Post-resignation Survival of Fiduciary Duties: *Big Catch Fishing Tackle Proprietary Limited v Kemp* (17281/18) 2019 ZAWCHC 20 (5 March 2019

R Cassim*

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Author

Rehana Cassim

Affiliation

University of South Africa

Email

cassir@unisa.ac.za

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Abstract

In *Big Catch Fishing Tackle Proprietary Limited v Kemp* (17281/18) 2019 ZAWCHC 20 (5 March 2019) the Western Cape Division, Cape Town had to determine whether a former director of a company continued to owe fiduciary duties to the company after he had resigned, and if so, whether he could temporarily be interdicted from competing with the company until the main action was heard in court. The court dismissed the company's application for an interim interdict. This article critically analyses the judgment in regard to the post-resignation fiduciary duties of directors. The judgment is noteworthy as it sheds light on the post-resignation fiduciary duties of directors – an area of law which is still developing in South African law. This article contends that the court incorrectly conflated the legal principles relating to the appropriation of corporate opportunities with the misuse of confidential information. It is further argued that courts should not lay down a closed list of instances when directors' fiduciary duties will continue post-resignation, as the court attempted to do in this case. It is suggested that courts should adopt a flexible and pragmatic approach in determining when a director's fiduciary duties will survive after his or her resignation.

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Keywords

South African company law; the *Companies Act*; post-resignation fiduciary duties of directors; duty not to misappropriate corporate opportunities; constitutional right to choose a trade, occupation and profession.

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1 Introduction

In *Big Catch Fishing Tackle Proprietary Limited v Kemp*[1] (hereafter *Big Catch v Kemp*) the Western Cape Division, Cape Town had to determine whether a former director of a company continued to owe fiduciary duties to the company after he had resigned, and if so, whether he could temporarily be interdicted from competing with the company until the main action was heard in court. The court dismissed the company's application for an interim interdict. This article critically evaluates the judgment in regard to the post-resignation fiduciary duties of directors. The judgment is noteworthy for shedding light on the post-resignation fiduciary duties of directors – an area of law which is still developing in South African law.

In view of the paucity of decisions on the post-resignation fiduciary duties of directors in South Africa, it is useful to refer to the relevant jurisprudence in other jurisdictions. It is common cause that the legal principles on fiduciary duties were adopted in South African law from English law, and that the remedies available against those who occupy a fiduciary position and act in breach of their fiduciary duties in English and South African law are similar.[2] Australian company law, which is historically largely based on company law in the United Kingdom (hereafter the UK), is also referred to in this article for guidance on ascertaining the post-resignation fiduciary duties of directors. This approach of considering foreign law is reinforced by section 5(2) of the *Companies Act* 71 of 2008 (hereafter the *Companies Act*), which provides that, to the extent appropriate, a court interpreting or applying the *Companies Act* may consider foreign law.[3]

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* Rehana Cassim. BA (*cum laude*) LLB (*cum laude*) LLM (*cum laude*) (Witwatersrand) LLD (Unisa). Associate Professor, Department of Mercantile Law, University of South Africa, attorney and notary public of the High Court of South Africa. E-mail: cassir@unisa.ac.za. ORCiD: https://orcid.org/0000-0001-6179-2361.

1 *Big Catch Fishing Tackle Proprietary Limited v Kemp* (17281/18) 2019 ZAWCHC 20 (5 March 2019) (hereafter *Big Catch v Kemp*).

2 *Phillips v Fieldstone Africa (Pty) Ltd* 2004 3 SA 465 (SCA) para 30; *Kruger Investments Group Ltd v Nuberry Holdings Limited* (14184/15) 2015 ZAWCHC 159 (30 October 2015) para 36.

3 In *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa v Bestvest 153 (Pty) Ltd* 2012 5 SA 497 (WCC) para 26, the court remarked that South African company law has for many decades closely tracked the English system and has taken its lead from the relevant English Companies Acts and jurisprudence, but s 5(2) of the *Companies Act* 71 of 2008 (the *Companies Act*) now encourages our courts to look further afield and to have regard in appropriate circumstances to other corporate law jurisdictions, be they American, European, Asian or African, in interpreting the *Companies Act*.

