



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 17281/18

In the matter between:

**BIG CATCH FISHING TACKLE PROPRIETARY
LIMITED**

First Applicant

DAVID IAN CHRISTIE N.O.

Second Applicant

TAMMY PATRICIA CHRISTIE N.O.

Third Applicant

ANDRÉ MINNIË N.O.

Fourth Applicant

DAVID IAN CHRISTIE

Fifth Applicant

vs

JUSTIN MILES KEMP

First Respondent

RICHARD WALE

Second Respondent

UPSTREAM FLY FISHING

Third Respondent

WARREN GRIFFITHS

Fourth Respondent

Hearing: 19, 20 February 2019

Judgment: 5 March 2019

JUDGMENT

De Waal AJ:

- [1] This is an application for interim relief pending the final determination of an action instituted by the Applicants under Case Number 12277/2018 (**"the action"**).
- [2] The action was launched on 11 July 2018. The Respondents have pleaded to the Applicants' particulars of claim but due to the complex factual and legal nature of the claims, the parties were *ad idem* that the matter is unlikely to go to trial soon, and certainly not within the next year.
- [3] The present application was brought as one of urgency on 19 September 2018 and set down by the Applicants for 2 October 2018. On that day, the matter was postponed for hearing on the semi-urgent roll on 19 and 20 February 2019. I became seized of the matter via the early allocation system which was triggered by the volume of the papers. I should record that in adjudicating this matter, I was greatly assisted by the heads of argument and subsequent notes on argument, compiled by counsel for the Applicants and counsel for the Respondents.
- [4] The background is that on 2 August 2014, the First Applicant (**"Big Catch"**) bought a business which was trading as a supplier of *inter alia* fishing tackle, specialist fishing and fly fishing equipment and apparel. The First Respondent (**"Kemp"**) and the Second to Fourth Applicants (**"the Trust"**) became 50/50 shareholders in Big Catch and Kemp and the Fifth Applicant (**"Christie"**) became the directors of Big Catch.

[5] By the time that the troubles started the business of Big Catch included the arrangement, marketing and hosting of fishing and fly fishing tours for customers in international waters and foreign territories as well as to inland and offshore locations in South Africa. In respect of the former, the Applicants alleged that Kemp was specifically mandated by Big Catch during 2015 to 2016 to expand its offering to fishing and fly fishing in international waters and to "*investigate and develop business opportunities*" in this regard.

[6] On 15 March 2018 Kemp resigned as director and employee of Big Catch. The reasons for his resignation are in dispute:

6.1. The Applicants contend that it was discovered on or about 13 March 2018 that Kemp had been acting in breach of his duties and obligations towards Big Catch and that he was basically channelling some of the internal fishing business away from the company to himself and that he received payments into his own personal bank account(s).

6.2. Kemp denies these allegations. His version is that he approached Christie during February 2018 to tell him that the company could no longer afford substantial salaries for both of them and that one of them must buy the other out. When Kemp did not accept Christie's offer for his 50% shareholding, the latter accused him of all sorts of wrongdoing. Under duress and coercion caused *inter alia* by the laying of criminal charges against him, Kemp decided to resign.

[7] Whether Kemp acting improperly or unlawfully whilst he was a director of Big Catch and, if so, the extent to which Kemp will have to disgorge any profit he made, are matters to be determined in the action. The present matter relates to the question of whether Kemp and the other three Respondents should be interdicted, essentially from competing with Big Catch, until the action is finally determined. In this regard I should mention that the Second Respondent was an employee of Big Catch until 23 March 2019 and he is now working with Kemp. The Third and Fourth Respondents are in the international fishing and fly fishing business and they are accused by the Applicants of being used by Kemp for purposes of the allegedly unlawful activities.

[8] In the action, the Applicants are suing the Respondents for:

8.1. R3 689 231.14 in respect of past damages; and

8.2. R20 119 589.42 for future damages;

based on allegations (amongst others) of misappropriation of fishing and fly fishing tackle, equipment and apparel; unauthorised direct payments of commission income to Kemp; unaccounted sales of stock at discounted rates; reckless transactions and payment to customers; unauthorised donations and sponsorships; and future loss of profits.

