi s-socjeta` intimata SOS IT Business GmbH hija wkoll cazzjonista fis-socjeta` Voxbyte Holding Ltd in kwantu ghar-rimanti tliet mitt (300) ishma ordinarji (vide Dok. A1);*

4. *Illi mar-registrazzjoni tas-socjeta` Voxbyte Holding Limited, kull azzjonist kien jippossiedi tliet mitt (300) sehem kull wiehed (vide Dok. A) pero` recentement gie nieqes l-azzjonist Jurgen Kurt Haake u l-ishma tieghu gew trasferiti causa mortis in kwantu mija u hamsin (150) sehem favur ir-rikorrent ibnu Torsen Haake u r-rimanti mija u hamsin (150) sehem favur ir-rikorreccenti martu Marina Inge Haake (vide Dok. A2), biex b`hekk l-azzjonisti llum huma dawk kif indikati fit-tieni u t-tielet paragrafi supra u f`Dok. A1 anness;*

5. *Illi s-socjeta` Voxbyte Holding Ltd hija s-socjeta` holding ta` tliet socjetajiet sussidjarji li huma Voxbyte Management Ltd (C60714), Voxbyte IT Development Ltd (C60715) u Voxbyte Voice Services Ltd (C60717) (vide Dok. B, Dok. C, Dok. D u Dok. E), fejn din tippossiedi l-ishma kollha hlief wiehed f`dawn is-socjetajiet;*

6. *Illi n-negozju ta` dawn it-tliet socjetajiet sussidjarji kien se jikkonsisti primarjament fl-izvilupp u provvista ta` voicemail software, liema*

negozju kien intiz sabiex irendi profitt sostanzjali skont ma hemm previst fid-dokument anness ma` dan ir-rikors u mmarkat bhala "Dok. F";

7. Illi Voxbyte Holding Ltd giet irregistrata mar-Registru tal-Kumpaniji ta` Malta fis-6 ta` Gunju 2013, izda qabel ma giet hekk irregistrata r-rikorrenti Lutz Wiese u Torsten Haake, flimkien mal-azzjonist precedenti u cioe` d-defunt Jurgen Kurt Haake, kif ukoll flimkien mal-intimata SOS IT Business GmbH kienu ftiehm, lkoll qua azzjonisti, fir-rigward tar-responsabbiltajiet kummercjali ta` kull wiehed minnhom fil-kumpaniji Voxbyte, partikolarment fir-rigward ta` Voxbyte Voice Services Ltd (vide Dok. G);

8. Illi skont ma kienu ftiehm, ir-rikorrenti Torsten Haake u Lutz Wiese flimkien mad-defunt Jurgen Kurt Haake kienu responsabbli ghall-gestjoni, marketing u bejgh tal-voicemail software, liema software kien se jkun il-fulkru tan-negozju tal-kumpaniji Voxbyte. Min-naha l-ohra, l-intimata SOS IT Business GmbH kellha tkun responsabbli principalment sabiex tizviluppa u tipprovi dan is-software essenzjali u vitali biex in-negozju ta` dawn il-kumpaniji jkun jista` jopera;

9. Illi nonostante din l-obbligazzjoni, l-intimata SOS IT Business GmbH naqset, minghajr raguni valida, milli tizviluppa u tipprovi s-software kollu mehtieg ghal dan il-ghan, kif ukoll li tikkontribwixxi bhala azzjonista ta` Voxbyte Holding Ltd, u dan kif se jigi ppruvat waqt il-mori;

10. Illi b`rizultat ta` din l-inadempjenza u nuqqas ta` koperazzjoni da parti tal-intimata SOS IT Business GmbH, il-kumpaniji Voxbyte ma setghux jibdew fl-operat taghhom u jiggeraw in-negozju li kellu jrendi profitt sostanzjali;

11. Illi l-intimata SOS IT Business GmbH giet imsejha diversi drabi mir-rikorrenti, inkluz permezz ta` ittra legali (vide Dok. H), sabiex twettaq l-obbligazzjonijiet taghha skont il-ftehim mar-rikorrenti. Izda wara li giet hekk interpellata, ezigiet li tithallas ghat-twettiq tal-obbligi taghha (vide Dok. I) u dan kuntrarjament ghal dak li kien gia miftiehem kif fuq inghad (Dok. G);

12. Illi inoltre, zewg laqghat generali straordinarji tal-azzjonisti ta` Voxbyte Holding Limited gew imsejha mir-rikorrenti bl-ghan li tinstab

soluzzjoni għall-problema li kienet qed tohloq SOS IT Business GmbH bl-inadempjenza tagħha. Izda dawn il-laqgħat ma taw ebda rizultati pozittivi għaliex l-intimata SOS IT Business GmbH naqset milli tippartecipa fl-istess (vide Dok. J), liema nuqqas juri fic-car il-fatt li l-intimata SOS IT Business GmbH m'għandhiex interess u/jew intenzjoni li tikkontribwixxi jew tippartecipa fil-kumpaniji Voxbyte;

13. Illi sussegwentement u minhabba l-inadempjenza kontinwa tal-intimata SOS IT Business GmbH, ir-rikorrenti Torsten Haake u Lutz Wiese flimkien mad-defunt Jurgen Karl Haake offrew li jakkwistaw l-ishma li l-istess SOS IT Business GmbH għandha fis-socjeta` Voxbyte Holding Limited bl-ghan li s-socjetajiet Voxbyte jkunu jistghu jottjenu s-software mehtieg minghand terzi biex b`hekk jibdew joperaw minghajr aktar ostakoli (vide Dok. K) u dan ukoll sabiex jigu evitati spejjez zejda relattivament għall-eventwali stralc ta` Voxbyte Holding Limited (f`kaz li din kellha tithalla inattiva) u l-inkorporazzjoni ta` socjeta` għida mir-rikorrenti. Izda l-intimata SOS IT Business GmbH esigiet l-ammont ta` hmistax-il elf ewro (€15,000) għat-trasferiment tal-ishma li hi għandha fis-socjeta` Voxbyte Holding Limited (vide Dok. L), liema ammont huwa esagerat u mhux gustifikat jew ragonevoli, kif se jigi ppruvat fil-mori;

14. Illi b`rizultat ta` din l-inadempjenza da parti tal-intimata SOS IT Business GmbH, is-socjetajiet Voxbyte ma setghux jibdew in-negozju tagħhom bil-konsegwenza li, kif se jigi ppruvat waqt il-mori tal-kawza, minflok għamlu profitt kif kien gie previst (vide Dok. F), sofrew u qed isofru danni kemm finanzjarji kif ukoll danni għar-reputazzjoni tagħhom fil-konfront tal-klijenti u s-socji potenzjali tagħhom;

15. Illi c-cifra ta` hmistax-il elf ewro (€15,000) mitluba mill-intimata SOS IT Business GmbH għax-xiri tal-ishma li hi għandha fis-socjeta` Voxbyte Holdings Limited hija wahda esagerata u malizzjuza meta wiehed iqis il-valur nominali ta` dawn l-ishma u l-fatt li r-rikorrenti, kif se jigi ppruvat fil-mori tal-kawza, ġia investew ammont sostanzjali ta` flus fis-socjetajiet Voxbyte, liema socjetajiet tilfu u qed jitilfu flus tort tal-intimata SOS IT Business GmbH stess;

16. Illi l-agir abbużiv ta` SOS IT Business GmbH f`dan ir-rigward qed jagħti lok għal sitwazzjoni fejn l-affarijiet ta` Voxbyte Holdings Limited qed jitmexxew b`mod li huma, oppressivi, b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju, għar-rikorrenti qua membri jew b`mod li huma kontra l-interessi tal-membri in generali u, għalhekk hemm

bzonn ta` intervent rapidu minn din l-Onorabbli Qorti ai termini tal-Artiklu 402 tal-Kap. 386.

Ghaldaqstant, in vista tal-premess, ir-rikorrenti jitolbu bir-rispett lil din l-Onorabbli Qorti joghghobha, ai termini tal-Artiklu 402 tal-Kap. 386 tal-Ligijiet ta` Malta :

(1) Tiddikjara u tiddeciedi li l-agir ta` SOS IT Business GmbH, qua membru ta` Voxbyte Holding Limited, qed jaghti lok ghal sitwazzjoni fejn l-affarijiet ta` Voxbyte Holding Ltd qed jitmexxew b`mod li huma oppressivi, b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju, ghar-rikorrenti qua membri jew b`mod li huma kontra l-interessi tal-membri in generali.