2 The facts

In 2014 Big Catch Fishing Tackle Proprietary Limited (hereafter Big Catch) acquired a business engaged in supplying fishing tackle, fly fishing equipment and apparel. The business was also involved in the arrangement, marketing and hosting of fishing and fly fishing tours for customers in international waters, inland and offshore locations in South Africa.[4] Retired Proteas cricketer Justin Kemp (the respondent) (hereafter Kemp) and the second to fourth applicants (together known as the Trust) were 50/50 shareholders in Big Catch. The fifth applicant, Christie, a marine biologist and businessman, was a member of the Trust. Kemp and Christie were appointed as directors of Big Catch. The applicants alleged that Kemp was mandated during 2015 and 2016 to expand its offering to fishing and fly fishing in international waters and to investigate and develop business opportunities in this regard.[5]

On 15 March 2018 Kemp resigned as a director and employee of Big Catch but remained as a 50 per cent shareholder of the company. The applicants alleged that Kemp resigned as a consequence of their discovery on 13 March 2018 that he had acted in breach of his fiduciary duties and obligations towards Big Catch by channelling some of the internal fishing business away from Big Catch to himself and receiving payments into his personal bank account.[6] Kemp denied these allegations. He asserted that he had approached Christie in February 2018 to inform him that Big Catch could no longer afford substantial salaries for both of them, and that one would have to buy the other out. Kemp alleged that when he failed to accept Christie's offer for his 50 per cent shareholding, Christie accused him of wrongdoing. Kemp maintained that he subsequently resigned from Big Catch under duress and coercion caused, *inter alia*, by the laying of criminal charges against him by Christie.[7]

The question before the court was whether Kemp and the three other respondents should be interdicted from competing with Big Catch until the main action (in a different court) was finally determined. In the action the applicants intended to sue the respondents for approximately R3 million in respect of past damages and R20 million for future damages based, *inter alia*, on allegations of the misappropriation of fishing tackle, unauthorised director payments of commission income to Kemp, reckless transactions,

4 *Big Catch v Kemp* para 5.
5 *Big Catch v Kemp* para 5.
6 *Big Catch v Kemp* para 6.1.
7 *Big Catch v Kemp* para 6.2.

unauthorised donations and sponsorships, and future loss of profits.[8] Since the relief sought in the current application was found to be overbroad, it was narrowed down to apply only to the respondents' conducting business with certain individuals who were known customers and service providers of Big Catch.[9] The other three respondents in this matter were a former employee of Big Catch who was working with Kemp (second respondent),[10] Upstream Fly Fishing, Kemp's new venture (third respondent), and another person involved in the international fly fishing business (fourth respondent), all of whom were accused by Big Catch of being used by Kemp for his alleged unlawful activities. The applicants contended that Kemp's fiduciary duties towards Big Catch did not cease to exist when Kemp resigned on 15 March 2018 but continued, and that Kemp had to be interdicted from breaching his fiduciary duties by doing business with known customers and service providers of Big Catch.[11] In essence, the applicants contended that a director may not appropriate any business opportunities of his or her former employer, even after resignation.[12]

3 The judgment

The court, per De Waal AJ, affirmed that an applicant for an interim interdict must satisfy the four following requirements: (i) a *prima facie* right to the relief sought in the main case (being the action in this case); (ii) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; (iii) a balance of convenience in favour of granting the interim interdict; and (iv) the absence of any other adequate ordinary remedy.[13] These requirements must be considered in conjunction with, and not in isolation from, one another.[14]

On the first requirement of a *prima facie* right to the relief sought in the main case, the question before the court was whether Kemp's fiduciary duties

8 *Big Catch v Kemp* para 8.

9 *Big Catch v Kemp* para 15.

10 An analysis of whether former employees owe fiduciary duties to their companies is beyond the scope of this article.

11 *Big Catch v Kemp* para 27.

12 *Big Catch v Kemp* para 29.

13 *Big Catch v Kemp* para 17.