[9] Important for present purposes, is that the Applicants are also seeking wide-ranging interdictory relief in the action against First to Third Respondents. The final interdicts sought in the action can be summarised as follows:

- 9.1. Interdicting and restraining First to Third Respondents from hosting or engaging in fishing charters and/or tours for fishing, including fly fishing; doing business or selling fishing, including fly fishing, tackle, equipment, apparel and ancillary products to Big Catch's customers and services providers, including but not limited to Alphonse Island, Ocean Active, Eden Island and Tsimane Lodge;
- 9.2. Interdicting and restraining First to Third Respondents from misappropriation of Big Catch's business, business opportunities, including but not limited to the use of the registered name or any configuration of the names "*Big Catch*", "*Big Catch Fly*" and "*Big Catch Tours*" with or without any devices or logos used to depict Big Catch's business; and
- 9.3. Interdicting and restraining First to Third Respondents from doing business with, approaching for business, or making contact with any of Big Catch's customers, service providers or suppliers with whom Kemp and the Second Respondent had contact whilst they were engaged with or in the employment of Big Catch (the time period of such engagement / employment is defined in the particulars).

[10] It is not entirely clear to me how interdictory relief and future damages can be claimed in the same action given that the former should prevent the latter from occurring, but this is fortunately not an aspect with which I am required to deal.

[11] Apart from two differences (additions), which I deal with below, the relief sought before me are interim interdicts formulated in similar terms as the final interdicts sought in the action. The additions are that, in the present application, the Applicants are also seeking the following interim relief against Kemp (as shareholder) in terms of s 163 of the Companies Act 71 of 2008 (**"the Companies Act"**):

11.1. Interdicting and restraining Kemp from exercising any rights, including voting rights in Big Catch; and

11.2. Interdicting and restraining Kemp from interfering in, or participating in, the management of Big Catch in any manner.

Narrowing down the relief sought

[12] At the hearing of the matter it became common cause that there was no evidence that any of the Respondents were misappropriating or using the trade names of Big Catch. This part of the relief originally sought was accordingly not pursued.

[13] Similarly, it was accepted that Kemp was not interfering with the management of Big Catch and this part of the relief was also abandoned.

[14] At the hearing there was some debate about whether Kemp could be interdicted from exercising any rights, including voting rights, for an interim period under s 163(2) of the Companies Act and whether such relief will have any practical effect given the 50/50 split in shareholding and the resignation of Kemp as director. I thought I understood Mr Möller, who appeared for the

Applicants together with Mr Benade, to have indicated that the Applicants do not persist with this part of the relief as well. But I must have been mistaken because this aspect was resuscitated in a post-hearing note from counsel and I will accordingly deal with this aspect below.

- [15] The Applicants further conditionally trimmed the remainder of the interdictory relief they seek in response to an objection from the Respondents, who was represented by Mr Dickerson SC, to the wide and vague terms on which the interim interdicts were sought. Without conceding that the relief sought was overbroad, counsel for the Applicants suggested that if this were a concern, the interim interdicts could be trimmed down to apply only to the Respondents' conducting business with certain individuals who are known past customers of Big Catch (and identified as such in the papers) and certain entities which are known service providers of Big Catch, more particularly Untamed Angling SA (that operate the Tsimane Lodge in Bolivia) and Alphonse Fishing (that operates Blue Safari Destinations and Alphonse Island Lodge Destinations *inter alia* in the Seychelles).

Approach to interim interdicts

- [16] The requirements for and the approach to interim interdicts *pendent lite* are well established.
- [17] An applicant for an interim interdict normally has to satisfy the following requirements:

- 17.1. a *prima facie* right to the relief sought in the main case (the action in the present instance);
- 17.2. a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- 17.3. a balance of convenience in favour of granting of the interim interdict;
- 17.4. the absence of any other adequate ordinary remedy.¹

[18] The different requirements should not be considered separately or in isolation but in conjunction with one another in order to determine whether the Court should exercise its discretion in favour of granting the interim relief sought.²

[19] At the interim interdict stage, less is required from an applicant than at the final interdict stage. It is sufficient for an applicant to show a *prima facie* case though open to some doubt.