(2) Tordna li l-ishma kollha li s-socjeta` intimata SOS IT Business GmbH tippossiedi fis-socjeta` Voxbyte Holding Limited u cioe` tliet mitt (300) sehem tal-valur nominali ta` ewro-il (€1) wiehed, jigu trasferiti lir-rikorrenti f`ishma ugwali bejniethom, u cioe` mitt (100) sehem ghal kull rikorrent, u dan ghall-prezz li din l-Onorabbli Qorti jidhrilha li huwa ekwu u gust fic-cirkostanzi.

(3) Tordna lis-socjeta` Voxbyte Holding Limited sabiex thejji u tiffirma dawk id-dokumenti kollha mehtiega u necessarji relattivament ghat-trasferiment imsemmi inkluz id-dokument mehtieg sabiex it-trasferiment imsemmi jigi accettat u rregistrat fir-Registru tal-Kumpaniji.

(4) Tordna lir-Registratur tal-Kumpaniji sabiex jaghmel dak kollu li huwa mehtieg u necessarju sabiex it-trasferiment imsemmi jigi accettat u rregistrat fir-Registru tal-Kumpaniji.

(5) Tordna lis-socjeta` SOS IT Business GmbH sabiex tiffirma kull dokument li jista` jkun mehtieg u necessarju ghall-istess trasferiment.

(6) Tordna li jittiehdu dawk il-mizuri provvizorji kollha necessarji sabiex jimminimizzaw it-telf u d-danni li attwalment qed issofri Voxbyte Holding Limited, u b`konsegwenza s-socjetajiet sussidjarji taghha wkoll, b`rizultat tal-agir u l-inadempjenza tal-intimata SOS IT Business GmbH.

U dan kollu taht dawk it-termini, pattijiet u kondizzjonijiet l-ohra kollha li din l-Onorabbli Qorti jidhrilha xierqa u opportuni fic-cirkostanzi.

Bl-ispejjez kontra s-socjeta` intimata SOS IT Business GmbH.

Rat il-lista tax-xhieda u l-elenku ta` dokumenti esebiti mar-rikors.

Rat ir-risposta tar-Registratur tal-Kumpaniji prezentata fis-6 ta` Gunju 2016 li taqra hekk :-

Illi in kwantu ghall-merti fattwali tal-proceduri odjerni, partikolarment in kwantu ghall-fatt jekk il-kumpanija in kwistjoni timmeritax li jigi applikat ir-rimedju mitlub minnha fir-rikors promotur taht l-Artiklu 402 tal-Att dwar il-Kumpaniji l-esponent Registratur tal-Kumpaniji jirrimetti ruhu ghad-decizjoni ta` din l-Onorabbli Qorti peress li hu mhuwiex edott ghal kollox mill-fatti kollha kif iddikjarati mill-atturi.

Illi l-konvenut ihoss li l-uniku interess tieghu f`din il-kawza ghandu jikkoncerna dak li ghandu x`jaqsam mal-operat tieghu bhala Registratur tal-Kumpaniji, kif mitlub mil-ligi, partikolarment fejn jikkoncerna r-registrazzjoni ta` dokumenti li jkunu mehtiega li jigu kkonsenjati jew notifikati lilu ghar-registrazzjoni skont xi wahda mid-dispozizzjonijiet tal-Att dwar il-Kumpaniji.

Illi f`dan il-kaz, ir-Registratur ihoss li ma kellux ikun wiehed mil-legittimi kontraditturi fil-proceduri odjerni. Dan meta wiehed jikkonsidra l-fatt li jidher bic-car li l-bazi ta` dan il-kaz huwa dizgwid intern u personali bejn il-partijiet komponenti tal-kumpanija.

Illi ghaldaqstant l-esponent jixtieq jissolleva li lest li joqghod ghal kull decizjoni jew ordni li din l-Onorabbli Qorti jidhrilha xierqa u opportuni li taghti fic-cirkostanzi partikolari ta` dan il-kaz.

Illi l-konvenut m`ghandux jinzamm responsabbli ghall-ebda spejjez gudizzjarji konnessi ma` dan il-kaz.

Rat illi l-intimati SOS IT Business GmbH (minn issa `l quddiem tissejjah “**SOS IT**”) u Voxbyte Holding Limited (minn issa `l quddiem tissejjah “**Voxbyte**”) kienu debitament notifikati skont il-ligi, baqghu ma pprezentawx risposta.

Semghet ix-xiehda tar-rikorrent fl-udjenza tat-22 ta` Mejju 2017.

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

Rat l-atti l-ohra tal-kawza.

II. Provi

1. Xiehda

Ir-rikorrent ikkonferma l-kontenut tar-rikors promotur, kif ukoll id-dokumenti li kienu esebiti.

Stqarr illi minn mindu kienet iffurmata, il-kumpannija Voxbyte Holding Limited ma ghamlet l-ebda attivita` kummercjali ghaliex is-sistema li kellha tigi fornita minn SOS IT baqghet ma gietx fornita skont kif kien miftiehem bejn l-azzjonisti. Voxbyte spiccat imblukkata bla ma tista` taghmel xejn.

Spjega li SOS IT kellha tizviluppa sistema partikolari ta` information technology.

Qal illi Voxbyte nkorriet spejjez biex giet iffurmata u sabiex tibqa` tezisti, liema spejjez kienu ta` madwar EUR 10,000 u kienu jikkonsistu fit-thejjija ta` *annual returns* u *book keeping*. SOS IT ma kkontribwietx ghal dawn l-ispejjez.

Stqarr illi sabiex jibdew l-attivitajiet kummercjali tal-kumpannija, kien mehtieg li SOS IT tmur barra mill-kumpannija peress li ma kienx gust illi din tibbenefika mill-attivitata ta` Voxbyte.

Qal li SOS IT kienet interpellata diversi drabi b`ittri, telefonati u emails sabiex toqghod mal-obbligi taghha. Kienet ukoll kontattata mill-avukat tieghu. Min-naha taghha, SOS IT baqghet ma wegbitx.

Kompla jghid illi huma ghamlu proposta lil SOS IT sabiex tbiegh l-ishma taghha. Din wiegbet illi riedet EUR 15,000 taghhom. Huma deherilhom li l-ammont kien esagerat billi Voxbyte kienet socjeta` li baqghet ma operatx u kull ma hallset kien il-valur nominali tal-ishma. Il-konsegwenza ta` dan kollu kien illi Voxbyte baqghet imblokkata.

Stqarr illi l-bejgh tal-ishma kien propost wara li SOS IT baqghet ma pprovdietx is-sistema skont il-ftehim ta` bejn l-azzjonisti sahansitra minkejja li ghamlulha *deadline*.

In segwitu minkejja kull ftehim li kien hemm qabel, SOS IT riedet li tithallas rata ferm gholja sabiex taghmel is-sistema bil-prezz jithallas minn qabel.

Ghalhekk saret din il-kawza.

2. Dokumenti

Kienu prezentati bhala prova dawn id-dokumenti :

Dok A sa Dok A2 :

Taghrif dwar Voxbyte mir-Registru tal-Kumpanniji.

Dok B :

Dokument iffirmit mir-rikorrenti u SOS IT li juri l-istruttura ta` Voxbyte.

Dok C :

Dettalji tas-socjeta` Voxbyte Management Ltd mir-Registru tal-Kumpanniji.

Dok D :

Dettalji tas-socjeta` Voxbyte IT Development Limited mir-Registru tal-Kumpanniji.

Dok E :

Dettalji tas-socjeta` Voxbyte Voice Services Ltd mir-Registru tal-Kumpanniji.

Dok F :

Dokument dwar profit previst min-negozju.

Dok G :

Shareholders` agreement u zewg emails b`dokumenti annessi li juru x` kien il-ftehim ta` bejn ir-rikorrenti u SOS IT dwar ir-responsabilitajiet kummercjali individwali taghhom.

Dok H :

Korrispondenza, inkluz ittri legali fejn SOS IT kienet interpellata sabiex tipprovdi *s-software* skont il-ftehim u sabiex toqghod mal-obbligi taghha bhala membru ta` Voxbyte.

Dok I :

Risposta ta` SOS IT ghall-ittra fid-dok H fejn talbet li tithallas sabiex tipprovdi *s-software* lil Voxbyte.

