MALTA

QORTI TAL-MAGISTRATI (GHAWDEX) GURISDIZZJONI SUPERJURI

MAGISTRAT DR. ANTONIO MICALLEF TRIGONA

Seduta tas-17 ta' Marzu, 2008

Rikors Numru. 4/1998/3

Paul Dimech bhala azzjonist, u l-Perit Arkitett Inginier Civili Josph P.Dimech bhala Direttur ghan-nom u n-rapprezentanza ta' 'Umiblock Malta Limited'

vs

Enzo Leone u Mary Rose Agius Leone f'isimhom u qua azzjonisti, u Mary Rose Agius Leone qua Direttrici tal-istess socjeta' 'Umiblock Malta Limited'

Il-Qorti,

Ir-rikors intavolat jaqra:

"Illi l-esponenti Paul Dimech huwa azzjonist fil-kumpanija Umiblock Malta Limited fin-nofs ta' l-ishma mahruga fil-waqt illi l-intimati ghandhom in-nofs l-iehor; fil-waqt illi l-

esponenti l-AIC Joseph Dimech u l-intimata Mary Rose Agius Leone huma z-zewg diretturi ta' din il-kumpanija;

Illi l-esponenti qeghdin jinzammu milli jaccedu jew b'xi mod ikollhom kontroll fuq il-mod kif qieghed jigi gestit in-negozju tal-kumpanija stante illi minkejja diversi promessi da parti tal-intimati u minkejja sforzi ripetuti da parti tal-legali tal-esponenti, l-intimati baqghu ma kkonsenjawx id-dokumenti relattivi ghat-tmexxija tan-negozju lill-esponenti, u qeghdin jiggestixxu dan l-istess negozju bi pregudizzju ghad-drittijiet tal-kumpanija nnifisha;

Illi dan kollu qieghed ikun ta' pregudizzju kontinwu u dejjem aktar gravi ghall-esponenti illi qeghdin jigu imcahhda mill-partecipazzjoni illi tixraq fil-gestjoni tan-negozju tal-kumpanija u fil-profitti li dan suppost jiggenera;

Illi recentement l-esponenti irnexxilhom jakkwistaw prova illi n-negozju tal-kumpanija qieghed jitmexxa b'mod illegali illi zgur sejjer ikompli jzid il-pregudizzju ghad-dannu tal-esponenti;

Illi dan il-mod kif qeghdha titmexxa l-kumpanija huwa oppressiv u mhux gust; diskriminatorju kontra l-esponenti u ta' pregudizzju ghalihom a tenur tal-Artikolu 402 tal-Att XXV.1995 u dan ghar-ragunijiet fuq esposti;

Ghaldaqstant l-esponenti jitolbu bir-rispett illi din l-Onorabbli Qorti joghgobha tohrog ordni a tenur tal-Artikolu 402 tal-Att XXV.1995 sabiex:

a. tirregola t-tmexxija tal-affarijiet tal-kumpanija fil-futur;
b. tirrestringi u tipprojbixxi lill-intimati milli jkomplu jbieghu jew jutilizzaw il-fondi u makkinarju tal-kumpanija hlief taht il-kontroll ta' din l-istess Qorti;
c. taccerta li n-negozju tal-kumpanija qieghed jitmexxa b'mod strettament konformi mal-ligi;
d. jxolji l-kumpanija u tipprovdi ghall-stralc konsegwenzjali taghha;
e. tipprovdi ghall-hlas ta' kumpens mill-intimati lill-esponenti tad-danni u telf kollu u danni kollha li l-esponenti garrbu u ghadhom igarrbu minhabba n-

nuqqasijiet, abbuzi u difetti da parti tal-intimati fit-tmexxija tal-kumpanija".

Illi r-risposta tal-intimati hi:

Illi l-intimata Mary Rose Agius Leone m'hix direttrici tas-socjeta' Umiblock Malta Limited u ghalhekk ir-rikors imsemmi in kwantu dirett kontra taghha fil-kapacita' imsemmija huwa irritu, null u minghajr ebda effett legali;

Illi minghajr pregudizzju ghall-premess hemm in-nullita' tal-istess rikors in kwantu s-socjeta' imsemmija ma tistax topera iktar u wisq inqas jista' xi hadd mid-diretturi jidher ghaliha. Dan ghaliex billi ma kkonfermatx ruhha mad-disposizzjoni tal-Artikolu 428 tal-Att XXV tal-1995 huma applikabbli d-disposizzjonijiet tas-subartikolu 8 tal-istess artikolu li jipprovdi li s-socjeta dahlet ipso jure fi stat ta' xoljiment. Kien proprju minhabba n-nuqqas da parti tar-rikorrenti li ma setghux jigu mharsa d-disposizzjonijiet u jigu segwiti l-proceduri hemm tassattivament ordnati;

