



MALTA

**QORTI CIVILI**

**PRIM' AWLA**

**ONOR. IMHALLEF**

**JOSEPH ZAMMIT MC KEON**

Seduta tat-30 ta' April, 2015

Citazzjoni Numru. 1153/2014

**Rikors maghmul ai termini tal-Artikolu 218 tal-Kapitolu 386 tal-Ligijiet ta` Malta**

- 1. Ecopure Limited (C19492)**
- 2. Falcon Wines & Spirits Limited (C3774)**
- 3. Farsons Beverage Imports Company Limited (C476)**
- 4. The General Soft Drinks Company Limited (C1591)**
  - 5. Miller Distributors Limited (C344)**
  - 6. P J Sutters (Marketing) Limited (C35984)**
  - 7. Simonds Farsons C.I.S.K p.l.c. (C113)**
  - 8. Quintano Foods Limited (C33660)**

*kontra*

**Erom Trading Limited (C65591)**

**Il-Qorti :**

**I. Preliminari**

Illi fis-17 ta` Dicembru 2014, ir-rikorrenti pprezentaw rikors fejn, abbazi tal-premessi hekk kif dedotti, talbu lill-Qorti sabiex :-

1. *Tiddikjara illi s-socjeta` Erom Trading Limited ma tistax thallas id-djun taghha ai termini tas-subartikolu (2)(a)(ii) tal-artikolu 214 u s-subartikolu (5) tal-artikolu 214 tal-Att dwar il-Kumpanniji (Kapitolu 385 tal-Ligijiet ta` Malta);*

2. *Tordna x-xoljiment u l-istralc konsegwenzjali mill-Qorti tas-socjeta` intimata Erom Trading Limited ai termini ta` l-artikolu skond id-disposizzjonijiet tas-Sub-Titolu I tat-Titolu II tal-Hames Parti tal-Att dwar il-Kumpanniji (Kapitolu 386 tal-Ligijiet ta` Malta);*

3. *Taghti kull provvediment li jidhrilha xieraq u opportun.*

## Kopja Informali ta' Sentenza

Illi mar-rikors, kienu prezentati ghadd ta` dokumenti li l-Qorti hadet konjizzjoni taghhom.

Illi meta ma kienx ghadu finalizzat il-process tan-notifika tas-socjeta` intimata bir-rikors promotur, bid-dokumenti li kienu annessi mieghu, u bl-avviz tas-smigh tal-kawza, deher l-Av. James D'Agostino fl-udjenza tas-**16 ta` April 2015** fejn, wara li ta ruhu b`notifikat ghall-kumpanija ntinata, ipprezenta nota li taqra hekk :-

*tiddikjara u taccetta li mhijiex f`qaghda li thallas id-djun taghha skond l-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta. Ghalhekk qeghda tammetti t-talba tar-rikorrenti ghax-xoljiment u konsegwenti stralc taghha u cioe` ta` Erom Trading Limited.*

Illi fl-istess udjenza d-difensuri talbu li l-kawza tibqa` ghas-sentenza.

Illi l-procediment thalla ghas-sentenza ghal-lum.

## II. L-Art 218(1)(b) tal-Kap 386

Kif jirrizulta kjarament mill-premessi tar-rikors, is-socjetajiet rikorrenti ghandhom *locus standi* sabiex jippromwovu l-istanza tal-lum bhala *kredituri* tas-socjeta` intimata. Dan il-fatt huwa accettat mis-socjeta` intimata.

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

Ir-rikorrenti sejsu t-talba ghax-xoljiment u stralc tas-socjeta` intimata abbazi tal-Art 214(2)(a)(ii) tal-Kap 386.

Bl-**Art 214(2)(a)(ii) tal-Kap 386** il-ligi taghti lill-Qorti diskrezzjoni li xxolji u tistralcja kumpannija *jekk il-kumpannija ma tkunx tista` thallas id-djun taghha*. Dan is-subinciz (ii) irid jinqara flimkien ma` l-**Art 214(5)** li jistabilixxi meta kumpannija skond il-ligi taghna ghandha titqies li ma tkunx tista` thallas id-djun taghha.