Dok J :

Zewg avvizi ta` zewg laqghat generali straordinarji ta` Voxbyte bl-agenda tkun l-inadempjenza ta` SOS IT, flimkien ma` minuti tal-istess.

Dok K :

Ittra legali fejn ir-rikorrenti joffru li jixtru l-ishma ta` SOS IT fil-kumpannija Voxbyte.

Dok L :

Risposta ta` SOS IT ghal Dok K fejn SOS IT talbet il-hlas ta` EUR 15,000 bhala prezz tal-bejgh tal-ishma taghha fis-socjeta` Voxbyte.

III. L-Art 402 tal-Kap 386

Ir-rikorrenti qeghdin iressqu t-talbiet taghhom abbazi tal-**Art 402 tal-Kap 386**.

Il-Qorti sejra taghmel riferenza ghal dawk mis-subartikoli tal-Art 402 li tqis rilevanti ghall-istanza tal-lum –

(1) Kull membru ta' kumpannija li jilmenta li l-affarijiet tal-kumpannija jkunu tmexxew jew qed jitmexxew jew aktarx jitmexxew b'mod li, jew li xi att jew ommissjoni tal-kumpannija kienu jew huma jew x'aktarx se jkunu, oppressivi b'mod mhux gust diskriminatorji kontra, jew b'mod mhux gust ta' pregudizzju, ghal membru jew membri jew b'mod li jkunu kontra l-interessi tal-membri in generali, jista' jaghmel rikors lill-qorti ghal ordni taht dan l-artikolu.

...

(3) Jekk dwar rikors maghmul skond is-subartikolu (1) ... il-qorti tkun tal-fehma li l-ilment ikun bazat sewwa u li jkun gust u ekwu li hekk taghmel, il-qorti tista' taghmel ordni taht dawk il-kondizzjonijiet li jidhrilha xierqa -

(a) li jirregola t-tmexxija ta' l-affarijiet tal-kumpannija fil-futur ; jew

(b) jirrestringi jew jipprojbixxi l-ghemil ta' xi att propost ; jew

(c) jehtieg lill-kumpannija li taghmel xi att li r-rikorrent ikun ilmenta li kienet naqset li taghmel ; jew

(d) jipprovi għax-xiri ta' l-azzjonijiet ta' xi membri tal-kumpannija minn membri oħra tal-kumpannija jew mill-kumpannija nnifisha u, f'kaz ta' xiri mill-kumpannija, għat-tnaqqis li jkun mehtieg fil-kapital azzjonarju mahrug tal-kumpannija ; jew

(e) jordna lill-kumpannija li tibda, tiddefendi, tkompli jew ma tkompli procedimenti tal-qorti, jew jawtorizza lil membru jew membri tal-kumpannija li jibdeu, jiddefendu, ikompli jew ma jkomplu procedimenti tal-qorti f'isem u għan-nom tal-kumpannija ; jew

(f) jipprovi għall-hlas ta' kumpens minn dik il-persuna li tista' tkun instabet responsabbli mill-qorti għal telf jew danni li jkunu ggarrbu minhabba att jew nuqqas li dwaru jkun sar ilment lill-persuna li tkun garrbet dak it-telf jew danni ; jew

(g) ixolji l-kumpannija u jipprovi għall-istralc konsegwenzjali tagħha.

(4) Meta jsir ordni għax-xoljiment ta' kumpannija skond is-subartikolu (3)(g), il-kumpannija għandha titqies li tkun xoljiet fid-data meta jkun sar l-ordni u d-disposizzjonijiet tas-Sub-Titoli I u III tat-Titolu II tat-Taqsima V ta' dan l-Att li jirregolaw l-istralc ta' kumpanniji għandhom japplikaw.

(5) Ordni magħmul taht dan l-artikolu jista' jehtieg lil kumpannija biex ma tagħmilx xi emenda, jew li tagħmel emenda mehtiega, fil-memorandum jew fl-istatut tagħha.

Għalkemm id-dicitura tal-Art 402(1) ittiehdet testwalment minn disposizzjoni simili li tirrizulta fil-Companies Act ta' New Zealand, tajjeb jinghad illi l-ligi ta' New Zealand segwiet l-izvilupp legislattiv fir-Renju Unit. Fir-Renju Unit, kien hemm l-ewwel il-Companies Act 1985 (Sec 459). Imbagħad fi zminijiet aktar ricenti kienet hemm il-Companies Act 2006 [Sec 994(1)]. Fil-fatt Sec 459 thassar għal kollox mill-Companies Act 1985 u dahal ezatt kif kien fl-Art 994(1) tal-Companies Act 2006.

Fil-pag 485 ta' l-ktieb **Company Law** (Fourth Edition – 2016 – OUP) **Brenda Hannigan** tghid :-

“Where the court is satisfied that a petition under s. 994 is well founded, it may make such order as it thinks fit for giving relief in respect of matters complained of [s 996(2)]”

Sabiex tinghata ordni skont kif previst fis-subartikoli (3), (4) u (5) ta` l-Art 402, hija tassattiva l-prova tal-att li minnu qeghdin jilmentaw ir-rikorrenti.

Dan ifisser illi jekk abbazi tal-provi akkwiziti l-qorti tkun sodisfatta li jirrizulta dak previst fis-subartikolu (1), allura tghaddi mbaghad biex taghti l-ordni skont is-subartikoli l-ohra.

Jekk il-prova tkun insodisfacjenti ghaliex ma jkunx irrizulta dak previst mis-subartikolu (1), allura l-qorti ghandha tieqaf hemm, u ma ghandhiex tapplika dak previst mis-subartikoli l-ohra.

Ghalhekk il-prova tas-sussistenza legali u fattwali ta` dak li jipprovdi s-subartikolu (1) huwa pregudizzjali sabiex il-qorti taghti konsiderazzjoni lit-talbiet l-ohra tar-rikorrenti.

IV. Il-prova

Fil-Pag 970 ta` Principles of Maltese Company Law (MUP – 2007) Andrew Muscat ighid illi fuq ir-rikorrenti jinsab il-piz tal-prova li l-att jew omissjoni jaqa` fl-ambitu tas-subartikolu (1).

Ighid –

*This wording (tal-subartikolu 1) clearly suggests that the member **need only prove one effect** of the conduct, act or omission, that is, that such conduct, act or omission, has been, is or is likely to be “oppressive” or “unfairly discriminatory” or “unfairly prejudicial” (to a member or members) or contrary to interests (of the members as a whole). (enfasi u sottolinear tal-qorti)*

Fis-sentenza li ta` din il-Qorti diversament presjeduta tat-30 ta` Jannar 2008 fil-kawza “**Cutajar pro et noe et vs S.C. & Company Limited et**” inghad hekk –

*Illi **l-prova biex tirnexxi dina l-azzjoni tispetta lir-rikorrenti** (enfasi u sottolinear ta` din il-qorti) li ressqu dina l-azzjoni. Huma jridu jippruvaw li (a) l-affarijiet tal-kumpanija jkunu tmexxew jew qed jitmexxew jew aktarx jitmexxew b`mod li... (b) jew li xi att jew omissjoni tal-kumpanija kienu jew huma jew x`aktarx se jkunu, oppressivi b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju, ghal membru jew membri jew b`mod li jkunu kontra l-interessi tal-membri in general.*

Il-ligi taghna ma taghtix spjegazzjoni ta` x`inhu oppressiv b`mod mhux gust diskriminatorji kontra, jew b`mod mhux gust ta` pregudizzju. Kull kaz ghalhekk irid jigi trattat u deciz fuq il-mertu tieghu proprju, u dana kaz b`kaz. L-iskop tal-ligi hu biex il-Qorti tkun tista` tintervjoni f`dawh il-kazijiet fejn hemm bzonn li jinghata rimedju minhabba unfair dealing fejn jigi pruvat li kien hemm azzjonijiet jew omissjonijiet li ma kienux gusti u li kienu ta` pregudizzju jew li l-affarijiet tal-kumpanija mhux qed jitmexxew sew.

Fil-pag 492 ta` **Company Law** (op. cit.) **Brenda Hannigan** tghid :-

“Whether the company`s affairs are being or have been conducted in a manner which is unfairly prejudicial to the petitioner`s interest is an objective, not a subjective, matter. The prejudice must be real, rather than merely technical or trivial, and the petitioner does not have to show that the persons controlling the company have acted deliberately in bad faith or with a conscious intent to treat him unfairly.