14 *Big Catch v Kemp* para 18. "Balance of convenience" means the prejudice to the applicant if the interdict is refused, weighed against the prejudice to the respondent if it is granted (*Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 2 SA 382 (D) 383). The stronger the prospects of success, the less the need for the balance of convenience to favour the applicant, and *vice versa* (*Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 3 SA 685 (A) 691). See further *Knox D'Arcy Ltd v Jamieson* 1996 4 SA 348 (A) 378-379; *Camps Bay Residents and Ratepayers Association v Augoustides* 2009 6 SA 190 (WCC) para 9.

continued after his resignation as a director of Big Catch.[15] The court held that the default position is that an executive director may not carry on business activities which fall within the scope of his or her company's business during the time he or she serves as a director, but this changes on resignation.[16] After resignation, the court held, in the absence of some special circumstance such as a restraint of trade or the use of confidential information, a director does not commit a breach of his or her fiduciary duty merely because he or she takes steps to ensure that on ceasing to be a director he or she can continue to make a living – whether by setting up a business in competition with his or her former company or by joining a competitor – and then pursuing opportunities similar in nature to those targeted by his or her former company.[17] The court held that if this were not the case it would be a "very drastic invasion" of a former director's constitutional right to professional freedom in section 22 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).[18] The court said that whether a former director is misappropriating the rights of the company or merely using his or her own skill and knowledge or using general information is a factual enquiry.[19]

In regard to the circumstances when the fiduciary duties of a director will survive the termination of his or her relationship with the company, the court stated as follows:

> 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.[20] (Emphasis supplied.)

The court drew attention to *Sibex Construction SA (Pty) Ltd v Injectaseal CC*[21] (hereafter *Sibex*), where the court quoted from the case of *Canadian Aero Service Ltd v O'Malley*,[22] in which the Canadian Supreme Court stated that a director is precluded from usurping for himself or diverting to another person or company a maturing business opportunity which his company is actively pursuing, or where his 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

15 *Big Catch v Kemp* para 28.
16 *Big Catch v Kemp* para 34.
17 *Big Catch v Kemp* para 34.
18 *Big Catch v Kemp* para 35.
19 *Big Catch v Kemp* para 43.
20 *Big Catch v Kemp* para 36.
21 *Sibex Construction SA (Pty) Ltd v Injectaseal CC* 1988 2 SA 54 (T) 66 (hereafter *Sibex*).
22 *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 (SCC) para 25.

led him to the opportunity which he later acquired.[23] This, the court in *Big Catch v Kemp* held, indicates that the fiduciary duty after resignation relates to "commercially valuable, confidential, information"[24] obtained whilst the person was a director of the company. The court concluded that a company that wishes to prevent a director from competing with it after resignation should either do so by imposing a reasonable restraint of trade clause or by persuading a court that it has an interest worthy of protection, such as confidential information, lists of clients or connections, that justifies an interdict.[25] In the absence of a restraint of trade, the court said, the onus shifts to the director's former company to prove that there is a claim.[26]

Based on the facts, the court found that the applicants could not point to any fly fishing trips to be undertaken by Kemp or any of the other respondents in the future that amounted to a business opportunity that accrued to Big Catch whilst Kemp was a director.[27] While the applicants referred to three instances when Kemp had arranged international fly fishing trips for alleged customers of Big Catch to destinations operated by service providers of Big Catch and at least one of these opportunities arose prior to Kemp's resignation, the court held that these trips had already taken place and if Kemp had acted unlawfully, the only remedy against him would be the disgorgement of profits, which is what was sought from Kemp in the action.[28] Thus, while the court conceded that some existing contracts or maturing business opportunities may have been appropriated by the respondents, it held that these related to past events for which an interdict would serve no use.[29]

The court found further that the applicants had not relied on the use of confidential information, trade secrets, client lists or customer connections as a ground for protecting Big Catch against competition from Kemp.[30] This, the court said, was not surprising given that any head start or "springboard" conferred by such confidential information would have been dissipated by the time of the application for an interim interdict, which was brought almost a year after Kemp had resigned.[31] Since the matter dealt with the arrangement of fly fishing tours to well-known destinations, the court said

23 *Big Catch v Kemp* para 38.
24 *Big Catch v Kemp* para 38.
25 *Big Catch v Kemp* para 40.
26 *Big Catch v Kemp* para 40.
27 *Big Catch v Kemp* para 46.
28 *Big Catch v Kemp* para 45.
29 *Big Catch v Kemp* para 39.
30 *Big Catch v Kemp* para 46.
31 *Big Catch v Kemp* para 46.

that it was highly unlikely that knowledge about these destinations, service providers and customers interested in visiting them could not be gained over a period of a year.[32] Consequently the court held that the applicants had not succeeded in proving the first requirement for an interim interdict, that is a *prima facie* right to the relief sought in the main case.