[20] With regard to factual disputes, the Court should consider those facts set out by the applicant together with any facts set out by respondent which the applicant cannot dispute. On those facts, it should then be determined whether, having regard to the inherent probabilities, the applicant should (not could) obtain final relief.³ If serious doubt is thrown on the case of the

¹ *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383E-G; *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 372E – G

² *Camps Bay Residents and Ratepayers Association and Others v Augoustides and Others* 2009 (6) SA 190 (WCC) at para 9

³ *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189 read with *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688 where the Court stated the following regarding *Webster v Mitchell*:

"With the greatest respect, I am of opinion that the criterion prescribed in this statement for the first branch of the inquiry thus outlined is somewhat too favourably expressed towards the applicant for an interdict. In my view the criterion on an applicant's own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial. Subject to

applicant he cannot succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to "some doubt".

[21] The test of a *prima facie* case does not only apply in respect of disputed factual issues, but also in respect of legal issues which are in dispute. Where the legal issues are complex or in urgent matters where decisions on legal issues have to be made without time to arrive at a final considered view, it is only necessary for the Court to form a *prima facie* view on the legal issues.⁴

[22] It has been held that a practical and sensible approach for the Court is to refrain from making any final legal findings in proceedings for interim relief unless this would result in the final disposal of either the matter as a whole or a particular aspect thereof. Failing that, the mere expression by the Court of a *prima facie* view on a particular aspect is of academic interest only and does not advance the matter any further towards finality.⁵ The final determination of legal issues is ultimately for the Court hearing the proceedings for final relief.

[23] With reference to the balance of convenience, the Courts have applied the so-called "*sliding-scale*" test. In terms of this test, the stronger the prospects of success, the less the need for the balance of convenience to favour the

that qualification, I respectfully agree that the approach outlined in Webster v Mitchell, supra, is the correct approach for ordinary interdict applications."

⁴ *Tony Rahme Marketing Agencies SA (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council* 1997 (4) SA 213 (W) at 215C-216C; *Ward v Cape Peninsula Ice Skating Club* 1998 (2) SA 487 (C) at 497B-498H; *Zulu v Minister of Defence* 2005 (6) SA 446 (T) at 459I-461G.

⁵ *Geyser v Nedbank Ltd* 2006 (5) SA 355 (W) at 359-360

applicant. Conversely, the weaker the prospects of success, the greater the need for the balance of convenience to favour the applicant.⁶

- [24] The court possesses a general and overriding discretion whether to grant or refuse an application for interim relief. Such discretion must be exercised judicially upon consideration of all the facts.⁷

Prima facie right

- [25] Reference is made in the Applicants' founding papers to the use of "*trade secrets*" and "*confidential information*"; to "*unlawful competition*" as well as an unsigned contract of employment between Big Catch and the Second Respondent, which contains a restraint of trade for a period of eight months.⁸

- [26] However, during the course of the hearing, the Applicants pinned the legal basis for the interdictory relief sought to one cause of action only. In this regard, the Applicants disavowed any reliance on contractual obligations (the unsigned restraint of trade) or delictual wrongs (unlawful competition) and restricted their case, as far as the existence of a *prima facie* right is concerned, to future breaches of fiduciary duties by Kemp and the Second Respondent, and the contention that such breaches would be facilitated by Third and Fourth Respondents.

- [27] In this regard the Applicants contend that the fiduciary duties of Kemp towards Big Catch, flowing from his position as director, and the fiduciary duties of

⁶ *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 3 SA 685 (A) at 691F – G

⁷ *Camps Bay Residents and Ratepayers Association and Others v Augoustides (supra)* at para 9

⁸ Even if the contract was enforceable (which is doubtful) the restraint would have expired by 22 November 2018 and would accordingly not have assisted the Applicants.

Second Respondent towards Big Catch flowing from his position of employee, did not cease to exist when Kemp resigned on 15 March 2018 and when the Second Respondent left the employ of Big Catch on 23 March 2018. The Applicants contend that the fiduciary duties survived and that Kemp and the Second Respondent may be interdicted from breaching them by doing business with known customers of Big Catch and known service providers of Big Catch, as described above.