The conduct complained of must be prejudicial in the sense of causing prejudice or harm to the relevant interest of the member (usually, but not limited to financial damage) and also unfairly so (usually connoting some breach of company law or the constitution but not limited to that) and it is not sufficient if the conduct satisfies only one of these tests.” [enfasi u sottolinear ta` din il-qorti].

V. **Il-legittimu kontradittur**

Fil-“**Principles of Maltese Company Law**” (op. cit.) **Andrew Muscat** jitratta l-kwistjoni ta` kontra min tista` tigi istitwita azzjoni ta` din ix-xorta.

Fil-pag 995 tal-ktieb ighid hekk :-

The Companies Act does not specify the person or persons against whom an action under article 402 is to be brought. It does well not to do so. The reason is that the choice of the defendant or defendants depends on the facts of the case and on the type of relief sought.

... the persons responsible for the conduct complained of would typically vary from the current or past majority shareholder to the managing director or the controlling directors acting on behalf of company. Control may also be vested in a shadow director, a provisional administrator, a liquidator, an official receiver and even the pledgee of shares in the company, who, in terms of the pledge agreement, may exercise the shareholder's voting rights or appoints directors on the board.

Moreover, as will be noted in the following pages, the forms of relief that may be granted by the court are considerably wide-ranging; a court order could be issued against a number of persons, typically the company itself and one or more shareholders. In Joseph Calleja vs Vincent Calleja, an article 402 was filed only against one of the shareholders. The company itself was not a party. The defendant pleaded that the company itself were wrongly instituted, as the action had to be filed against the company and not against himself as a member. The Court, in a judgement in parte, considered article 402 to provide a flexible and equitable remedy and agreed with the applicant's submissions that an article 402 action had to be instituted against the person or persons who were allegedly responsible for the wrongdoing and that the court's order need not in all cases be issued against the company itself. The Court remarked that as the applicant's allegations of wrongdoing were directed towards the defendant, it was clear that the defendant was a proper party to the proceedings. It also stated that the fact that the action was not also filed against the company did not nullify the proceedings.

... Given the fundamental principle of Maltese procedural law that no person can be bound by a court's decision or judgement unless he is a party to the relative proceedings, it is important for the complainant to carefully identify the person or persons against whom the action is to be filed.

Daqstant ghall-fini ta` dak li nghad ir-Registratur tal-Kumpanniji fir-risposta tieghu.

VI. Gurisprudenza

Fis-sentenza li tat il-Qorti ta` Ghawdex (Gurisdizzjoni Superjuri) fl-4 ta` Frar 2009 fil-kawza “**Ellis vs Ellis**” inghad hekk –

Jibda biex jinghad li dan il-provediment jista' jigi nvokat mill-membri kollha, u mhux biss minn membri minoritarji u m'hemmx dubju li d-diskrezzjoni u l-poteri moghtija lill-qorti f'dan il-kuntest huma wesghin. Minn dan il-provediment hu evidenti li :

(a) *Dan il-provediment japplika wkoll f'kaz ta' att jew ommissjoni izolata ;*

(b) *Ir-rimedju jista' jinghata kemm ghal dak li jkun gara fil-passat u wkoll xi att propost li jsir fil-futur ;*

(c) *L-ilment jrid ikun fuq it-tmexxija tal-affarijiet tal-kumpannija jew fuq att jew ommissjoni tal-kumpannija.*

Fis-sentenza taghha tad-9 ta` Marzu 2007 fil-kawza “**Vella et vs Vella Brothers Ltd et**”, il-Qorti tal-Appell qalet hekk –

... l-Artikolu 402 ta' l-Att dwar il-kumpaniji jaghti diskrezzjoni pjuttost wiesa' lill-Qrati u dan ghalix dawn il-provedimenti ghandhom l-ghan li jissalvagwardjaw u jiprotegu lill-azzjonisti ta' socjeta' kummercjali, partikolarment lil dawk li huma minoritarji u li ghalhekk qeghdin fl-impossibilita' li jirregolaw il-mod li bih tkun qed titmexxa s-socjeta' li fiha huma jkollhom interess ...

*... din id-disposizzjoni, li hija bbazata fuq l-Art.459 tal-Companies Act (1985) Ingliza, hija ispirata fuq principji ta' ekwita' aktar milli minn drittijiet strettament legalistici biex ikun jista' jigi moghti rimedju. Dak li hu necessarju hu li l-azzjonista jipprova li minhabba l-gestjoni tas-socjeta' partikolari hu qed isofri, jew ukoll jista' jsofri, pregudizzju ta' natura oppressiva, ingusta jew diskriminatorja. Tali gestjoni tista' tirreferi sempliciment ghal xi att specifiku jew xi ommissjoni tal-kumpanija. Il-pregudizzju jista' jirreferi ghall-azzjonist li qed jipromwovi l-proceduri, ghal xi azzjonist iehor jew ghall-interess in generali ta' l-azzjonisti. Ma hemmx ghalfejn li huwa jipprova li huwa zgur ser isofri xi pregudizzju fil-futur. Tali prova tista' ssir fuq bazi ragjonevoli ta' possibilita' (“**Vincent Monreal et v. Lino Delia noe**” deciza mill- Prim'Awla tal-Qorti Civili fit-13 ta' Mejju, 1999). Infatti gie deciz mill-Qrati Inglizi fil-kawza in re **Bovey Hotel Ventures Ltd** [(1983) B.C.L.C. 290] li ‘the Court will not give a list of situations when this remedy may be resorted to however one principle remains clear. A shareholder may make use of this article when his shareholding in the*

company has been seriously diminished at least seriously jeopardized by reason of a course of conduct or the part of those who have the de facto control of the company, which has been unfair to the member concerned”.

... *Fid-decizjoni O’Neill v Phillips* moghtija mill-House of Lords fl-20 ta’ Mejju 1999, gie ritenut illi l-legislatur ried illi biex jinghata rimedju taht l-artikolu jigi kkunsidrat il-kriterju ta’ dak li huwa ‘fair’. Izda Lord Hoffman izid ighid li - “Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used ... The requirement that prejudice must be suffered as a member should not be too narrowly or technically construed.

Fid-decizjoni In Re Bovey Hotel Ventures Ltd. (1983) Slade J ighid dwar ‘unfair prejudice’ –

The test for unfairness must, I think, be an objective, not a subjective, one. In other words it is not necessary for the petitioner to show that the persons who have de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith ; the test, I think is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner’s interests.”

Fis-sentenza “Monreal et vs Delia noe” (op. cit.) inghad –

Dawn il-provedimenti huma ta’ salvagwardja u ta’ protezzjoni ghall-azzjonisti ta’ socjeta` kummercjali, b’mod partikolari ghal dawk li huma minoritarji. Ir-rimedji li johorgu minn dawn il-provedimenti huma moghtija lil kull azzjonist ta’ socjeta` kummercjali. Kull azzjonist, anke jekk hu minoritarju, ta’ socjeta` kummercjali, anke jekk hi pubblika, jista’ jitlob li jinghataw l-ordnijiet kollha necessarji u opportuni, f’kaz li jirnexxielu jipprova illi minhabba l-gestjoni tal-istess socjeta` huwa qed isofri jew ukoll jista’ jsofri xi pregudizzju ta’ natura oppressiva, ingusta jew diskriminatorja. Tali gestjoni tista’ tirreferi semplicement ghal xi att specifiku jew xi omissjoni tal-kumpanija. Il-pregudizzju jista’ jirreferi ghall-azzjonist li qed jippromuovi l-proceduri, ghal xi azzjonist iehor jew ghall-interessi in generali tal-azzjonisti. In vista ta’ dan kollu jista’ jinghad li hu bizzejjed li l-azzjonista jipprova li huwa qed isofri jew eventwalment jista’ jsofri xi pregudizzju minhabba xi agir tas-socjeta` li taghha huwa jippossjedi xi ishma. Ma hemmx ghalfejn li huwa jipprova li huwa zgur li ser isofri xi pregudizzju fil-futur. Tali prova tista’ ssir fuq bazi ragjonevoli ta’ probabbilita`. Inoltre, skond dak li hemm provdut fis-subartikolu (3) tal-istess artikolu 402, il-Qorti tista’ tippocedi biex taghmel kull ordni necessarja u opportuna skond dawn il-

provedimenti, jekk jirrizulta li l-ilment tal-azzjonista hu sewwa bbazat u jekk il-Qorti thoss li huwa ekwu u gust li taghmel.

