



MALTA

QORTI CIVILI

PRIM' AWLA

ONOR. IMHALLEF

JOSEPH ZAMMIT MC KEON

Seduta tas-26 ta' Frar, 2015

Rikors Numru. 1222/2012

Jane Mizzi

(karta ta' l-identita` numru 267858M)

kontra

JAJ Company Limited (C22257) u b`digriet tad-9 ta` Mejju 2013 gew nominati l-Avukat Dr Martin Fenech LL.D. u l-Prokuratur Legali Alison Wadge bhala kuraturi deputati sabiex dawn jirrapprezentaw il-kumpannija intimata JAJ Company Limited, u b`digriet tal-11 ta` Settembru 2013, gie nominat Dr. Simon Micallef Stafrace LL.D. bhala kuratur deputat in sostituzzjoni ta` Dr Martin Fenech LL.D.

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fis-7 ta' Dicembru 2012 li jaqra hekk :-

Illi r-rikorrenti hija azzjonista tas-socjeta` intimata u qed tipprezenta dan ir-rikors a tenur ta` l-Artikolu 214(2)(a)(ii) tal-Att dwar il-Kumpanniji bin-Numru XXV tal-1995 u fiha qieghdha tintalab il-likwidazzjoni minhabba insolvenza tas-socjeta` intimata ;

Illi l-kumpannija in kwistjoni kienet tigi gestita minn Alfred Mizzi, zewg ir-rikorrenti li kien l-uniku direttur taghha u li miet tragikament fis-26 ta` Mejju 2011 ;

Illi t-tfal ta` Alfred Mizzi rrinunzjaw ghall-wirt tieghu u l-esponenti, mart l-imsemmi Alfred Mizzi ma tistax tiehu hsieb il-kumpannija billi la taf is-suq u lanqas ma taf taghmel negozju ;

Illi inoltre wara li miet Alfred Mizzi bdew johorgu diversi kredituri u rrizulta li hemm hafna dejn u fil-fatt ittiehdu diversi sentenzi kontra l-kumpannija intimate JAJ Company Limited fosthom "Bilom Construction

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Limited vs JAJ Company Limited” Rikors Gur Nru 1141/2011 deciza fid-9 ta` Lulju 2012, “Bitmac (Works) Limited (C15559) vs JAJ Company Limited Rikors Gur Nru 1214/2011 deciza fit-28 ta` Gunju 2012, “Denfar Concrete Supplies Limited vs JAJ Company Limited” Rikors Gur Nru 1063/2011 deciza fil-15 ta` Gunju 2012, “Central Cement Limited (C6108) vs JAJ Company Limited Rikors Gur Nru 915/2011 deciza fis-7 ta` Mejju 2012, “Saliba Bros Limited vs JAJ Company Limited” Rikors Gur Nru 721/2011 deciza fis-26 ta` April 2012, f`liema sentenzi s-socjeta` intimata giet ikkundannata thallas diversi ammonti oltre l-imghax u l-ispejjez u dan ghar-ragunijiet kontenuti fl-imsemmija sentenzi ;

Illi din il-lista ma hijiex necessarjament lista shiha u/jew kompluta ;

Illi hemm ukoll diversi mandati eżekuttivi kontra l-istess socjeta` intimata, izda sfortunatament ma setghetx thallas l-ammonti dovuti ;

Illi l-kumpannija ma ghadhiex topera, ma ghandhiex haddiema u ma ghandhiex assi sufficjenti biex jissodisfaw dawn id-djun ;

Illi ghalhekk jirrizulta li s-socjeta` intimata ma tistax thallas id-djun taghha u dan a tenur tal-Artikolu 214(5)(b) tal-Att dwar il-Kumpanniji u barra minn dan, ghaddew iktar minn erbgha u ghoxrin (24) gimgha mill-esekuzzjoni tat-titoli eżekuttiv u ghalhekk is-socjeta` intimata mhijiex f`posizzjoni li thallas id-djun taghha u dan a tenur tal-Artikolu 214(5)(a) tal-Att dawr il-Kumpanniji ;