As an alternative ground for the interdict, the applicants sought to rely on the shareholders' agreement between Kemp and Christie. This shareholders' agreement provided that Kemp and Christie would devote an equal amount of time and effort in the business, that if one of them should be away on leave the other would ensure the smooth running of the business, and that they would receive an equal salary.[33] It further provided that the shareholders would, at all times during the subsistence of the agreement and their relationship with the company, bear to each other the "utmost faith as is required by law to be borne to partners, the one to the other."[34] Based on this good faith clause, the applicants argued that Kemp continued after his resignation as a director to be bound to act in good faith towards Christie. In dismissing this argument, the court held that the shareholders' agreement dealt with obligations between Kemp and Christie while they were "both actively running the company"[35] and that, just as the duty to pay Kemp the same salary as Christie could not survive the termination of the relationship between Kemp and the company, so too the duty of Kemp to treat Christie as a partner could not outlast the termination of his working relationship with the company.[36] The court ruled that since Big Catch was no longer paying a salary to Kemp, there was no reason for Kemp to continue to take business to the company.[37] It held further that the shareholders' agreement was not relevant since it regulated the relationship between Kemp and Christie, and not between Kemp and Big Catch.[38]

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32 *Big Catch v Kemp* para 46.

33 *Big Catch v Kemp* para 48.

34 *Big Catch v Kemp* para 48.

35 *Big Catch v Kemp* para 50.1.

36 *Big Catch v Kemp* para 50.1. The reference to the term "partner" in the shareholders' agreement of a company is not correct as a company cannot be equated to a partnership.

37 *Big Catch v Kemp* para 50.1.

38 *Big Catch v Kemp* para 50.2. The applicants also applied, under s 163(2) of the *Companies Act* (relief from oppressive or prejudicial conduct) to interdict Kemp from exercising any voting rights for an interim period. The court dismissed this request because no facts had been pleaded by the applicants which demonstrated that Kemp had been exercising his voting rights in a manner harmful to Big Catch (*Big Catch v Kemp* para 51).

In considering conjunctively the remaining three requirements for an interim interdict, the court held that the applicants would not suffer irreparable harm if the interdict was not granted, and that they had an alternative remedy to recover their losses.[39] This was because they would be entitled to request the respondents to discover the details of their fishing trips with the known customers and service providers of Big Catch and if successful in the action to disgorge the profits made from those business activities.[40] The court had no hesitation in holding that the balance of convenience in favour of granting the interim interdict weighed decisively against the applicants.[41] It held that this was particularly so since the respondents would not be able to recover any losses they might suffer as a result of the granting of the interim interdict.[42] In concluding that a proper case for an interim interdict had not been made out by the applicants, the court ordered the Trust and Christie to pay the respondents' costs, jointly and severally.[43] The court ruled that Big Catch was exempted from paying costs on the ground that a costs order against Big Catch would affect Kemp in his capacity as a 50 per cent shareholder of the company.[44]

4 Analysis

4.1 The fiduciary duty not to misappropriate corporate opportunities

It is a well-established rule of company law that directors may not place themselves in a position where they have or can have a personal interest conflicting, or which possibly may conflict, with their fiduciary duties to the company.[45] Directors may not, without the informed consent of the company, make a profit or retain a profit made by them while performing their duties as directors (the "no-profit rule"), nor may they misappropriate corporate opportunities that properly belong to the company (the "corporate opportunity rule").[46] The no-profit rule is designed to strip the fiduciary of

39 *Big Catch v Kemp* para 54.
40 *Big Catch v Kemp* para 54.
41 *Big Catch v Kemp* para 55.
42 *Big Catch v Kemp* para 55.
43 *Big Catch v Kemp* para 59.
44 *Big Catch v Kemp* para 59.
45 *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461 471; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 177; *Boardman v Phipps* [1966] 3 All ER 721 (HL) 756; *Movie Camera Co (Pty) Ltd v Van Wyk* 2003 2 All SA 291 (C) para 46; *Phillips v Fieldstone Africa (Pty) Ltd* 2004 3 SA 465 (SCA) para 31; *Da Silva v CH Chemicals (Pty) Ltd* 2008 6 SA 620 (SCA) para 18 (hereafter *Da Silva*).
46 *Modise v Tladi Holdings (Pty) Ltd* [307/19] 2020 ZASCA 112 (29 September 2020) para 35. For a detailed discussion of the no-profit rule and the corporate opportunity rule, see Cassim "Duties and Liability of Directors" 534-554.