Fis-sentenza taghha tal-31 ta` Jannar 2003 fil-kawza “**Ellul vs Ellul pro et noe**”, il-Qorti tal-Appell qalet hekk –

... *Fil-ligi Ingliza (ara Art 459 tal-Companies Act, 1985) jinstab rimedju simili li hu maghruf bhala “The Unfair Prejudice Remedy”. Il-Qorti ta’ l-Appell Ingliza stabbiliet fil-kaz “in Re Saul D. Harrison & Sons plc ([1995] 1BCLC 14)” il-linji ta’ gwida dwar kif kellu jkun l-operat biex ikun jista’ jigi kkwalifikat bhala, “unfairly prejudicial” (fit-test tal-Ligi Maltija din il-frazi hi tradotta “b’mod mhux gust ta’ pregudizzju”). Wiehed kellu, fl-ewwel lok, jara jekk dak l-operat kienx jew le skond l-istatut tal-kumpanija. Izda fl-applikazzjoni tal-imsemmija dispozizzjoni – ispirata fuq principji ta’ ekwita` aktar milli minn drittijiet strettament legali – il-Qorti tiehu in konsiderazzjoni l-aspettattivi legittimi (“legitimate expectations”) li r-rikorrent jista’ jkollu u li sikwiet ikunu ferm aktar wiesgha mid-drittijiet strettament legali li johorgu mill-istatut tas-socjeta`. Dawn l-aspettattivi legittimi jitwiieldu minn xi relazzjonijiet personali partikolari bejn l-azzjonisti. Fil-kaz Ebrahimi vs Westbourne Galleries Ltd. ([1973] AC 360) Lord Wilberforce elenka numru ta’ sitwazzjonijiet fejn dan ir-rimedju jista’ jinghata, sitwazzjonijiet dawn li x’aktarx jinstabu f’ kumpaniji zghar privati li ta’ sikwiet jissejhu “quasi partnerhsips”, fosthom is-segwentanti :-*

“(i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company ;

(ii) an agreement, or understanding, that all, or some (for there may be “sleeping members”) of the shareholders shall participate in the conduct of the business ;

(iii) restriction upon the transfer of the members’ interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere”.

Fid-decizjoni ta` din il-Qorti diversament presjeduta tas-7 ta` Ottubru 2016 fil-kawza **Av. Dr. Pio M. Valletta noe vs Jeno Torocsik et** inghad illi sabiex ikun hemm *unfair prejudice*, (a) it-test irid ikun wiehed oggettiv; (b) *M’hemmx htiega li l-attur jipprova l-mala fede* ; (c) *M’hemmx htiega li l-attur jipprova li kien hemm intenzjoni li tikkawza pregudizzju* ; (d) *Mhux gust ma jfissirx bilfors li l-agir irid ikun illegali* ; u (e) *L-agir irid ikollu effett negattiv fuq l-attur bhala azzjonist.*

Fid-decizjoni **Re Coroin Ltd** – 2012 – All ER (d) 58(Feb) – EWHC 129 (Ch) – moghtija mic-Chancery Division tal-Ingilterra – David Richards J. qal hekk :-

“630 Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member ... The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section.

631 Where the acts complained of have no adverse financial consequences, it may be more difficult to establish relevant prejudice. This may particularly be the case where the acts or omissions are breaches of duty owed to the company rather than to shareholders individually. If it is said that the directors or some of them had been in breach of duty to the company but no loss to the company has resulted, the company would not have a claim against those directors. It may therefore be difficult for a shareholder to show that nonetheless as a member he has suffered prejudice ...”

VII. Dottrina

Fil-pag. 464 ta' **Ferrar's Company Law** – Third Edition - jinghad hekk –

... The position will vary greatly from the small private companies, commonly called quasi-partnerships, to public companies of considerable size. As a quasi-partnership, the company will usually have been formed or continued on the basis of a personal relationship involving mutual confidence. There may be an agreement or understanding that all or some of the shareholders are to participate in the conduct of the business. Restrictions on the transfer of shares will be the rule rather than the exception. The individuals involved may also have made relatively substantial capital contributions to the company. Shareholders in such companies will be a small close-knit group, actively involved in many instances in the daytoday operations and financially and personally committed to the company. Here the scope for legitimate expectations beyond their strict legal rights is obviously greatest.

However, as Lord Wilberforce stressed in Ebrahimi v Westbourne Galleries Ltd, the case for giving effect to equitable considerations must be

made in each instance and it is not sufficient simply to assert that the company is small or private, for in many cases the basis of the relationship will be adequately and exhaustively laid down in the articles. If it is so defined by the articles or, for example, by the articles supplemented by a shareholders' agreement, then there is little room for finding further legitimate expectations beyond those outlined in the documents.

The interests of shareholders in larger private and public companies, on the other hand, are likely to be quite different from those of shareholders in quasi-partnerships and considerably more restricted. In these larger companies there is usually no underlying personal relationship, employment is rarely an issue and the shareholders are more interested in such matters as dividend yield and capital appreciation than involvement in the day-to-day running of the company. If they become dissatisfied, especially if it is a public company, they can sell their shares and withdraw from the company. Here the members rarely have expectations beyond their strict legal rights as provided by the articles.

“That is not to say that s.459 does not apply to larger private companies and public companies for the section is clearly not limited to quasi-partnerships. The point is that it may be harder to establish conduct which is unfairly prejudicial to the interests of the members in such companies.

Fil-pag. 409 ta` **Cases and Materials on Company Law** – Fifth Edition – **Hicks and Goo** – ighidu :-

In the early days of S.459, it was thought that the petitioner must have unfairly suffered prejudice to an interest as a member only (and not eg. as a director). This requirement has never been relaxed in that the Court is prepared to recognise that members may have different interests having regard to their rights, expectations and obligations (re a company (No 00477 of 1986 [1986 BCLC 376; O'Neill v Phillips. [1999] 1 WLR 1092). This is particularly so in quasi-partnership cases where a minority is excluded from management. But where the articles make detailed provision for any departing members to sell their shares at a fair price, the position may be different ...Section 459 has proved to be a powerful weapon for minority shareholders, particularly in the case of quasi-partnerships. In such companies, minorities who are excluded from management participation or who unfairly suffer loss as a result of wrongdoing by directors or majority shareholders may get relief under the section.

Fil-pag. 449 ta` **Farrar's Company Law** - Fourth Edition - jinghad illi –

A member's interests are not necessarily limited, therefore, to his strict legal rights under the Articles and the Companies' Act but can extend also to legitimate expectations as to the conduct of the company's affairs arising from the nature of the company and the agreements and understandings between the parties.

Fil-pag. 506 ta' **Company Law** (op. cit.) **Brenda Hannigan** tghid :-

*"Mere deadlock between the parties who have lost trust and confidence in one another is insufficient then to merit relief under CA 2006, s 994, **in the absence of prejudicial conduct.**" [enfasi u sottolinar ta' din il-qorti].*

Fil-pag. 711 ta' **Boyle & Birds' Company Law** (Eight Edition – 2011 – Jordans) l-awturi jghidu :-

"The term "unfair prejudice" whether analysed as a `standard` or a `concept` is a relatively more objective one which is concerned with running the company in a way that is clearly unfair in its consequences to the complaining shareholder, even if the respondents can claim to have acted in the best of good faith."

Fil-pag. 691-692 ta' l-ktieb **Gower and Davies - Principles of Modern Company Law** (Eighth Edition – 2008 – Sweet & Maxwell) jinghad illi :-

"... the courts recognised that sec 994 protects expectations and not just rights. Borrowing from public law, it is sometimes said that the section protects the "legitimate expectations" of the petitioner, though more recently the courts have preferred the private law phrase "equitable considerations" [Qorti tal-Appell Ingliza fil-kawza "Saul D Harrison & Sons plc" – 1995 – ghall-uzu tal-frazi "legitimate expectations" ; House of Lords – "O'Neill vs Phillips" – 1999 – ghall-uzu tal-frazi "equitable considerations"] Whatever the language used, the difficult issue is to distinguish those expectations of the petitioner which are to be classified as "legitimate" or which considerations are to fall within the category of "equitable considerations" and so as deserving of legal recognition and protection from those expectations which the petitioner may harbour as a matter of fact but which the courts will not protect."