[28] I should add that it is common cause that both Kemp and Second Respondent owed fiduciary duties to Big Catch before their resignation. The question relates to what happens to these duties after resignation or termination of employment.

[29] The Applicants essentially contend that a director or employee may not appropriate any business opportunities of his former employer, even after resignation.

[30] The Respondents accept that certain features of the fiduciary duty of a director and an employee survive the termination of employment but contend that they merely prevent the appropriation of business opportunities acquired through the use of trade secrets or confidential information; or client lists or customer connections; or through the violation of another interest of the former employer which is worthy of protection. Furthermore, the value of confidential information diminishes over time and with it wanes the employer's interest in preventing such information from being used by former directors or employees. The Respondents contend that in the post-resignation period, the fiduciary duty is only breached when confidential information is used whilst

being commercially useful. In this regard, I was referred to the concept of “springboarding” which entails not starting at the beginning in developing a technique but using as a starting point the fruits of someone else’s labour. The Respondents contend that the “springboard” conferred by confidential information is always limited in time. It will almost never be longer than it will take to gather the information for one self.

[31] In order to assist me with choosing between what appears to be a fundamental difference in approach, I was referred to a plethora of cases by counsel for the Applicants and the Respondents.

[32] The Applicants referred me to *dicta* in cases such as *Sibex Construction (SA) (Pty) Ltd and Another v Injectaseal CC and Others* 1988 (2) SA 54 (T) at 66D-F; *Cyberscene Ltd v i-Kiosk Internet & Information (Pty) Ltd* 2000 (3) SA 806 (C) at paragraph 31; *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) at paragraphs 18 – 21; *Industrial Developments Consultants v Cooley* [1972] 2 All ER 162) at 175 a-c and 176 b-c. These were cited in support of submissions that a strict ethic pervades this area of law which ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or which he is associated a business opportunity even after his resignation.

[33] The Respondents also rely on *Sibex*, *Da Silva* and *Cyberscene*, but further referred me to *Atlas Organic Fertilizers v Pikkewyn Ghwano* 1981 (2) SA 173 (T) at p193A-194A and 198C to 199D; *Bell & Another v Lever Bros & Others* 1932 AC 161 (HL) at 195; *Meter Systems Holdings Ltd v Venter & Another* 1993 (1) SA 409 (W) at 426G to 432D and 428G-429A; *SA Historical Mint*

(Pty) Ltd v Sutcliffe & Another 1983 (2) 84 (C) at 90D to 91B and *Symington & Others v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* [2005] 4 All SA 403 (SCA); *Multi Tube Systems v Ponting & Others* 1984 (3) 182 (D) at 189F to 190B; *Speith & Another v Nagel* [1997] 3 All SA 316 (W) at 322 and *Knox D'arcy Ltd & others v Jamieson & Others* 1995 (2) SA 579 (W) at 613G to I. The Respondents further relied on the work of Saner, *Agreements in Restraint of Trade in South African Law*, at pages 7-53 to 7-54.

[34] In my view, the default position is that an executive director or a senior employee may not carry on business activities which fall within the scope of his company's business during the time when he serves as director or works as employee. The default position however changes on resignation. Then, in the absence of some special circumstance (restraint of trade; use of confidential information, etc.) the director or employee does not commit a breach of his fiduciary duty merely because he takes steps to ensure that, on ceasing to be a director or employee, he can continue to make a living even by setting up a business in competition with his former company or by joining a competitor and then pursuing opportunities similar in nature to those targeted by his former company. This is how the legal position is described in the seminal work of Blackman *et al Commentary on the Companies Act* (Vol 2 at p. 8 – 180 – 1).

[35] The description of the default by Blackman *et al* must be correct because otherwise a director or senior employee would effectively have to change careers every time he leaves a company. I say this because the position contended for by the Applicants would mean that the director or employee

would not be able to continue working in the same line of business after leaving his company. That cannot be right. If that was the general principle, there would be no need for restraints of trade and the extensive jurisprudence developed by our Courts in order to ascertain whether such restraints are reasonable. The common law fiduciary duties would have the same effect as a restraint. Moreover, if the Applicants are correct, the law would sanction a very drastic invasion of a former director or employee's s 22 constitutional right to professional freedom.