gains made in breach of his or her duty, while the corporate opportunity rule is designed to prevent the judgment of the fiduciary being swayed by self-interest.[47] In *Da Silva v CH Chemicals (Pty) Ltd*[48] (hereafter *Da Silva*) the Supreme Court of Appeal (hereafter the SCA) said that while an attempt at an all-embracing definition of a "corporate opportunity" is likely to be a fruitless task, a corporate opportunity is generally understood to be one that the company was actively pursuing;[49] or one which can be said to fall within the company's existing or prospective business activities; or which related to the operations of the company within the scope of its business,[50] or which falls within its line of business.[51] While the no-profit and corporate opportunity rules are distinct, they are mutually reinforcing and usually overlap.[52] Even if an opportunity ceases to be a corporate one as a result of its being rejected by the board,[53] if a director wishes to pursue the opportunity personally he or she must obtain the prior approval or the subsequent ratification of the majority of the shareholders in a shareholders' meeting in order to ensure that he or she is not hit by the no-profit rule.[54]

As the SCA in *Modise v Tladi Holdings (Pty) Ltd*[55] affirmed, the corporate opportunity rule is not confined to assets or property but extends to confidential information that directors use for their personal gain.[56] It is trite that directors may not use confidential information obtained by virtue of their office as directors to acquire a corporate opportunity for themselves or to harm the company.[57] This is encapsulated by section 76(2)(a) of the *Companies Act*, which states that a director must not use the position of director, or any "information" obtained while acting in the capacity of a director to gain an advantage for the director or another person other than

47 *Chan v Zacharia* (1984) 154 CLR 178 para 24; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) para 1305; *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 para 4501; *Ying Mui v Frank Kiang Ngan (No 3)* [2017] VSC 29 para 396; *Modise v Tladi Holdings (Pty) Ltd* [307/19] 2020 ZASCA 112 (29 September 2020) para 42.

48 *Da Silva* para 19.

49 See *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 (SCC) para 25.

50 See *Bellairs v Hodnett* 1978 1 SA 1109 (A) 1132.

51 See *Movie Camera Co (Pty) Ltd v Van Wyk* 2003 2 All SA 291 (C) paras 45, 57.

52 *Modise v Tladi Holdings (Pty) Ltd* [307/19] 2020 ZASCA 112 (29 September 2020) para 35 citing Cassim "Duties and Liability of Directors" 536 and 547.

53 See *Peso Silver Mines Ltd v Cropper* (1966) 58 DLR (2d) 1.

54 See *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 (HL); *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162; *Bhullar v Bhullar* [2003] 2 BCLC 241 para 41.

55 *Modise v Tladi Holdings (Pty) Ltd* [307/19] 2020 ZASCA 112 (29 September 2020) para 36.

56 See further Cassim "Duties and Liability of Directors" 539-540.

57 *Cranleigh Precision Engineering (Pty) Ltd v Bryant* [1964] 3 All ER 289 301; *Boardman v Phipps* [1966] 3 All ER 721 (HL) 748; *Sibex* 64.

the company or a wholly-owned subsidiary of the company, or to knowingly cause harm to the company or a subsidiary of the company. Section 76(2)(a) of the *Companies Act* impliedly encapsulates both the no-profit and corporate opportunity rules and extends to the misuse of confidential information.[58]

If a corporate opportunity is misappropriated by a director the law will treat the acquisition as having been made on behalf of the company, which may claim the opportunity from the director.[59] Where such a claim is no longer possible, the company may claim any profits which the director may have made as a result of the acquisition of the opportunity, or claim damages in respect of any loss it may have suffered thereby.[60] In an appropriate case a company may be protected by an interdict from an irreparable loss it may suffer if the former director is allowed to continue to exploit a corporate opportunity created in breach of his or her fiduciary duty.[61] Such an interdict must accord with public policy and the *boni mores* of the commercial community.[62] As highlighted by the court in *Big Catch v Kemp*,[63] if any corporate opportunities have in the past been misappropriated by a former director, an interdict would serve no use – in such an event there is no remedy against the former director other than a disgorgement of profits.