Illi ghaldaqstant u ghar-ragunijiet suesposti, ir-rikorrenti titlob bir-rispett lil din l-Onorabli Qorti sabiex :

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1. *Tiddikjara u tiddeciedi illi s-socjeta` intimata mhijiex f`qaghda li thallas id-djun taghha u ilha f`dan l-istat mill-bidu tas-sena 2011 u konsegwentement tordna x-xoljiment u l-istralc konsegwenzjali tal-istess socjeta` intimata a tenur tal-Artikolu 214(2)(a)(ii) tal-Att dwar il-Kumpanniji, Kap 386 tal-Ligijiet ta` Malta (Att Nru XXV tal-1995);*

2. *Taghti kull provvediment opportun sabiex jinhatar stralcjarju u jigi kondott l-istralc konsegwenzjali skond id-disposizzjonijiet tal-Att dwar il-Kumpanniji, Kap 386 tal-Ligijiet ta` Malta.*

Bl-ispejjez kontra l-intimata.

Rat in-nota b`dokument li pprezentaw il-kuraturi deputati fis-6 ta` Novembru 2013.

Rat ir-risposta li pprezentaw il-kuraturi deputati fis-6 ta` Novembru 2013 fejn iddikjaraw illi ma kienux edotti mill-fatti u ghalhekk kienu qeghdin jirriservaw id-dritt li jipprezentaw risposta motivata f`kaz u jekk jigu edotti mill-fatti.

Semghet ix-xiehda ta` Noel Mangion, Av. Alexia Aquilina, Brian Baldacchino u Av. Carl Grech fl-udjenza tat-18 ta` Frar 2014 u rat id-dokumenti li kienu prezentati fl-istess udjenza.

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Semghet ix-xiehda ta` Nicholas Agius, ta` Anatole Baldacchino u ta` l-PL Quintin Tanti fl-udjenza tal-25 ta` April 2014 u rat id-dokumenti li kienu prezentati fl-istess udjenza.

Semghet ix-xiehda ta` Gilbert Bugeja u tal-awditur Winston Magro fl-udjenza tat-23 ta` Gunju 2014 u rat id-dokumenti li kienu prezentati fl-istess udjenza.

Semghet ix-xiehda ta` r-rikorrenti u ta` Peter Sammut fl-udjenza tat-2 ta` Ottubru 2014 u rat id-dokumenti li kienu prezentati fl-istess udjenza.

Rat id-digriet moghti fl-istess udjenza fejn halliet il-kawza ghas-sentenza.

Rat l-atti tal-kawza.

Ikkunsidrat :

II. Provi

Noel Mangion – rapprezentant tad-Direttur Generali (Taxxi Interni) – xehed illi s-socjeta` intimata (minn issa `l quddiem tissejjah '**JAJ**') kellha pendenzi mad-Dipartiment tat-Taxxi Interni kemm ghar-rigward ta`

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kontribuzzjonijiet tas-sigurta` socjali, kemm ghar-rigward ghal taxxa tal-impjegati, kif ukoll ghar-rigward ta` taxxa taghha.

Ghar-rigward tat-taxxa u kontribuzzjonijiet tas-sigurta` socjali tal-haddiema, JAJ kellha taghti €158,851 sal-2009 (Dok CIR1). Fl-2008 kien sar mandat ta` sekwestru kontra s-socjeta` intimata li ghadu validu ghaliex mill-ftehim li kien sar bejn id-dipartiment u JAJ saru biss tliet hlasijiet. Il-ftehim skada f`Gunju 2013. Wara l-2009, JAJ ma baghtitx aktar dokumenti. L-uniku informazzjoni li kellu d-dipartiment kienu mill-FS3s li kienu jibghatu l-haddiema. Ma hemmx figuri finali dwar l-ammont dovut minn JAJ sakemm ma tibghatx id-dokumenti pendenti. Ghar-rigward tal-2010 u 2011, hemm indikat bil-highlighter isfar fuq Dok CIR2 l-ammonti dovuti minn JAJ bhala taxxa u kontribuzzjonijiet (i.e. €68,531.35). Dwar l-2012 u 2013, id-dipartiment ma kellux informazzjoni.