[36] I agree with the Respondents' submissions that whilst the fiduciary duties of a director and employee survive the termination of the relationship with a company, the content of that duty does not remain the same after resignation. The duty will only be breached after resignation if it involves the use of confidential information or violates an interest of the company that is worthy of protection in some other way.

[37] I further do not believe that the cases referred to by the Applicants support the proposition they contend for.

[38] In *Sibex Construction*, Goldstone J held at p. 66D – E that a director or senior officer of a company is precluded from usurping for himself or diverting to another person or company with whom he is associated a "*maturing*" business opportunity which his company is "*actively pursuing*", even after his resignation, where the resignation "*may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired*". This indicates that the fiduciary duty

after resignation relates to commercially valuable, confidential, information obtained whilst the person was director or senior employee.

[39] It is so that in *Cyberscene* the Court held at paragraph 31 that the common law fiduciary duty of directors subsists even after the appointment has ceased. But the Court then went on to state that a director only acts in breach of his fiduciary duty when he sabotages the company's contractual opportunities or when he uses confidential information to advance the interest of a rival concern or his own business or to prejudice the company. At paragraph 32 the Court reiterates the principle established in *Sibex* and held that the fiduciary duty means that a director may not interfere with existing contracts of his company or the "*maturing business opportunities accruing to it*". It is not contended in the present case that Kemp and the other Respondents are to be interdicted from appropriating such existing contracts or maturing business opportunities until the action is heard and determined. Some may have been appropriated but, as I shall explain below, these relate to past events for which there is no remedy other than disgorgement of profits. An interdict would not serve to prevent any harm to the Applicants as far as these past events are concerned.

[40] In *Da Silva* the SCA held at paragraph [20] that if a corporate opportunity is not one of which the director became aware of whilst performing his duties as director but only arose after his resignation, he is at liberty in the absence of explicit contractual restraints to exploit it to the full even though it falls within the scope of the company's business activities. The SCA recorded in this paragraph that it must be "*emphasised that the expertise and experience*

acquired by a director during his period of employment with the company and in general even the personal relationship established by him during that period belong to him and not to the company". The SCA also referred, in this regard, to s 22 of the Bill of Rights and the principle that all persons should in the interests of society be productive and be permitted to engage in trade and commerce with their professions. For this reason, the SCA stated that "*The general policy of the courts is accordingly not to impose undue restraints on post-resignation activities*". This, in my view, can only mean that a company that wishes to prevent a director or employee from competing with it after resignation should either do so by way of imposing a reasonable restraint of trade or it will have to persuade a Court that it has an interest worthy of protection, such as confidential information, client lists or connections, that justifies an interdict. In this regard, counsel for the Respondents, correctly in my view, contended that, in the absence of a restraint of trade, the onus shifts to the director's former company to justify the interdict both in law and in fact.

- [41] Turning to the authorities referred to me by Respondents, I found the principles, with respect, well explained in *Atlas* at p. 193, where Van Dijkhorst J reiterated that an employee, upon termination of his employment, is free to draw upon his knowledge, experience, memory and skill, howsoever gained, provided he does not use, disclose or impinge upon any of the secret processes or business secrets of his former employer. *Bell*, referred to Van Dijkhorst J at p. 198 of *Atlas*, referred to the principle in English law that a director may even become a director of a rival company as long as he does not disclose information obtained confidentially by him as a director of the first

company. If that is what an existing director may do in English law, a resigned director should at least be able to do the same.

[42] In *Meter Systems*, Stegmann J undertook a comprehensive analysis of what constitutes unlawful competition as far as the use of confidential information is concerned. The categories of information qualifying for protection were set out and discussed. At 426J, Stegmann J held that when a fiduciary relationship is not based in contract, it is "*necessary to look to the law of delict, and in particular to the principles of aquilian liability, in order to ascertain the extent of the legal duty to respect the confidentiality of information imparted or received in confidence*".