Fil-pag 569-570 tal-ktieb **Company Law** (26th Edition – 2009/2010 – OUP) l-awturi **Mayson, French & Ryan** ighidu hekk b`riferenza ghad-decizjoni ta` Re Saul D Harrison and Sons, citata aktar kmieni :-

“The words `unfairly prejudicial` are general words and they should be applied flexibly to meet the circumstances of the particular case ... The conduct [being complained of] must be both prejudicial [in the sense of causing prejudice or harm to the relevant interest) and also unfairly so; conduct may be unfair without being prejudicial or prejudicial without being unfair, and it is not sufficient if the conduct satisfies only one of these tests.”

Ikomplu billi jaghmlu riferenza ghal “O`Neill vs Phillips” (op. cit.) in partikolari dwar l-għazla li għamel il-Parlament Ingliz –

“Parlament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief ... it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. Although fairness is a notion which can be applied to all kinds of activities its content will depend upon the context in which it is being used.”

VIII. Risultanzi dwar l-ewwel talba

Skont ix-xieħda ta` Torsten Haake, l-intimata SOS IT kienet responsabbli li tizviluppa u tipprovdi *software* essenzjali u vitali sabiex in-negozju tal-kumpanniji sussidjarji ta` Voxbyte jkun jista` jipprocedi. Haake u Lutz Wiese flimkien mad-defunt Jurgen Kurt Haake kellhom ikunu responsabbli għall-gestjoni, *marketing* u bejgh tal-*voicemail software* li kellha tigi zviluppatha minn SOS IT.

Il-Qorti ezaminat Dok G li huwa l-ftehim bejn l-azzjonisti li kien iffirmit fil-5 ta` Mejju 2013. Mid-dokument ma jirrizultax x`kienet ir-responsabbilita` ta` SOS IT versu Voxbyte.

Kien hemm dokument iehor li jiffirma parti minn email skambjata bejn uhud mir-rikorrenti ma` Sven Oliver Sackers, dan tal-ahhar -

rapprezentant ta` SOS IT. Id-dokument jittratta dwar *business plans* tal-kumpannija sussidjarja Voxbyte Voice Services Limited.

Jinghad specifikament illi :-

“Sven Oliver Sakers is specifically responsible for development and further advancement in IT and the associated internal and external personnel and partner companies.

... 2.5.1 The man for everything digital

Sven Oliver Sackers

Data protection officer, developer and IT Consultant, Self employed with 13 years of professional experience. This included taking responsibility in a company environment, such as the 24-hour service for PC users.

Projects completed in the past few years:

- *accounting software for cigarette machines across Germany*
- *industrial solution for the professional equestrian sport “Primus”*
- *industrial solution for waste management (ERP)*
- *organisational solution axxyOffice (CRM & DMS)*
- *marketing module for horses for sale (CMS)*
- *data protection concepts for companies with up to 19,000 employees`*
- *ITIL-compliant service management*
- *single point of contact between the company and the supplier*

Passionate visionary” (fol 65- 66)

Minn konsiderazzjoni tad-dokument intitolat “*Matrix of Responsibilities for VOXBYTE Companies*” (fol 91 sa 92) jirrizulta illi IT Business GmbH kienet responsabbli ghal :

operative acquisition, developing presentation documents, external appearance of the company, product information, direct supervision of the business area; appointing managers, appointing other staff depending on the business area; salaries, bonuses and rewards depending on the business area; annual discussions depending on the business area; staff development depending on the business area; office organization; IT, strategic company development software development; sales; operational company development software development, sales; new markets/services; visions; u PR work/company presentation.

L-istess kumpanija kellha d-dritt tiddeciedi dwar :

strategic acquisition; marketing; developing presentation documents; external appearance of the company; product information; appointing managers; appointing other staff depending on the business area; salaries, bonuses and rewards depending on the business areal ORGA between the areas of the company; Professional development advertising; marketing; IT; employment law; contractual law; coordinating shareholders; signature matrix; liquidity planning/control; annual plan development; budget list; liquidity planning; controlling; definition of measures; strategic company development software development; sales; operational company development software development, u sales. (fol 91 -92).

Jirrizulta li SOS IT qatt ma pprovdiet is-*software* u naqset milli tikkontribwixxi bhala azzjonista ta` Voxbyte, bil-konsegwenza li Voxbyte ma setghet qatt tibda topera.

In-nuqqasijiet ta` SOS IT jirrizultaw mill-korrispondenza skambjata ma` SOS IT u ma` Alpha Business Limited li kienet qed tagixxi bhala fiducjarja ta` l-istess SOS IT.

Fl-ittra tal-11 ta` Mejju 2014 (a fol 102 et seq) jinghad specifikament illi :-

“Regarding the fact that the uncompleted software solution for the VOXBYTE voice message tool is causing an unnecessary and significant delay to the further progress of our activities in terms of sales, customer service, turnover and company result, we wish to request once more in writing that you fulfill your promises of 8 May 2014. In the jointly agreed responsibilities matrix, SOS IT Business GmbH also took on the area of IT Development.”

L-ittra tkompli b`lista ta` dak li kellu jigi supplit bhala *software*.

Irrizulta wkoll li ssejhet laqgħa generali straordinarja fid-19 ta` Gunju 2014 fejn kienu trattati r-riperkussjonijiet li kienet għaddejja minnhom Voxbyte minhabba n-nuqqas ta` *software* li baqa` ma kienx fornit minn SOS IT. (fol 112-113).

Addirittura wara li kienet interpellata sabiex tforni s-*software* b`ittra legali tal-1 ta` Ottubru 2014 (fol 114), SOS IT ippretendiet li tithallas EUR 90 kull siegħa għal dawk is-servizzi, minkejja l-ftehim a fol 115-116.

In segwitu għal dan, kienet imsejha laqgħa straordinarja ohra fl-20 ta` Ottubru 2014 fejn għal darb`ohra kienu senjalati l-inadempjenzi ta` SOS IT (a fol 117 u fol 118 et seq).

Fil-minuti ta` l-laqgħa, jingħad :-

“ ... TH (Torsten Haake) stated that the company cannot move forward at the moment because it does not have the software to be able to do so and this is because SOS IT Business GmbH did not provide the software that it bound itself to provide under the Shareholders` Agreement. Therefore, it is not a question of the Company requiring funding. The shareholders` agreement states that SOS IT Business GmbH has to provide the software however SOS IT Business GmbH is not compliant.

4. TH stated that because of the default on the part of SOS IT Business GmbH, the Company,

besides not being able to move forward, is also incurring penalties with the relevant authorities here in Malta, such as the Registry of Companies, which is causing problems for the other shareholders;

5. TH stated that he wants to obtain the required software and safeguard the company. He stated that he is not keen on putting the company into liquidation. One of the reasons for this is that the company's future looks very promising

6. TH expressed the wish to acquire AB's shares in the Company. This view was shared by IVG (Ian Vella Galea proxy for Jurgen Haake u Mr Lutz Wiese)

7. IVG stated that if AB was acquired by the other shareholders of the Company, the company can start to negotiate with new suppliers for the software required."

Sabiex jigu evitati l-ispejjez ta' stralc ta' Voxbyte, kif ukoll il-formazzjoni ta' kumpannija gdida, saret talba sabiex l-ishma li SOS IT ghandha go Voxbyte jinbieghu lir-rikorrenti. Madanakollu SOS IT talbet hlas ta' EUR 15,000. Skont ir-rikorrenti l-prezz pretiz kien rifjutat ghaliex kien meqjus eccessiv (ara l-ittra tat-23 ta' Ottubru 2014 a fol 136, l-ittra b'risposta ta' SOS IT ta' l-10 ta' Novembru 2014 a fol 140).

Saret laqgħa generali ohra ta' Voxbyte fid-19 ta' Novembru 2014. Mill-minuti jirrizulta li kienet diskussa l-korrispondenza skambjata ma' SOS IT u nghataw ir-ragunijiet ghala kellu jkun rifjutat il-prezz pretiz minn SOS IT għat-trasferiment tal-ishma. Fost ir-ragunijiet indikati fid-dokument a fol 157 sa 158, jingħad :-

" In spite of repeated calls to do so, SOS has failed to deliver the software that it undertook to rework to the point of full market maturity. The demands have been put to SOS via practically all media, including in particular, two meetings in Bielefeld.

SOS assumed the task of IT developer in the responsibility matrix with all the associated rights and obligations.

In a move that has left us baffled, SOS has demanded a fee from its “own” company for the fulfillment of its contractual obligations.