In kwantu jirrigwarda l-pendenzi ta` taxxa dovuti mis-socjeta` intimata, ix-xhud irrileva li l-ahhar return li baghtet JAJ kien ghas-sena ta` stima 2009. Wara dik is-sena, id-dipartiment ghamel stimi fl-assenza tal-presentata ta` dokumenti. Il-posizzjoni tidher fid-Dok CIR3. Fl-2008 it-taxxa dovuta kienet €15,404 waqt li fl-2009 kien dovut l-ammont ta` €9243.

Av. Alexia Aquilina – rappresentant tar-Registatur Qrati Civili u Tribunali – ipprezentat lista tal-mandati kawtelatorji u esekuttiv, oltre kontromandati, li saru kontra JAJ (Dok REG1).

Brian Baldacchino – rappresentant tal-HSBC Bank Malta plc – ipprezenta dawn id-dokumenti :-

Dok HSBC1 : dan juri self (013-029384-300) ; il-kapital dovut huwa ta` €70,850.35, flimkien ma` imghax ta` €13,705.46 u spejjez legali ta` €736.21 ;

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Dok HSBC2 : dan ukoll huwa loan facility (042-091660-200) ; il-kapital dovut huwa ta` €112,623.12 waqt li l-imghax kien ta` €11,577.04 ;

Dok HSBC3 : dan huwa self iehor (042-091660-301) ; il-kapital dovut huwa ta` €43,865.10 u l-imghax akkumulat huwa €8501.42 ;

Dok HSBC4 : dan huwa self iehor (042-091660-303) : il-kapital dovut huwa ta` €86,486.78 waqt li l-imghax akkumulat huwa ta` €16,297.43 ;

Dok HSBC5 : dan huwa kuntratt ta` kostituzzjoni ta` debitu li r-rikorrenti ffirmat bhala garanti ta` JAJ ;

Dok HSBC6 u 7 : dawn huma zewg *contingency liability guarantees* ghal €1747.03 u €1863.50 rispettivament.

Dok HSBC8 : zewg ittri ufficjali.

Ix-xhud ikkonferma li l-bank ma kienx ipprezenta mandati kontra s-socjeta` debitrice jew il-garanti.

Av. Carl Grech – rapprezentant ta` Central Cement Limited – xehed li fis-7 ta` Mejju 2012, Central Cement Limited hadet sentenza minn din il-Qorti diversament presjeduta fejn kienet kanonizata kreditur ta` JAJ fl-ammont ta` €33439.45 bl-imghax u bl-ispejjez (Dok CC1). Ipprezenta kopja tat-taxxa (Dok CC2) u kopja tal-mandat ta` sekwestru kawtelatorju li kien presentat kontra JAJ (Dok CC3). In segwitu bis-sahha tas-sentenza saret ipoteka generali kontra JAJ fil-15 ta` Jannar 2014 (Dok CC4 u CC5). Billi JAJ ma kenitx propjetarja ta` mmobbli, l-ipoteka baqghet generali.

Nicholas Agius xehed illi huwa kien impjegat bhala labourer u driver ma` JAJ. Billi kellu pendenzi ta` paga x`jithallas, huwa ghamel kawza fit-Tribunal Ghal Talbiet Zghar fl-ismijiet “Nicholas Agius vs JAJ Company Limited” li kienet deciza fis-17 ta` Frar 2012. L-ammont dovut kien €3,459.43 apparti l-imghax. Baqa` ma thallas xejn.