[43] In *SA Historical Mint*, Van den Heever J held at 90J that "*there is not and cannot be a general duty burdening an employee, whether humble or at 'top management' level, not to compete with the company that formerly employed him*". It was further held that in the process of competing, the former director may not "*steal*" what is the company's property, i.e. its trade secrets or confidential internal business information or its energy expended in research efforts. Whether the former director is misappropriating the rights of the company or merely using his own skill and knowledge or using general information is a factual enquiry.

[44] *Multi Tube* deals with the question of when the benefit of the "*springboard*" or head start conferred by confidential information abates and ultimately disappears. Broome J held at 189G that the unfair advantage of a head start is usually of limited duration and that there must come a time when the

matters in question are no longer secret and an interdict will then no longer be warranted.

[45] Turning to the facts of the present matter, the Applicants have referred in their papers, read with the annexures to the papers, to three instances where Kemp has arranged international fly fishing trips for persons alleged to be Big Catch customers to destinations / lodges operated by Big Catch service providers. At least one of these opportunities appears to have arisen prior to the resignation of Kemp on 15 March 2018. However, the problem for the Applicants in respect of these trips are that they have already taken place and if Kemp acted unlawfully, the only remedy against him in respect of these trips is the disgorgement of profits, which is what is sought from him in the trial. An interdict cannot undo that which has already taken place.

[46] The Applicants could not point to a single trip to be undertaken by Kemp or any of the other Respondents in the future which amounts to a business opportunity that accrued to Big Catch whilst Kemp was a director or whilst Second Respondent was an employee. The Applicants further did not rely on the use of confidential information; trade secrets; client lists or customer connections as a ground for protecting Big Catch against competition from Kemp. This, in my view, is not surprising given that any head start or "*springboard*" conferred by such confidential information would have dissipated by now, given that it is now almost a year after Kemp resigned. After all, one is dealing in the present matter with the arrangement of fly fishing tours to well-known destinations. In my view, it is unlikely in the extreme that knowledge about these destinations (service providers) and

customers interested in visiting them cannot be gained over a period of a year.

[47] I now turn to deal briefly with two other grounds on which the Applicants sought the interdicts against the Respondents.

[48] The first is a shareholders agreement dated 8 April 2016 between Kemp and Christie. In terms of this shareholders agreement the two undertook to spend an equal amount of time and effort in the business and furthermore that they would endeavour to try to ensure that the one is in the shop if the other is away on leave to ensure the proper and smooth running of the business. Both parties would get an equal salary based on each holding a 50% share in the business. At the end of the agreement the following is recorded:

"The shareholders shall at all times during the subsistence of this agreement and their relationship to the company, bear to each other the utmost faith as is required by law to be borne to partners, the one to the other."

[49] The Applicants relied on this shareholders agreement, which they say have not been cancelled, for the proposition that Kemp continues to be bound to act towards Christie as one partner must do to another partner.

[50] In my view, this argument fails at two levels:

50.1. Firstly, the shareholders agreement appears to me to deal with the relationship between Kemp and Christie whilst they are both actively running the company. This is why the agreement records that the

two shall treat each other as partners during the subsistence of the agreement and their relationship to the company. Just as the duty to pay Kemp the same salary as Christie cannot survive the termination of the relationship between Kemp and the company, the duty of Kemp to treat Christie as a partner, cannot outlast the termination of the former's working relationship with the company. When Big Catch is no longer paying him why should Kemp continue to take business to the company?

50.2. Secondly, it is in any event not contended that Kemp and the other Respondents were appropriating the business opportunities of Christie. The Applicants' case has always been that the business opportunities of Big Catch were being taken by Kemp *et al.* The shareholders' agreement deals with the relationship between Kemp and Christie and not with the relationship between Kemp and Big Catch. It is irrelevant in respect of the latter relationship, which is the subject matter of the present dispute.

