Tackling the Big Fish

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In *Big Catch Fishing Tackle Pty Ltd and Others v Justin Miles Kemp and Others (2019)*, De Waal AJ dismissed the application instituted for interim relief, with costs against the second to fifth applicants, on the basis that the applicants had not made out a case that they would suffer irreparable harm if the interdict was not granted.

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An often misunderstood issue amongst entrepreneurs is the muddled duties of individuals who act in the roles of shareholder, director and employee. In its judgment, the court assisted to untangle these issues.

The case pertains to various issues between shareholders in the first applicant, fishing tour company Big Catch Fishing Tackle Pty Ltd (Big Catch). The first to fourth applicants (the Trust) and the first respondent, a former international South African cricketer (Kemp), each owned 50% of the issued share capital in Big Catch. Kemp was also a director of Big Catch, as was the fifth applicant (Christie).

In March 2018, Kemp resigned as an executive employee and director of Big Catch. Kemp alleged that he resigned under duress and coercion caused by, inter alia, Christie laying criminal charges against him. The applicants contended that Kemp had been acting in breach of his duties towards Big Catch by channelling some business away from the company to himself.

Issues

The court was required to determine whether Kemp and the other three respondents should be interdicted from essentially competing with Big Catch, until the action proceeding (in another court) was determined.

The applicants sought wide-ranging interdictory relief, inter alia, in terms of section 163 of the Companies Act, 2008 (the Act) interdicting and restraining the first respondent from exercising any rights, including voting rights in the first applicant and interfering in, or participating in, the management of the first applicant.

Fiduciary duties

The applicants contended that Kemp's fiduciary duties towards Big Catch as a director, and the second respondent's fiduciary duties flowing from his position of senior employee did not cease to exist when the two parties resigned from Big Catch. The court had to consider what happens to fiduciary duties after resignation or termination of employment.

The court held that a director or senior employee may not carry on business activities which fall within the scope of the company's business during the time when s/he served as a director or employee. However, the position changes on resignation, and in the absence of a special circumstance (such as a restraint of trade agreement, use of confidential information, or otherwise), the director or employee does not commit a breach of their fiduciary duty where he takes steps to ensure that, on ceasing to be a director or employee, he continues to earn a living, even by setting up, or joining, a competitor. If this were the case, a director or employee would have to change careers every time he leaves a company. Thus, if a corporate opportunity arose after resignation, such corporate opportunity may be pursued by that director or employee, in the absence of contractual restraints.

On termination, a director or employee is free to use their knowledge, expertise, memory, and skill, howsoever gained, provided that s/he does not disclose or impinge the secret processes or trade secrets of the former company to the new, or rival company.

The shareholders agreement

The applicants further sought to rely on the shareholders agreement (SHA), which had not been cancelled, on the basis that the Trust (Christie) and Kemp agreed to spend equal amounts of time and effort in the business and would ensure that if one of the shareholders was away, the other shareholder would ensure the smooth and proper running of the business. The shareholders further agreed that they would get an equal salary based on each holding a 50% share in the business.

The court however, pointed out that the shareholders had obligations in terms of the SHA to treat each other as partners during the subsistence of the agreement and their relationship to the company. As the duty to pay Kemp the same salary as Christie couldn't survive due to the termination of the employment relationship, the same principles had to be carried into the SHA.

Section 163 of the Act

Section 163 of the Act allows a shareholder or director to approach court for interim or final relief, where an act or omission of the company, or the business of the company, is being conducted in a manner which is oppressive or prejudicial and such conduct unfairly disregards the interests of the applicant.

The court held that it did not believe there was any justification for a temporary deprivation of a shareholder's rights under section 163 of the Act, and as no facts were pleaded by the applicants which demonstrated that Kemp was even exercising his voting rights, let alone exercising those rights in a manner harmful to Big Catch, the remedy could not proceed.

Conclusion

Given the above, the court held that the applicants would not suffer irreparable harm if the interdict was not granted. As such, the balance of convenience weighed decisively against the applicants and they failed to make out a case for interim interdictory relief.

The court illustrated that where a director or employee ceases to work for a company, their fiduciary duties survive the termination of the relationship with the company, but that duty does not remain the same after resignation. The duty will only be breached where a director or employee was required to protect the company's protectable interests in contract or law but failed to do so after termination of the relationship.

Thus, when drafting various corporate documents where individuals are shareholders, directors and employees, it is important to consider carefully the provisions in both the Shareholders Agreement and the Executive Employment Agreement. Understanding the rights as a shareholder, against the roles, duties and responsibilities as a director and employee is of paramount importance.

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