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SECTION 402 OF THE COMPANIES' ACT: THE RIGHT TO APPEAL? | NEILSON' STITCHING: A GRAVE AFFRONT TO THE NOTION OF RESPECT FOR HUMAN DIGNITY | THE NEW ECO-DESIGN DIRECTIVE | INTERVIEW WITH PROFS JOSEPH M. GANADO, ONE OF MALTA'S MAIN PINNACLES IN LEGAL EDUCATION



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Section 402 of the Companies' Act: The Right to Appeal?

Reviewed In The Light of a Recent Court of Appeal Judgment In The Names.

Jonathan Shaw pro et noe et vs David Alan Shaw (Rik Nru. 618/09 AL)



On the 27th November 2009, The Court of Appeal in a recent judgement delivered on the 27th November 2009, in the names *Jonathan Shaw pro et noe et vs David Alan Shaw* (Rik Nru. 618/09 AL) upheld the plea that there exists no right appeal from a decree issued by a court of first instance following an application filed in terms of section 402 of the Companies Act.

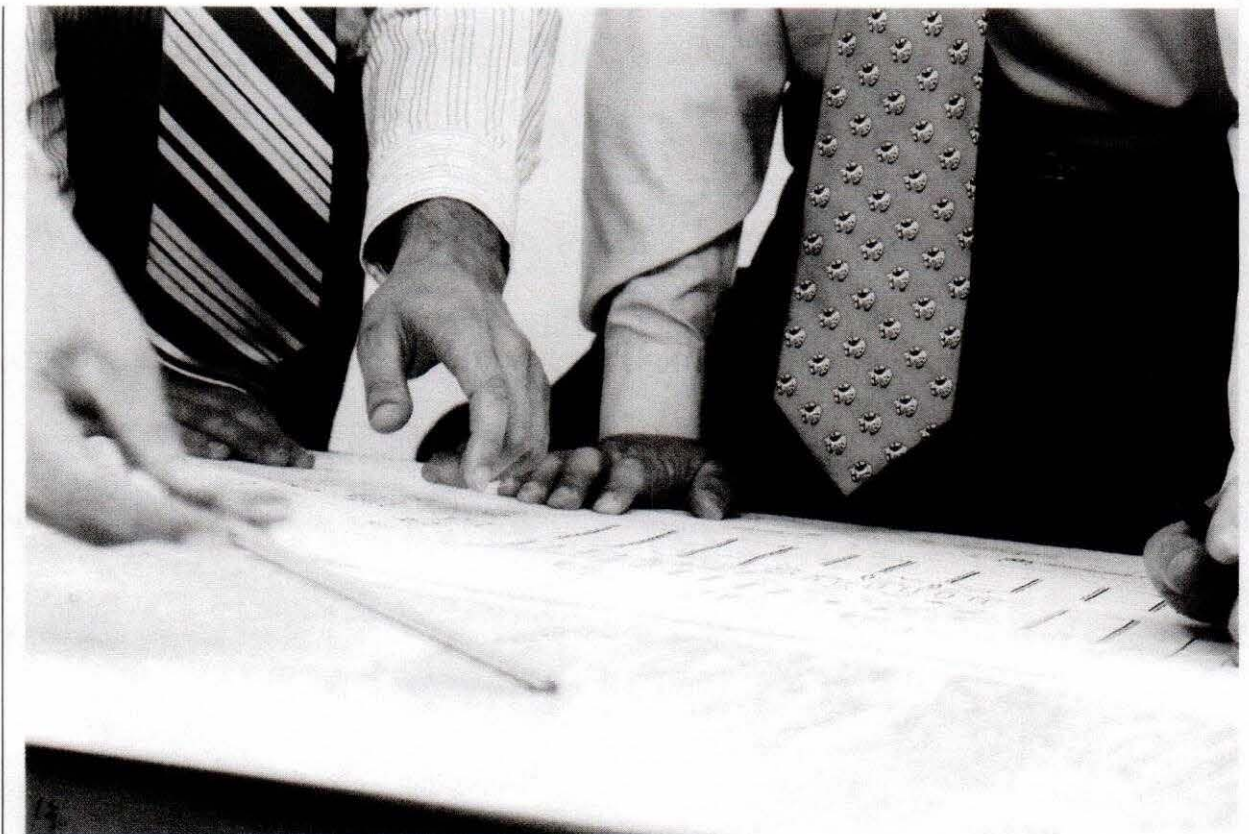
Section 402 of the Companies Act provides protection to shareholders in a company from unfair prejudice.

The facts of the case in brief were that Applicants holding eighty per cent (80%) of the shares in a company claimed that the Respondent holding the remaining shares was acting in an abusive manner and requested the court to issue all opportune measures. The Respondent replied that he was acting in good faith according to the company statute. The court of first instance delivered a decree dismissing the application.

Applicants lodged an appeal to the decree delivered by the Court of first

instance claiming nullity of judgement on a number of grounds, inter alia, that the first court came to its decision:

1. without appointing the case for hearing;
2. without hearing the evidence;
3. without affording the parties an opportunity to plead the case;
4. by accepting the reply of the respondent in toto the court accepted Respondent's submissions without any evidence confirming or corroborating same.



Appellants requested the quashing of the said decree.