Anotole Baldacchino xehed li huwa kien l-accountant ta` JAJ. L-ahhar accounts li pprepara biex tagghom isir l-audit kienu tal-2008. L-audit kellu jsir minn Peter Sammut izda safejn jaf hu l-audit baqa` ma kienx maghluq. Stqarr illi fl-2008, JAJ kien diga` kellha problemi ta` likwidita` u kien issenjala dan il-fatt lid-direttur Alfred Mizzi. Dan miet fis-26 ta` Mejju 2011. Il-kumpannija kienet iddur kollha kemm hi mal-hidma ta` Alfred Mizzi. Miet hu, waqa` kollox.

PL Quentin Tanti – rappresentant tar-Registratur tal-Kumpanniji – xehed ipprezenta l-memorandum u l-articles of association ta` JAJ (Dok MFSA1)

Gilbert Bugeja xehed illi l-kumpannija Bilom Construction Limited hija kreditur ta` JAJ. Saret kawza kontra JAJ biex jigi rkuprat l-ammont dovut preceduta mill-presentata ta` mandat kawtelatorju. Il-kawza kienet dik bin-Nru 1141/2011 fl-ismijiet “Bilom Construction Limited vs JAJ Company Limited”. Kienet deciza fid-9 ta` Lulju 2012. JAJ kienet ordnata thallas lil Bilom is-somma ta` €54,968 bl-imghax u bl-ispejjez (Dok GB1). Fit-3 ta` Novembru 2011, Bilom kisbet il-hrug ta` mandat ta` inibizzjoni kontra JAJ (Dok GB2). Inoltre Bilom ipprezentat mandat ta` qbid kawtelatorju kontra JAJ (Nru. 161/2012) li bis-sahha tieghu inqabdu xi ingenji (Dok GB3).

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Winston Magro xehed illi huwa kien l-awditur ta' JAJ ghal perijodu ta' sena sal-2007. Ma kienx baqa' awditur ghaliex kien irtira bl-eta'. Meta hallieha hu, JAJ kienet ghadha fin-negozju. L-andament tax-xoghol taghha kien altalenanti. L-uniku direttur kien Alfred Mizzi ; il-kumpannija kienet hu u hadd aktar : *one and all* ; jaghmel kollox hu. Ipprezenta l-ahhar audited accounts li hejja hu u cioe' dawk ghas-sena li ghalqet fil-31 ta' Dicembru 2007 (Dok DM1).

Peter Sammut xehed illi huwa ghamel l-audit ta' JAJ ghas-sena li ghalqet fil-31 ta' Dicembru 2008. Ipprezenta r-report and financial statements tal-kumpannija ghall-2008 (Dok PS1). Il-qaghda finanzjarja tal-kumpannija kienet hazina hafna fis-sens li kien hemm hafna dejn. Huwa dahhal riserva fl-accounts.

Ir-rikorrenti xehdet illi r-ragel taghha Alfred Mizzi kien miet b'disgrazzja. Ta' JAJ Alfred Mizzi kien l-uniku direttur. Wara li miet saret direttur hi halli jkompli x-xoghol ghalkemm hi ma kienet taf xejn dwar il-kumpannija, lanqas jekk kenitx azzjonista taghha. Wara li saret hi direttur, sabet li kien hemm hafna kredituri u ghalhekk irrizenjat. Damet direttur ghal xi xhur biss. Kollox kien f'idejn zewgha ; ghaliha u safejn kienet taf hi kollox kien ward u zahar.

Ikkunsidrat :

III. Dokumenti

Diversi kienu d-dokumenti li kienu prezentati fil-kors tal-kawza. Il-Qorti sejra tirreferi ghal xi whud in partikolari, ghaliex fil-fehma taghha jindirizzaw preciz il-bazi tal-azzjoni tar-rikorrenti ; ghal ohrajn sejra taghmel riferenza b`mod generali.