[51] Finally, reliance was placed on s 163 of the Companies Act. As stated above, I understood that it was accepted at the hearing of the matter that the temporary relief sought on the basis of this section in paragraph 2.2 of the notice of motion was not persisted with. However, even if it was not abandoned, I do not believe that there is any justification for a temporary deprivation of a shareholder's rights under s 163(2) of the Companies Act in the present matter. No facts were pleaded by the Applicants which demonstrate that Kemp was even exercising his voting rights, let alone

exercising those rights in a manner harmful to Big Catch. Given this, I fail to see on what basis I should temporarily deprive Kemp of his voting rights.

[52] It is tempting to conclude with reference to the above analysis that the Applicants have no prospects to obtain the final interdicts they contend for in the action. However, on reflection, I decided that it would not be appropriate for me to make a final determination on this aspect. All the facts and the evidence are not before me and the Applicants may still make out some or other exceptional case for the interdictory relief they seek at trial.

[53] It suffices to say that the Applicants' prospects are in my view extremely weak insofar as they seek interdictory relief against future breaches of fiduciary duties on the basis contended for in the application before me.

Irreparable harm; no alternative remedy and the balance of convenience

[54] In the circumstances of the present matter the remaining three requirements for an interim interdict may be considered together. The main difficulty faced by the Applicants in respect of all three requirements is that it will be relatively easy for them to claim their loss of profits due to the appropriation of business opportunities with their known customers and known service providers at trial. The Applicants will be entitled to require the Respondents to discover the details of their trips with the known customers and/or service providers of Big Catch and if successful in the action, to disgorge the profits made from those business activities. This means that the Applicants will not suffer irreparable harm if the interdicts are not granted. They also have an alternative remedy to recover their losses.

[55] The balance of convenience weighs decisively against the Applicants. In this regard it was correctly contended on behalf of the Respondents that they will not be able to recover any losses they will suffer as a result of the granting of the interim interdict. This is so because the interdict will protect the Applicants from any claim from the Respondents. In this regard it is significant that the Applicants have not provided the Respondents with an undertaking that if the interim interdicts are not confirmed in the action, they will make good any losses that the Respondents have suffered. It is in any event not clear how the Respondents are to quantify these losses. Their claim will be based on a guess of how many trips they lost as a result of the interim interdict.

[56] For the reasons set out above I do not believe that a proper case was made out for interim interdictory relief.

Costs

[57] I considered the Applicants' argument that costs in the present matter should stand over for determination in the action. I am however disinclined to defer the task of determining the issue of the costs of the present application to the presiding Judge at trial. He or she will then again have to trawl through the voluminous papers filed in the present matter, which may well be unrelated to the issues to be decided in the trial, merely in order to determine the issue of costs in the present proceedings.

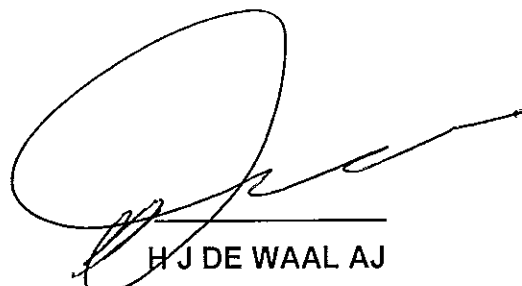
[58] Although costs remain in the discretion of the Court, our courts have tended to award costs against an applicant if an application for interim relief is refused

whereas costs normally stand over if interim relief is granted. There is no reason why this should not apply in the present case.

[59] For these reasons, I have decided that the Trust and the Fifth Applicant shall be liable, jointly and severally, to pay the Respondents' costs in respect of the present matter. I have not made an award of costs against the First Applicant, as such an order would obviously affect the First Respondent as well, given that he is a 50% shareholder in the First Applicant.

Orders

- (i) The application is dismissed and the Second to Fourth Applicant, as trustees, and the Fifth Applicant are liable to pay the Respondents' costs, jointly and severally.

A handwritten signature in black ink, consisting of a large, stylized 'H' and 'J' followed by 'DE WAAL AJ'.

H J DE WAAL AJ
Acting Judge of the High Court

Cape Town
5 March 2019

APPEARANCES

Applicants' counsel: Advs Möller & Benade
Applicants' attorneys: A Posthumus, Cape Town

Respondents' counsel: Adv Dickerson SC
Respondents' attorneys: Bowman Gilfillan Inc., Cape Town