With its conduct, SOS has caused grave economic damage and harmed the public reputation of VOXBYTE.

Nor is the damage done restricted to VOXBYTE alone, it has also affected the holdings` partner corporations along with its tied sales representatives and organizations. “

Il-Qorti hadet kont ta` dan kollu.

Tirrileva illi minn imkien mill-provi ma rrizulta li r-rikorrenti kellhom xi htija sabiex SOS IT ma qaghditx mar-responsabilitajiet taghha ghar-rigward tas-software. Ghall-Qorti, dan ifisser illi r-rikorrenti mexxew bl-azzjoni tal-lum *with clean hands*.

Bil-mod kif SOS IT gabet ruhha mhux daqstant mar-rikorrenti bhala azzjonisti izda ma` Voxbyte hija prattikament qatghet lilha stess barra minn Voxbyte ghaliex warrbet ghal kollox fil-genb l-obbligi taghha bhala membru ta` Voxbyte sabiex timbotta `l quddiem l-interessi taghha. Din l-imgieba hija serja fil-kuntest ta` azzjoni ta` din ix-xorta mhux biss ghaliex tohloq pregudizzju lill-membri l-ohra izda ghaliex toqot negattivament l-ghanijiet li ghalihom kienet kostitwita Voxbyte, propju dak li jittratta dwaru s-subartikolu (1) tal-Art 402.

Fil-kaz ta` **In Re Coroin Ltd** (op. cit.) David Richards J kien irrileva illi l-*unfair prejudice remedy* mhijiex diretta “*to the activities of shareholders amongst themselves*”. Fl-istess waqt, ikkondizzjona dan billi qal : “*unless those activities translate into acts or omissions of the company or the conduct of its affairs*”

Din il-Qorti ma tqisx il-kwistjoni li ghandha quddiemha bhala konflitt bejn azzjonisti fil-kwalita` jew fl-interess personali taghhom, izda kwistjoni fejn membru gab ruhu hazin mhux kontra l-interess generali tal-membri izda wkoll kontra l-interess tal-kumpannija.

Fis-socjeta` r-rwol ta` SOS IT kien illi tipprovdi s-software, haga din li ma ghamiltx. Ghax ma ghamiltx dan, Voxbyte ma setghetx twettaq l-ghanijiet taghha. Baqghet litteralment *at the starting line*. Voxbyte hija a *holding company* b`numru ta` sussidjarji li prattikament imexxu n-negozju. Sprovvista minn software, batew is-sussidjarji ; kien hemm effett *domino* fin-negattiv.

Fil-Pag 487 et seq ta` **Company Law** (op. cit.) **Brenda Hannigan** tghid hekk :-

... the courts do not adopt a technical or legalistic approach to what constitutes the affairs of the company but will look to the business realities. It is frequently stressed that the requirement for the conduct of "the affairs of the company" should be liberally construed ...

Billi rrizulta ppruvat ghas-sodisfazzjon taghha illi l-kondotta ta` SOS IT kienet *unfairly prejudicial* ghall-interess tal-membri in generali u ghall-kumpannija, il-Qorti qeghda tilqa` l-ewwel talba tar-rikorrenti.

IX. L-Art 402(3) tal-Kap 386

Ladarba sabet vjolazzjoni tal-Art 402(1), il-Qorti sejra tghaddi ghall-konsiderazzjoni ta` dak li jipprovdi s-subartikolu (3) tal-Art 402. Fil-fatt it-talbiet l-ohra tar-rikorrenti saru fil-kwadru ta` din id-disposizzjoni bid-diversi paragrafi taghha.

In primis, il-Qorti tirrileva illi d-disposizzjoni takkorda lill-Qorti diskrezzjoni wiesgha sabiex taghti dik l-ordni li tkun xierqa tenut kont tal-fatti u cirkostanzi tal-kaz (ara d-decizzjoni tal-Qorti tal-Appell tal-31 ta` Jannar 2003 fil-kawza "**Philomena Ellul vs Charles Ellul pro et noe et**"). Id-diskrezzjoni li ghandha l-Qorti hija talment wiesgha illi sahsitra tista` twarrab t-talbiet li jsiru mill-membri li jkun garrab *unfair prejudice* skont is-subartikolu (1) u taghmel ordnijiet diversi.

Fil-provvediment li tat din il-Qorti fl-1 ta` Awissu 2017 fil-kaz : **Calamatta Cuschieri Investment Services Limited et v. Pefaco International plc et** inghad hekk :-

“ ... kull wahda mid-disposizzjonijiet tal-Art 402(3) hija sottoposta ghad-diskrezzjoni tal-Qorti. Dan ikompli jfisser illi anke jekk issib li jissussisti dak li jghid l-Art 402(1), xejn ma jzomm lill-Qorti milli tapplika rimedju minflok iehor...”

Fil-Pag. 285 ta` **“Company Law – Theory, Structure and Operation”** (OUP – 1998) **Brian Cheffins** ighid illi Sec 459 (illum Art 94 tal-Companies Act 2006) *provides a Judge with broad powers to grant to a successful applicant whatever remedy is appropriate.*

Ir-rikorrenti mhux jitolbu x-xoljiment ta` Voxbyte.

Fid-deposizzjoni tieghu, Torsten Haake jqiegħed fil-ġenb din il-possibilita` illi hija kontemplata fil-paragrafu (g) tas-subartikolu (3) għal zewg raġunijiet : fl-ewwel lok minhabba li procedura ta` xoljiment u stralc konsegwenti tinvolvi spejjez u fit-tieni lok għaliex jikkontendi illi għalkemm il-holding company ma operatx dan ma kienx għaliex l-ghanijiet u n-bnegozju tagħha mhuwiex fattibbli izda unikament minhabba l-inadempjenzi ta` SOS IT.

Kull sitwazzjoni għandha l-isfond tagħha.

Il-Qorti mhijiex tara illi xoljiment u stralc ta` Voxbyte tkun l-ahjar ordni li tista` tagħti. Tgħid dan għal tliet raġunijiet. Fl-ewwel lok għaliex ix-xoljiment u l-istralc jibqa` dejjem *a measure of last resort*; incidentalment il-legislatur qiegħed din il-possibilita` bhala l-ahhar fil-lista (ara l-paragrafu (g) tas-subartikolu (3)). Fit-tieni lok, għaliex fil-kaz tal-lum, b`ordni ta` xoljiment u stralc, tkun SOS IT li tiehu vantagg għaliex ikun ifisser li bil-fatt illi kienet inadempjenti gabet magħha l-waqa` ta` Voxbyte, haga li m`għandhiex tkun, tenut kont illi rrizulta ppruvat illi r-rikorrenti nkorrew l-aktar spejjez biex Voxbyte taqbad in-negozju, liema sforzi kienu stultifikati minn SOS IT. Fit-tielet lok, għaliex irrizulta mill-provi li għaliex Voxbyte hija a holding company, li għandha kumpanniji ohra li huma sussidjarji tagħha, eventweali xoljiment u stralc tal-holding company igib miegħu domino effect negattiv

hafna fuq is-setup u n-negozju tal-kumpanniji sussidjarji. Ghal dawn ir-ragunijiet, xoljiment u stralc ma jkunx gust u ekwu.

Ghalkemm din mizura li min-natura taghha tibqa` radikali, il-bejgh u l-akkwist tal-ishma fl-ambitu tal-paragrafu (d) tas-subartikolu (3) fil-kaz in ezami huwa perkors anqas accidentat biex jirrimedja ghas-sitwazzjoni li sabu ruhhom fiha r-rikorrenti u Voxbyte minn dak trattat fil-paragrafu precedenti. Il-Qorti ma tarax alternattivi ohra fic-cirkostanzi.

Fil-Pag 727-728 ta` **Boyle & Birds' Company Law** (op. cit.) jinghad hekk –

*It is not surprising that in the case of most successful petitions the remedy sought by the petitioners, and granted by the court, is that of purchase of the minority's shares by the majority. As a solution to intra-corporate disputes in small private companies this is till the most attractive choice among the remedial solutions offered by s.996. The Court of Appeal in "**Grace v. Biagola**" [2006. 2. BCLC 70, at 96-97] explained the policy considerations which guide the court in choosing an order for the purchase of the minority's shares :*

"In most cases, the usual order to make will be the one requiring the respondents to buy out the petitioning shareholder at a price fixed by the court. This is normally the most appropriate order to deal with the inter-corporate disputes involving small private companies ... The reasons for making such an order are in most cases obvious. It will free the petitioner from the company and enable him to extract his share of the business and assets in return for foregoing any future right to dividends. The company and its business will be preserved for the benefit of the respondent shareholders, free from his claims and the possibility of future difficulties between shareholders. In most cases of serious prejudice and conflict between shareholders, it is unlikely that any regime of safeguards which the court can impose will be as effective to preserve the peace and safeguard the rights of the minority".