1) **Id-dokumenti registrati tal-kumpannija**

Kien prezentat bhala **prova** minn rappresentant tar-Registratur tal-Kumpannija *an Extract from the Registered Documents* ta` JAJ (Dok MFSA1).

Minn dan id-dokument, jirrizultaw dawn **il-fatti** :-

1) JAJ kienet registrata fit-12 ta` Dicembru 1997 bin-Nru C22257.

2) Illum il-kumpannija m`ghandhiex diretturi. Bejn it-12 ta` Dicembru 1997 u s-26 ta` Mejju 2011 (data tal-mewt tieghu) l-uniku direttur kien Alfred Mizzi. Bejn il-21 ta` Gunju 2011 u t-3 ta` Ottubru 2011, ir-rikorrenti kienet direttur. Bejn l-24 ta` Frar 2010 u t-3 ta` Ottubru 2011, Jonathan Mizzi kien segretarju tal-kumpannija ; huwa kien issostitwixxa lil Charles Attard.

3) B`effett mill-24 ta` Frar 2010, l-azzjonisti tal-kumpannija kienu Alfred Mizzi (197,550 *Ordinary Shares*) ir-rikorrenti (2449 *Ordinary Shares*) u Jonathan Mizzi (1 *Ordinary Shares*).

4) Mill-*objects* tal-kumpannija jirrizulta li JAJ kienet tipproduci ghall-industrija tal-bini.

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5) L-*Authorised Share Capital* u l-*Issued Share Capital* tal-kumpannija kien ta` €465,874.60 *divided into 200,000 (two hundred thousand) Ordinary Shares ta` €2.329373 each.* L-*Issued Share Capital* huwa *fully paid up.*

6) L-ahhar *abridged financial statements* li dahlu ghand ir-Registratur tal-Kumpanniji fit-12 ta` Dicembru 2008 kienu dawk relattivi ghas-sena li ghalqet fil-31 ta` Dicembru 2007.

7) Qabel dawk jirrizultaw prezentati l-*abridged financial statements* ghas-snin li ghalqu bejn l-1998 u l-2006 (is-sentejn inkluzi).

2) **L-abridged financial statements ghas-sena 2007**

L-awditur kien Winston Magro. Skond il-*balance sheet*, JAJ kellha *total assets* ta` Lm 512,719 li minnhom Lm 229,863 kienu *debtors* u Lm 192,990 kienu *fixed assets*. Kelli *total equity* ta` Lm 95,953. U kellha *total liabilities* ta` Lm 416,766 ; minn dawn Lm 232,912 kienu *interest-bearing borrowings*.

3) **Mandat ta` Sekwestru Ezekuttiv Nru 2641/13**

Dan huwa Dok SEK1. Il-Mandat hareg wara talba ta` Nicholas Agius. Kien notifikat lir-Registratur tal-Qorti bhala sekwestratarju fit-28 ta` Novembru 2013 u lil JAJ fit-3 ta` Dicembru 2013 u cioe` wara l-presentata tar-rikors promotur.

4) **Mandat ta` Sekwestru Ezekuttiv Nru 1143/2011**

Dan huwa Dok SEK2. Il-Mandat hareg fit-23 ta` Awissu 2011 wara talba tal-Kummissarju tat-Taxxi Interni ghal sorte ta` €94,510. Is-sekwestratarji kienu notifikati fl-24 ta` Awissu 2011.

Ikkunsidrat :

IV. Risultanzi

1) Locus standi tar-rikorrenti

Skond l-ewwel talba, l-iskop dikjarat tar-rikorrenti huwa li titlob ix-xoljiment u stralc ta' JAJ abbazi tal-**Art 214(2)(a)(ii) tal-Kap 386**.

L-eligibilita` o meno tar-rikorrenti li ttenta l-azzjoni tal-lum hija stabbilita` bl-**Art 218 tal-Kap 386**.