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

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

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*(“cash flow insolvency”) ; it is also insolvent if its liabilities exceed its assets (“balance sheet insolvency”) ...*

Skond l-Art 214(5) **tnejn** huma c-cirkostanzi definiti mil-ligi fejn *kumpanija ma tkunx tista` thallas id-djun taghha –*

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

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

Huwa evidenti mill-premessi tar-rikors promotur illi r-rikorrenti qeghdin jinsistu fuq il-fondatezza tal-pretensjoni taghhom abbazi tal-paragrafu (b) tal-Art 214(5).

## IV. **L-Art 214(5)(b) tal-Kap 386**

Dak previst minn din id-disposizzjoni jabbina ruhu ma` *balance sheet insolvency* kif mifhum fil-ligi Ingliza.

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

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

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

*In determining whether the assets are outweighed by the liabilities a court is able to take into account contingent and prospective liabilities, but not contingent and prospective assets [Byblos Bank SAL v. Al-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 tagħha tat-28 ta' Mejju 2003 fil-kawza **“Axel John International AB vs Aluminium Extrusions Limited”** qalet hekk –

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

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

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

Fil-Pag 130 ikompli hekk –

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

Fil-Pag 134 ighid –

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

Fil-Pag 136 ighid –

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

Fuq l-iskorta tad-diversi dokumenti li pprezentaw ir-rikorrenti, hija evidenti l-qagħda finanzjarja kritika tas-socjeta` intimata. Il-kriticita` tal-qagħda finanzjarja tas-socjeta` intimata ttraduciet ruhha materjalment fi stat ta` insolvenza kif previst fl-Art 214(5)(b) tal-Kap 386, stat ta` fatt li huwa konfermat *senza mezzi termini* fin-nota li pprezentat l-istess socjeta` intimata fl-udjenza tas-16 ta` April 2015.

## V. Id-diskrezzjoni tal-Qorti

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

*Unpaid creditors of a company may consider commencing winding-up proceedings against the company as an alternative to suing for payment. As a debt collection mechanism, winding up proceedings may be swifter and, for the*



*individual creditor, less expensive than a claim that may come to trial for some time ; on the other hand, winding up is a collective procedure for the benefit of creditors generally and it does not benefit specific creditors individually (F. Oditah “Winding Up Recalcitrant Debtors” 1995 LMCLQ 107) ...*

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

Ipprudati r-rekwiziti tal-Art 214(5)(b), sahansitra bl-ammissjoni tas-socjeta` intimata, il-Qorti ssib li l-perkors obligat tas-socjeta` intimata huwa li tigi xjolta u stralcjata ; dan il-process huwa ta` beneficcju ghall-kredituri kollha kollettivament.

### Provvediment

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

1) Tiddikjara li fir-rigward tal-kumpannija intimata Erom Trading Limited (C65591), sahansitra bl-ammissjoni taghha stess, jirrizultaw ipprudati r-rekwiziti tal-Art 214(2)(a)(ii) u tal-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta.

2) Tordna x-xoljiment tal-kumpanija ntinata Erom Trading Limited (C65591) b`effett mis-17 ta` Dicembru 2014 skond l-Art 223(1) tal-Kap 386. Tordna wkoll l-istralc taghha.

3) Tahtar lir-Ricevitur Ufficjali bhala stralcjarju tal-kumpanija intinata Erom Trading Limited (C65591) bis-setghat u d-dmirijiet kollha previsti mid-disposizzjonijiet tal-Kap 386 tal-Ligijiet ta` Malta.

4) Tordna lis-socjetajiet rikorrenti u lill-kumpanija intinata sabiex *in solidum* bejniethom ihallsu l-ispejjez kollha, inkluzi 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-Tlieta 7 ta` Lulju 2015 fid-9.00 a.m.

**< Sentenza Finali >**

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