Dr Stefano Filletti for Respondent, in the Court of Appeal, raised a preliminary plea to the effect that there exists no right of appeal from a decree issued by a court of first instance pursuant to a decree delivered in terms of section 402 of the Companies' Act. In essence Respondent argued that:

1. Section 402 was an action which could be filed by a simple application (not sworn application, already known as writ of summons) and therefore the right of appeal under Cap. 12 of the Laws of Malta reserved for litigious proceedings did not automatically extend to these proceedings. An explicit right of appeal had to be provided for in the law;

2. There is no automatic right of appeal and previous judgements delivered by the Court of Appeal on similar proceedings do not create a right of appeal where the law did not explicitly grant such right;

3. The Companies Act does not afford a right of appeal from applications filed in terms of section 402 and there was no reference of the applicability of the right of appeal in terms of Cap. 12 of the Laws of Malta;

4. The interpretation and relative argumentation provided by Respondent was also confirmed by the drafting of section 402 of the Companies Act. Where deemed necessary the legislator/ Companies Act provided for a specific right of appeal. In fact section 401 of the Companies Act provided for a right of appeal from decrees issued pursuant to an application filed by an Applicant. It followed therefore that the fact that section 402 of the Companies Act excluded a reference to the right to appeal meant that the legislator explicitly excluded such right - *ubi lex voluit dixit*.

5. Upon an application filed in terms of section 402 of the Companies Act, the Court is to pronounce itself by means of a decree. To this effect Appellant had another remedy available at law, namely the filing of a suit in the Civil Court to quash the decree. There is a plethora of judgements which have confirmed this as the appropriate remedy in such instances. In the case in the names **Edgar Baldacchino et vs Joseph Bellizzi**, decided by the Court of Appeal dated 10th August 1953, (Vol. XXXVII.1519) the Court held that:

"Hemm tliet xorta ta' digrieti, skond il-ligi taghna: -dawk definitivi, dawk interlokutorji, u dawk li la huma definitivi u lanqas interlokutorji. Ghal dina it-tielet kategorija ta' digrieti ma hemmx appell dirett

quddiem il-Qorti ta' l-Appell tal-Maesta' Taghha r-Regina; u min irid jimpunja digriet li ma hux interlokutorju jew definitiv jista' jimpunjah biss permezz ta' citazzjoni in kontradittorju tal-kontroparti fil-Qorti li tkun emanat id-digriet ... izda appell minn digriet ta' dik ix-xorta b' semplici rikors quddiem il-Qorti ta' l-Appell bhal ma jsir fil-kaz ta' digrieti interlokutorji huwa null u ta' ebda effett."

Similar judgements were delivered in the cases in the names **Galea vs Bezzina** (Vol. XXXVIII.1336) decided on the 5th August, 1954, and **Joseph Bonello noe vs Emanuel Ellul noe** decided by the Court of Appeal, 26th June 1987.

Furthermore in the case in the names **Anthony Sammut vs Paolo Sammut et** (Vol. XLVII.110) the Court held that *"il-fatt li ... id-digriet gie moghti mhux kameralment, izda fl-udjenza pubblika, ma jbididix in-natura tad-digriet, ghax b' daqshekk la sar definitiv u l-anqas interlokutorju"*.

6. No other specific formalities applicable to litigious proceedings pursuant to Cap. 12 of the Laws of Malta were made applicable to proceedings in terms of section 402 of the Companies Act.

Dr Jean-Carl Farrugia for Appellant insisted that judicial proceedings in terms



of section 402 of the Companies' Act were always considered by our courts as ordinary litigious proceedings and that the decision by the court of first instance in this case was not to be considered a decree but rather a judgement in terms of section 226 of Cap. 12, Laws of Malta.

The Court of Appeal having heard submissions noted that:

- According to section 402 of the Companies Act, 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 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 the members as a whole, may make an application to the court for an order;
- Section 401 of the Companies Act imposes certain responsibilities on the Registrar of Companies, amongst others, the collection of

finances prescribed by the Companies Act, and this according to subsection (3) by filing a notice against the person responsible for payment. This application will give rise to an executive title in terms of Cap. 12 of the Laws of Malta if it is not contested within thirty (30) days of notification by filing an application in Court. In this case the application shall be heard and treated as a litigious proceeding to which all the provisions of Cap. 12 of the Laws of Malta are to apply. Every judgement delivered can be appealed by filing an appeal application to the Court of Appeal within six (6) days from judgement with the right to reply to the said appeal within six (6) days (and this pursuant to sub-article (16) and (17) of section 401).

The Court therefore highlighted the fact that there is a clear distinction between section 402 and section 401 of the Companies' Act. In section 402 there is no reference whatsoever to the provisions of Cap. 12 of the Laws of Malta and there is no obligation to notify any parties with the application. It is

therefore within the courts discretion to act where "*the court is of the opinion that the complaint is well-founded and that it is just and equitable to do so, the court may make such order under such terms as it thinks fit*".

Furthermore section 402, unlike section 401, does not mention any right of appeal. Section 401 imposes an explicit right of appeal with clear rules on how and when to appeal. According to the Court of Appeal this is a clear case where the principle *ubi lex voluit dixit* is to apply.

The Court of Appeal therefore held that the decision taken by the Court of First Instance in terms of section 402 of the Companies' Act was a decree, which according to our jurisprudence, does not give rise to an appeal. Such a decree can be revoked only by filing the relative suit requesting the revocation of that decree. There would be a right to appeal from this judgement.

For these reasons the Court of Appeal upheld the Respondent's plea declaring the Appellant's decree null and void. ■