Skond l-Art 218(1)(b), talba lill-Qorti fejn jintalab ix-xoljiment u l-istralc ta` kumpannija skond l-Art 214(2)(a) ghandu jsir b`rikors. Fost il-persuni li jistghu jipprezentaw ir-rikors hemm l-azzjonist. Irrizulta li r-rikorrenti hija azzjonista ; kwindi ghandha *locus standi* biex tittenta l-azzjoni tal-lum.

2) L-Art 214(2)(a)(ii) tal-Kap 386

Skond id-disposizzjoni li fuqha qeghda tistrieħ specificament ir-rikorrenti, *kumpannija tista' xxolji u tkun stralcjata mill-qorti ... jekk il-kumpannija ma tkunx tista' thallas id-djun taghha.*

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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 XXV tal-1995.

Kif sejrin naraw, fil-ligi taghna, li *kumpannija ma tkunx tista' thallas id-djun taghha* ghandu **sinjifikat preciz u definit** mil-ligi stess. Fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha. Il-koncett ta` insolvenza fil-ligi taghna huwa aktar ristrett minn dak tal-ligi Ingliza ghalkemm hemm *overlaps*.

Fit-Tmien Edizzjoni (2012) ta` l-ktieb **Boyle & Birds` Company Law** (pubblikat minn Jordans) pg 859 jinghad 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”) ...

3) **L-Art 214(5)(a) u (b) tal-Kap 386**

L-Art 214(2)(a)(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.

Tnejn huma c-cirkostanzi definiti mil-ligi stess –

(a) *jekk id-dejn dovut mill-kumpannija jkun baqa' ma thallasx ghal kollox jew fparti wara erbgħa u ghoxrin gimgha mill-ezekuzzjoni ta' titolu eżekuttiv kontra l-kumpannija 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-kumpannija ma tkunx tista' thallas id-djun tagħha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpannija.*

Ir-rikorrenti qegħda tinsisti fuq il-fondatezza tal-pretensjoni tagħha kemm abbazi tal-paragrafu (a) kif ukoll abbazi tal-paragrafu (b).

4) **L-Art 214(5)(a) tal-Kap 386**

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

Fil-kaz ta' *cash flow insolvency* din il-Qorti tghid illi filwaqt fil-ligi tagħna huwa specifikat **bil-preciz** x` m`għandhiex tagħmel kumpannija debitrice sabiex ma tkunx meqjusa li ma tistax thallas id-djun tagħha, fil-ligi Ingliza il-kriterju huwa aktar generiku għax 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 –

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

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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, u biex jigu għall-kaz tal-lum, il-Qorti diga` rrilevat illi r-rikorrenti mexxiet bl-azzjoni bhala azzjonista. Biex tirnexxi l-azzjoni tagħha skond il-paragrafu (a) mhuwiex tassattiv li *d-dejn* in kwistjoni jkun dovut specifikament lilha ; infatti fil-kaz tal-lum, ir-rikorrenti mhijiex tgħid illi hija wkoll kreditur ta` JAJ. Huwa bizzejjed li jkun *dejn* (anke ta` terzi) li jkun gie ezegwit kif previst fil-paragrafu (a).

Issa fil-kaz tal-lum, irrizulta ppruvat illi l-Mandat ta` Sekwestru Ezekuttiv Nru 1143/2011 li nhareg fit-23 ta` Awissu 2011, wara talba tal-Kummissarju tat-Taxxi Interni, għal sorte ta` €94,510, kien notifikat lis-sekwestratarji fl-24 ta` Awissu 2011. Hija l-gurisprudenza ta` din il-Qorti illi fejn si tratta ta` atti ezequttivi ndikati fl-Art 273 tal-Kap 12, il-fattur rilevanti sabiex jiskatta l-perijodu ta` erbgha u ghoxrin (24) gimgha għall-fini tal-Art 214(5)(a) tal-Kap 386 huwa l-ezekuzzjoni tal-Mandat. U fil-kaz ta` Mandat ta` Sekwestru, l-ezekuzzjoni tal-Mandat issehħ bin-notifika tal-att lis-sekwestratarji. Abbazi tax-xieħda ta` Noel Mangion mid-Dipartiment tat-Taxxi Interni dak il-kreditu baqa` ma thallasx. Irrizulta wkoll li l-azzjoni attrici kienet prezentati wara li għadew 24 gimgha mill-ezekuzzjoni tal-mandat. Infatti r-rikorrenti pprezentat l-azzjoni fis-7 ta` Dicembru 2012.