A director may resign from a company at any time because his or her right to do so is not a fiduciary power.[64] Unless restricted by contract, the right to resign may be exercised even if it has a disastrous effect on the company's business or reputation.[65] Resignation should not, however, be used as a means of evading the strict fiduciary duties imposed by law on a director.[66] It is thus in the interests of justice that the fiduciary duties "survive" the termination of the company-director relationship.[67] Section 76(2) of the

58 See Cassim "Duties and Liability of Directors" 551.

59 *Da Silva* para 18; *Kruger Investments Group Ltd v Nuberry Holdings Limited* (14184/15) 2015 ZAWCHC 159 (30 October 2015) paras 37-40.

60 *Symington v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* 2005 4 All SA 403 (SCA) para 27; *Da Silva* para 18. For a further discussion of this point see Cassim 2005 *Annual Survey of SA Law* 477-479.

61 *Spieth v Nagel* [1997] 3 All SA 316 (W) 324; *CyberScene Ltd v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C) para 31.

62 *Spieth v Nagel* 1997 3 All SA 316 (W) 324.

63 *Big Catch v Kemp* para 39.

64 *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 para 95.

65 *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 para 95; *Halcyon House Ltd v Baines* [2014] EWHC 2216 (QB) para 220; *First Subsea Ltd v Balltech Ltd* [2018] Ch 25 para 21.

66 *Findaload (Pty) Ltd v CMT Transport (Pty) Ltd* 2019 JOL 46156 (FB) para 29. See further Cassim 2008 *SALJ* 735-736.

67 *Findaload (Pty) Ltd v CMT Transport (Pty) Ltd* 2019 JOL 46156 (FB) para 29.

Companies Act does not address the complex issue of when a director's fiduciary duty to avoid a conflict of interest will survive his or her resignation.

In sharp contrast, section 170(2) of the UK *Companies Ac*t 2006 read with section 175 codifies the post-resignation fiduciary duty of directors to avoid a conflict of interest. Section 170(2)(a) provides that "a person who ceases to be a director" continues to be subject to the duty to avoid a conflict of interest enshrined in section 175,[68] as "regards the exploitation of any property, information or opportunity of which he became aware at a time when he was a director". The provision states further that the duties apply "to a former director as to a director, subject to any necessary adaptations". Section 170(4) of the UK *Companies Act* 2006 directs the courts to have regard to the corresponding common law rules and equitable principles in interpreting and applying the general statutory duties of directors.

Even though section 76(2) of the *Companies Act* does not codify the post-resignation fiduciary duties of directors, section 77(2)(a) of the *Companies Act* preserves the common law principles with regard to establishing the liability of directors for a breach of their fiduciary duties. It follows that the post-resignation fiduciary duties of directors must be determined with reference to the common-law authorities. The common-law authorities are clear that, in certain circumstances, a director's duty not to misappropriate a corporate opportunity may continue after his or her resignation.[69] The difficulty lies in determining the circumstances in which a director's duty not to misappropriate a corporate opportunity will survive his or her resignation.[70] Of course, if the opportunity arose only after a director's resignation, or if the director was unaware of the opportunity prior to resigning, it would not be a breach of his or her fiduciary duty not to exploit the opportunity after his or her resignation.[71]

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68 Section 175(1) of the UK *Companies Act* 2006 states that a director must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company. S 175(2) states that this duty applies in particular to the exploitation of any property, information or opportunity, and that it is immaterial whether the company could take advantage of the property, information or opportunity (s 175(2)). See further on s 175 of the UK *Companies Act* 2006 Lowry and Edmunds 2013 *HKLJ* 61-64.

69 See for example *Sibex* 66-67; *Spieth v Nagel* 1997 3 All SA 316 (W) 324; *CyberScene Ltd v i-Kiosk Internet and Information (Pty) Ltd* 2000 3 SA 806 (C) para 31; *Phillips v Fieldstone Africa (Pty) Ltd* 2004 3 SA 465 (SCA) para 31; *Da Silva* para 20; *Findaload (Pty) Ltd v CMT Transport (Pty) Ltd* 2019 JOL 46156 (FB) para 28.