Illi n-nuqqas ta' qbil bejn il-partijiet jirrigwarda principalment l-appartenenza tal-makkinarju li gie mixtri mill-esponenti u bi flushom, liema makkinarju r-rikorrenti minghajr ebda gustifikazzjoni kwalsijasi qeghdin jippretendu li jappartjeni lis-socjeta' Umiblock Malta Limited;

Illi l-esponenti ghandhom provi dokumentati dwar il-provenjenza tal-istess makkinarju u l-allegazzjonijiet tar-rikorrenti huma intizi biss sabiex jostakolaw lill-esponenti fix-xoghol taghhom;

Illi l-esponenti qatt ma rrifjutaw lir-rikorrenti l-partecipazzjoni fit-tmexxija ta' din il-kumpanija, ghall-kuntrarju kienu proprju r-rikorrenti li qatt ma wrew hegga u interess fit-tmexxija taghha minkejja l-istediniet tal-esponenti. L-unika haga li ghamlu r-rikorrenti kien li wara li nqala' l-inkwiet bejniethom huma talbu lir-rikorrenti l-kotba

tal-kumpanija liema kotba l-intimati kienu pronti kkonsenjawlhom".

Ikkonsidrat:

L-artikolu tal-Kap 386 invokat fil-proceduri istitwiti mir-rikorrenti hu l-Artikolu 402. Kull artikolu iehor mic-citat kap, applikabbli o meno, hu konsegwenzjali ghal jekk fil-kaz in dizamina l-Qorti jidrilha li ghandha tezercita d-diskrezzjoni vasta taghha taht l-imsemmi artikolu u taghti rimedju ghall-aggravji vantati mir-rikorrenti. L-artikolu invokat jkkontempla dritt ta' azzjoni lill- azzjonista ta' kumpanija li jitlob rimedju fil-konfront ta' atti jew ommissjonijiet tal-kumpanija li allegatament ikunu jew aktarx ser ikunu oppressivi b'mod mhux gust, diskriminatorji kontra jew b'mod mhux gust ta' pregudizzju, ghall-membru/i jew b'xi mod li jkunu kontra l-interessi tal-membri tal-kumpanija in generali. Dan hu spjegat ahjar fit-test bl-ingliz tas-subartikolu (i) tieghu li jghid illi: "any member of a company who complains that the affairs of the company have been or are being or are likely to be conducted in a manner that is, or that any act or omission of the company have been or are or are likely to be, oppressive, unfairly discriminatory against, or unfairly prejudicial, to a member or members or in a manner that is contrary to the interests of a member as a whole, may make an application to the court for an order under this article". L-implikazzjonijiet huma allura li l-artikolu hu "ta' salvagwardja u ta' protezzjoni ghall-azzjonisti ta' socjeta' kummercjali b'mod partikolari ghal dawk li huma minoritarji [b'dan li] r-rimedji li johorgu minn dawn il-provedimenti huma moghtija lil kull azzjonist ta' socjeta' kummercjali, [b'daqstant ukoll] li kull azzjonist, anka jekk hu minoritarju, ta' socjeta' kummercjali, anki jekk hi pubblika, jista' jitlob li jinghataw l-ordnijiet kollha necessarji u opportuni, f'kaz li jirnexxilu 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 li tista' tirreferi semplicement ghal xi att specifiku jew ghal xi

ommissjoni tal-kumpanija [u] li l-pregudizzju jista jirreferi ghall-azzjonist li qed jippromuovi l-proceduri, [jew] xi azzjonist iehor, jew ghall-interessi in generali tal-azzjonisti” - *Vincent Monreal et vs Lino Delia noe PA 13 ta’ Marzu 1999* – liema sentenza kompliet spjegat 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 [u] 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”.

Illi ghandu ghalhekk ikun wisq car li l-azzjoni hija esperibbli minn azzjonist diretta kontra l-kumpanija li fiha r-rikorrent ghandu jipprova, bizzejjed fuq bazi tal-probabbli, li qed isofri jew ukoll jista’ jsofri xi pregudizzju ta’ natura oppressiva, ingusta jew diskriminatorja.

Illi dan il-punt fil-kaz in dizamina jittraxxendi l-akkademiku fid-dawl tal-ewwel eccezzjoni tal-intimati u dak ssottomess minnhom fin-nota tal-osservazzjonijiet. Tabilhaqq isostnu f’din in-nota li l-kawza ma gietx proposta kontra n-nies idonji. Fil-kuntest ta’ din l-asserzjoni l-Qorti ser tinqeda minn silta li ser tirriproduci mis-sentenza tal-*Prim Aula deciza fit-8 ta’ Lulju 2004 fl-ismijiet Joseph Calleja pro et noe et vs Vincent Calleja,* mehuda mill-ktieb ‘*Minority Shareholders, Law, Practice and Procedure’ ta’ Victor Joffe,* li fil-fehma tal-Qorti tirrispekkja korrettement l-posizzjoni guridika fil-ligi taghna. Jintqal li: “the petitioner will be the member seeking relief, and the company of which he is a member and in relation to whose affairs he alleges unfairly prejudicial conduct will be made a respondent. Additionally, every member of the company (other than the petitioner) whose interests might be effected by the relief sought should be joined as a respondent, whether or not allegations of unfairly prejudicial conduct are made against him: in the case of a small private company, this will usually mean that every member ought to be joined as a respondent to the petition. The category of potential respondents (other than the company) is not, however, limited to members of the company. In an appropriate case relief may be sought against a non- or former member…” Tradott ghall-kaz in