Din il-Qorti hija tal-fehma li fil-kaz tal-lum, il-vot tal-Art 214(5)(a) tal-Kap 386 huwa sodisfatt.

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

Skond din id-disposizzjoni, kumpannija titqies li ma tkun tista` thallas id-djun taghha ... 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.

Dak previst minn din id-disposizzjoni jabbina ruhu ma` *balance sheet insolvency*. Dan l-abbinament jista` jsir billi 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-Khudhairi (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 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` Mejju 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 tbiagh 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.

Mill-assjem tal-provi, jirrizulta illi l-qaghda finanzjarja ta` JAJ hija hazina hafna.

JAJ ilha tliet snin u erba` xhur bla diretturi. L-ahhar direttur kienet ir-rikorrenti li rrizenjat fit-3 ta` Ottubru 2011. JAJ hija sprovvista wkoll minn segretarju ; l-ahhar segretarju kien Jonathan Mizzi li rrizenja fit-3 ta` Ottubru 2011. Ma jirrizultax li qeghda titmexxa minn xi hadd ; ma jirrizultax li ghandha impjegati ; u lanqas ma jirrizulta li qeghda tinnegozja.

Li certament jirrizulta huwa li ghandha xebgha dejn. **Tal-inqas** jirrizulta li ghandha taghti lid-Dipartiment tat-Taxxi Interni, l-ammont ta` €252,029.35 ; lill-HSBC Bank Malta plc, €364,642.91 ; lil Central Cement Limited, l-ammont ta` €33,439.45 ; lil Nicholas Agius, l-ammont ta` €3,459.43 ; u lil Bilom Construction Limited, l-ammont ta` €54,968. Dawn il-figuri la jinkludu imghax, la imghax ulterjuri u lanqas spejjez legali u gudizzjarji.

Ma jirrizultax li ghandha assi li tista` tiddisponi minnhom. Fil-fatt kellha xi ingeni li kienu kolpiti b`mandat ta` qbid ta` Bilom Construction Limited, u kellha fond go Marsaskala li kien il-mertu ta` procedura ta` bejgh bis-subbasta promossa mill-HSBC Bank Malta plc.

Fejn jirrigwarda kontabilita`, JAJ qeghda fi stat ta` abbandun fis-sens illi l-ahhar *abridged financial statements* li dahlu ghand ir-Registratur tal-Kumpanniji kienu dawk ghas-sena li ghalqet fil-31 ta` Dicembru 2007. Minn meta kienet kostitwita sal-2007, il-kumpannija baghtet il-*financial statements* taghha lir-Registratur tal-Kumpanniji b`mod regolari. Ghalkemm l-Awditur Peter Sammut ipprezenta *r-report and financial statements* tal-kumpannija

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ghas-sena li ghalqet fil-31 ta` Dicembru 2008, u ghalkemm kienu ffirmati mid-direttur Alfred Mizzi, ghal xi raguni baqghu ma gewx prezentati lir-Registratur tal-Kumpanniji.

Fi kwalunkwe kaz, kemm mill-accounts tal-2007 u aktar u aktar mill-accounts tal-2008, diga` tidher evidenti d-diffikulta` finanzjarja tal-kumpannija li kienet diga` qeghda taghmel difficli hafna s-*survival* taghha.