Fil-Pag 103 ta` **Principles of Maltese Company Law** (op. cit.) **Andrew Muscat** ighid :-

This radical order has a number of advantages : (i) that the complainant can realise the value of his interest in the company without having the company wound up ; (ii) that the purchasers will receive full value for the price paid for the shares ; and (iii) that the complainant on the one hand, and the company and the majority shareholder on the other, can make a

“clean break”. This remedy should ideally be used sparingly and should be resorted to only when other remedies are inapplicable or bound to be ineffective to redress the wrongdoing.

Il-Qorti ssib illi dan il-bran ighodd ferm għall-kaz tal-lum tenut kont tal-fatt li llum il-gurnata ma tezisti l-ebda relazzjoni ta` fiducja bejn l-azzjonisti. Din is-socjeta` għandha tinghata l-opportunita` li tibda topera u tirnexxi fil-għanijiet tagħha u mhux tithalla inattiva minhabba l-inadempjenza ta` azzjonist.

Il-Qorti sejra tilqa` t-tieni talba kif dedotta abbazi ta` ekwita`.

Issa ladarba se jkun ordnat lil SOS IT illi tbiegh l-ishma tagħha, irid ikun stabbilit *the full value* tal-ishma.

Fit-tieni talba, ir-rikorrenti jhallu fl-ahjar gudizzju tal-Qorti illi tistabilixxi l-prezz li jkun l-aktar ekwu u gust fic-cirkostanzi.

Provvediment

Għar-ragunijiet kollha premessi, il-Qorti qeghda tipprovdi dwar it-talbiet tar-rikorrenti billi –

Tiddikjara illi jirrizultaw sodisfatti r-rekwiziti tal-Art 402(1) tal-Kap 386 tal-Ligijiet ta` Malta. Għalhekk qeghda tilqa` l-ewwel (1) talba tar-rikorrenti kif dedotta.

Tastjeni milli tiehu konjizzjoni ulterjuri tas-sitt (6) talba tar-rikorrenti.

Riferibbilment għat-talbiet l-oħra tar-rikorrenti, u bl-applikazzjoni tal-Art 402(3) tal-Kap 386 :-

1) Tordna l-bejgh ta` l-ishma kollha li l-intimata SOS IT Business GmbH (HRB 121122) ghandha fil-kumpannija Voxbyte Holding Limited (C60711).

Ghal dan l-iskop tordna li ma jsir l-ebda tibdil fil-*memorandum* u fl-*articles of association* tal-kumpannija Voxbyte Holding Limited (C60711), sakemm isir il-bejgh u t-trasferiment ta` dawn l-ishma.

Jekk isir bdil fil-*memorandum* u fl-*articles of association* tal-kumpannija Voxbyte Holding Limited (C60711) sakemm isir il-bejgh u t-trasferiment ta` dawn l-ishma, dak il-bdil ikun null u bla effett.

2) Tordna lir-rikorrenti sabiex indaqs bejniethom it-tlieta jixtru u jakkwistaw l-ishma kollha li l-intimata SOS IT Business GmbH (HRB 121122) ghandha fil-kumpannija Voxbyte Holding Limited (C60711).

3) Tordna lir-rikorrenti sabiex – sa zmien sebat (7) ijiem mil-lum - jipprezentaw fir-Registru ta` din il-Qorti kopja ufficjali u aggornata tal-*memorandum* u tal-*articles of association* tal-kumpannija Voxbyte Holding Limited (C60711).

4) Tordna lir-rikorrenti sabiex – sa zmien tliet (3) xhur mil-lum – jipprezentaw fir-Registru ta` din il-Qorti il-*full audited accounts* tal-kumpannija Voxbyte Holding Limited (C60711) aggornati sal-lum, kif ukoll il-*management accounts* taghha sal-lum.

5) Tahtar lill-Awditur Michael Spiteri Bailey bhala perit tekniku sabiex - abbazi tal-assjem tal-atti ta` din il-kawza li taghhom qeghda tordna li ghandu jkollu access shih – inkluzi l-atti msemmija fil-paragrafu tlieta (3) u erbgha (4) ta` dan il-provvediment - jistabilixxi l-prezz ta` kull sehem tal-kumpannija Voxbyte Holding Limited (C60711) fid-data tal-lum.

Tordna lill-perit tekniku sabiex sa zmien hames (5) xhur mil-lum jipprezenta relazzjoni guramentata fejn jistabilixxi l-prezz ta` kull sehem tal-kumpannija Voxbyte Holding Limited (C60711).

6) Tordna lill-intimata SOS IT Business GmbH (HRB 121122) sabiex tbiegh u tittrasferixxi l-ishma kollha li ghandha fil-

kumpanija Voxbyte Holding Limited (C60711) lit-tliet rikorrenti f`ghadd indaqs bejniethom ghall-prezz li jigi stabbilit mill-perit tekniku.

7) Tordna lir-rikorrenti sabiex jixtru u jakkwistaw minghand l-intimata SOS IT Business GmbH (HRB 121122) kif fuq inghad l-ishma kollha li din ghandha fil-kumpanija Voxbyte Holding Limited (C60711) ghall-prezz li jigi stabbilit mill-perit tekniku.

8) Tordna illi l-bejgh, l-akkwist u t-trasferiment ta` l-ishma in kwistjoni ghandu jsir fi zmien xaghrejn mid-data tal-presentata tar-relazzjoni guramentata tal-perit tekniku.

Ghal dan il-ghan, tordna lir-rikorrenti u lill-intimata SOS IT Business GmbH (HRB 121122) sabiex jiffirmaw kull dokument mehtieg ghat-trasferiment tal-ishma.

Ghall-fini tal-proceduri kollha relatati mal-bejgh, akkwist u trasferiment tal-ishma, tahtar lill-Av. Dr. Anna Mifsud Bonnici bhala kuratur ghall-eventwali kontumaci ta` kull att li jkun mehtieg ghall-finijiet u effetti kollha tal-ligi.

9) Tordna illi fl-eventwalita` li l-intimata SOS IT Business GmbH (HRB 121122) ma tidhirx ghall-bejgh u t-trasferiment tal-ishma, il-prezz tal-ishma li jrid jithallas mir-rikorrenti ghandu jigi depozitat mill-Av. Dr. Anna Mifsud Bonnici fi zmien ghaxart (10) ijiem mid-data tal-bejgh u trasferiment tal-ishma. Mill-ammont depozitat, ghandhom jitnaqqsu (a) l-ispejjez tad-depozitu, (b) kwalunkwe taxxa li tkun dovuta mill-intimata SOS IT Business GmbH (HRB 121122) u (c) l-ispejjez ta` din il-kawza.

10) Tordna lir-Registratur tal-Kumpaniji sabiex jaghmel dak kollu li huwa mehtieg halli t-trasferiment tal-ishma jigi accettat u registrat. Inltre ghandu jassikura l-osservanza ta` l-ordinijiet kollha li qeghdin jinghataw bil-provvediment tal-lum fl-ambitu tas-setghat u d-dmirijiet li r-Registratur tal-Kumpaniji ghandu skont il-ligi.

11) Tordna lill-partijiet jew minnhom sabiex fil-kaz illi jkun sar il-bejgh, l-akkwist u t-trasferiment tal-ishma kif fuq inghad, jassikuraw li tkun prezentata nota fir-registru ta` din il-Qorti fejn jigi dikjarat li sar il-bejgh, l-akkwist u t-trasferiment tal-ishma u d-data tal-istess.

12) Tordna illi l-provvediment tal-lum fl-assjem tieghu ghandu jipprevali fuq kull disposizzjoni kontenuta fil-*memorandum* u fl-*articles of association* tal-kumpannija Voxbyte Holding Limited (C60711).

Tordna lill-intimata SOS IT Business GmbH (HRB 121122) sabiex thallas l-ispejjez kollha ta` din il-kawza, inkluz l-ispejjez tal-perit tekniku u tal-kuratur.

Onor. Joseph Zammit McKeon
Imhalled