meritu dak li jispikka bhala irregolari hi l-presenza fost r-rikorrenti tal-Perit Arkitett u Inginier Civili Joseph P.Dimech li qed jagixxi bhala rikorrent in vesti ta’ direttur ghan-nom u in raprezentanza tal-kumpanija ‘Umiblock Malta Limited’; altrimenti l-azzjoni hi istitwita sewwa rrispettivament mill-fatt jekk Mary Rose Agius Leone hiex jew le direttur fil-kumpanija, kwsitjoni din, li l-Qorti tqies marginali tant li m’ghandhiex effett fuq l-locus standi tal-kumpanija ‘Umiblock’ f’dawn il-proceduri. Kwindi, fil-fehma tal-Qorti, l-azzjoni treggi u m’hix nulla.

Illi mill-fatti esposti, fattur li jispikka inkontrovertibbli, hu li l-kumpanija ma setghetx tkompli topera minhabba li giet nieqsa l-fiducja reciproka bejn l-azzjonisti taghha tant li l-intimat Enzo Leone irrizenja minn direttur u r-rikorrenti kienu gja tilfu kull interess li jkomplu huma t-tmexxija tal-kumpanija. Apparti dan hu improbabbli kemm r-rikorrenti setghux f’dan l-istadju jkomplu joperaw meta l-materjal kien jingab minn ‘La Sana Casa’, socjeta’ kostitwita l-Italia, li kellha l-esklusivita’ tipprokura dan il-materjal u li taghha l-intmat Enzo Leone kellhu l-kontroll.

Illi bl-Artikolu 402 il-Qorti ghandha diskrezzjoni li jekk hi “of the opinion that the complaint is well founded and that it is just and equitable to do so…make such order, under such terms as it thinks fit:
(a) regulating the conduct of the company’s affairs in the future; 0R
(b) restricting or forbidding the carrying out of any proposed act; 0R
(c) requiring the company to do an act which the applicant has complained it has omitted to do; 0R
(d) providing for the purchase of the shares of any members of the company by other members of the company or by the company itself and, in the case of a purchase by the company, for the reduction accordingly of the company’s issued share capital; OR
(e) directing the company to institute, defend, continue or discontinue court proceedings, or authorising a member or members of the company to institute, defend,

continue or discontinue court proceedings in the name and on behalf of the company; 0R

(f) providing for the payment of compensation by such person as may have been found by the court responsible for loss or damage suffered as a result of the act or omission complained of, to the person suffering the said loss or damage; 0R

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

Illi fil-kaz in dizamina bosta huma l-pregudizzjali li r-rikorrenti jakkampaw bhala “unfairly prejudicial conduct” perpetrat kontra taghhom. U anka jekk l-intimat jirrispingi vigorosament kull allegazzjoni in propositu, jibqa l-fatt li f’azzjoni bhal din hu bizzejjed li r-rikorrenti jippruvaw fuq bazi tal-probabbli l-‘unfairly prejudicial conduct’ ossija l-pregudizzju. Il-vertenza relattiva l-proprjeta’ u l-uzu tal-makkinarju (tagliamuro MTM 2000), l-allegata misapproprjazzjoni, u l-allegata konkorrenza slejali huma fatturi in meritu, li fid-dawl li l-kumpanija waqfet topera u mhux possibbli li terga’ tigi operattiva, jikkostitwixxu, fuq bazi tal-probabbli, l-‘unfairly prejudicial conduct’ .

Ghaldaqstant hi tal-fehma li fic-cirkostanzi l-uniku rimedju plawsibbli li l-Qorti tara li tista tadotta u dak li tordna l-likwidazzjoni u x-xoljiment tal-kumpanija billi tinnomina stralcjarju li qeghdha fil-fatt tinnominah fil-persuna tal-Avukat Grazio Mercieca.

In kwantu ghall-ispejjez ghandhom jibqghu bla taxxa bejn il-partijiet b’dan pero’ li biex jaghmlu tajjeb ghall-ispejjez tal-istralcjaru huma jew min minnhom ghandhom jiddepositaw fir-registru ta’ din il-Qorti favur l-istess stralcjaru u liberament minnu zbankabbli, sitt elef (6,000) euro.

< Sentenza Finali >

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