Ghalkemm il-qaghda finanzjarja kienet diga` hazina, il-*colpa di grazia* gie bil-mewt b`disgrazzja ta` Alfred Mizzi fis-26 ta` Mejju 2011. Billi JAJ kienet *one and all* ma` Alfred Mizzi, bil-mewt tieghu, kollox mar *alla deriva* b`mod irrimedjabbli u rreparabbli.

Din il-Qorti hija tal-fehma li fil-kaz tal-lum, il-vot tal-Art 214(5)(b) tal-Kap 386 huwa sodisfatt ukoll.

6) Id-diskrezzjoni tal-Qorti

Il-Qorti taghmel riferenza ghal Pg 913-914 ta` Boyle & Birds` Company Law – 8th 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 n-negozju ta` JAJ huwa wieqaf tal-inqas ghal aktar minn tliet snin (li fid-dinja tan-negozju huwa zmien twil speċjalment fejn hemm id-dejn u dejn qawwi x`jithallas). Hija bla dirigenti, ghadha qeghda takkumula biss djun u ma qieghed isir xejn mill-azzjonisti sabiex tinsorgi, anzi huwa evidenti li qatghu qalbhom. Kumpannija li ma taghmilx negozju hija entita` bla ruh ghaliex ma tkunx qeghda taqdi l-ghanijiet taghha. Kumpannija li ma tiggenerax 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 li m`ghandhom l-ebda hajra jew intenzjoni li jinvestu fil-kumpannija. Ghal din il-Qorti, ix-xoljiment u l-istralc tal-intimata huwa inevitabbli.

Provvediment

Ghar-ragunijiet kollha premessi, il-Qorti ttipprovdi dwar it-talbiet tar-rikorrenti billi :-

1) Tiddikjara li fir-rigward tal-kumpannija JAJ Company Limited (C22257) jirrizultaw privati sal-grad rikjest mil-ligi r-rekwiziti tal-Art 214(2)(a)(ii) u tal-Art 214(5)(a) u (b) tal-Kap 386 tal-Ligijiet ta` Malta.

2) Tordna x-xoljiment tal-kumpannija JAJ Company Limited (C22257) b`effett mis-7 ta` Dicembru 2012 skond l-Art 223(1) tal-Kap 386. Tordna wkoll l-istralc taghha.

3) Tahtar lill-Awditur Michelle Spiteri Bailey bhala stralcjarju bis-setghat u d-dmirijiet kollha li huma stabbiliti fil-Kap 386 tal-Ligijiet ta` Malta. Bla hsara ghall-generalita` tas-setghat u dmirijiet -

a) wara li tikseb dikjarazzjoni dwar il-qaghda tal-kumpannija intimata, kif irid l-Art 226 tal-Kap 386 tal-Ligijiet ta` Malta, taghmel rapport lill-Qorti, kif irid l-Art 227 tal-Kap 386 tal-Ligijiet ta` Malta.

b) taghmel verifika ta` l-assi u tad-djun tal-kumpannija intimata ; u jekk ikun il-kaz, taghmel il-gradwazzjoni tad-djun.

c) jekk ikun il-kaz, tiehu taht il-kustodja jew kontroll taghha l-
assi tal-kumpanija intimata, kif ighid u jrid l-Art 237 tal-Kap 386 tal-
Ligijiet ta` Malta.

d) taghmel jew tiddefendi kull azzjoni jew procediment legali
iehor fl-isem u fl-interess tal-kumpanija intimata.

e) tipprezenta r-rapport lill-Qorti mhux aktar tard mid-19 ta`
Mejju 2015.

4) Tordna lir-rikorrenti sabiex thallas l-ispejjez kollha, inkluzi
l-ispejjez tal-kuratur deputat, l-ispejjez tal-istralc, kif ukoll id-drittijiet
u l-ispejjez tal-istralcjarju, u dan bl-applikazzjoni tal-Art 236(2) tal-Kap
386.

Thalli l-istralc ghall-udjenza ta` nhar it-Tnejn 25 ta` Mejju 2015 fid-
09.00 a.m.

< Sentenza Finali >

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