70 For a detailed discussion of the circumstances in which a director's duty not to misappropriate a corporate opportunity will survive his or her resignation, see Cassim 2008 *SALJ* 731-753.

71 *Da Silva* para 20.

4.2 Conflating the misuse of confidential information with the appropriation of corporate opportunities

In *Big Catch v Kemp* the court held that the "fiduciary duties of a director" 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."[72] Examples of interests "worthy of protection" provided by the court are client lists or connections.[73] Relying on *Sibex*,[74] (which quoted from *Canadian Aero Service Ltd v O'Malley*),[75] the court in *Big Catch v Kemp* acknowledged that a director could breach his or her fiduciary duties post-resignation by appropriating a maturing business opportunity which the company is actively pursuing, or where the resignation is prompted by a wish to acquire the opportunity for himself or herself, or where it was his or her position with the company rather than a fresh initiative that led him or her to the opportunity which was later acquired.[76] The court, however, explicitly linked these instances to the use of confidential information by stating that they "indicate that the fiduciary duty after resignation relates to commercially valuable, confidential, information" obtained whilst the person was a director.[77] The concept of appropriating a maturing business opportunity which the company is actively pursuing was originally developed by the Supreme Court of Canada in *Canadian Aero Service Ltd v O'Malley*,[78] and has since been endorsed by English courts[79] and by the SCA in *Da Silva*[80] but, notably, none of these courts linked the appropriation of a maturing business opportunity with the misuse of confidential information.[81]

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72 *Big Catch v Kemp* para 36.

73 *Big Catch v Kemp* para 40.

74 *Sibex* 66.

75 *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 (SCC) para 25.

76 *Big Catch v Kemp* para 38.

77 *Big Catch v Kemp* para 38.

78 *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 (SCC) para 25.

79 See for example *Balston Ltd v Headline Filters Ltd* [1990] FSR 385 412; *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 para 96; *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200 para 8; *First Subsea Ltd v Balltech Ltd* [2018] Ch 25 para 21; *CJC Media (Scotland) Ltd v Sinclair* [2019] CSOH 8 paras 74, 102.

80 *Da Silva* para 20.

81 In *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 para 48 the Supreme Court of Canada said that, while there is no closed list of factors to identifying a maturing business opportunity, some of these factors include the position of the director; the nature of the corporate opportunity; its ripeness; its specificity and the director's relation to it; the amount of knowledge possessed; the amount of time that elapsed between the termination of the relationship and an allegation of a fiduciary breach; the circumstances in which it was obtained, and the circumstances under which the relationship was terminated. These factors were approved by the UK Court of Appeal in *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200 para 8 and *First Subsea Ltd v Balltech Ltd* [2018] Ch 25 para 21.

A breach of a director's fiduciary duties post-resignation need not necessarily be connected to the misuse of confidential information. This was explicitly acknowledged by the Full Court of the Supreme Court of Australia in *Southern Real Estate Pty Ltd v Valerie Dellow and Wayne Arnold*[82] and by the Supreme Court of Victoria in *Courtenay Polymers Pty Ltd v Deang*[83] and *Advanced Fuels Technology v Blythe*[84] (hereafter *AFT v Blythe*). In these cases the courts stated that if a director takes steps which are against the company's interests with a view to resignation and subsequent involvement in a competing business, he or she will, in the absence of full disclosure or other extraordinary circumstances, be in breach of his or her fiduciary duty, "*even if those steps involve no misuse of confidential information*" (emphasis provided). These Australian cases are of persuasive authority in South African law due to the impact of section 5(2) of the *Companies Act*.

By linking the appropriation of a maturing business opportunity with the misuse of confidential information, the court in *Big Catch v Kemp*, with respect, incorrectly conflated the legal principles on the misuse of confidential information with those on the appropriation of a corporate opportunity. While both the fiduciary duties not to appropriate corporate opportunities and the duty not to misuse confidential information may continue after the resignation of a director[85] and may overlap in certain instances, they are separate and distinct rules and must not be confused. The distinct nature of these rules is statutorily recognised in English law. Section 170(2) of the UK *Companies Act* 2006 in this regard provides that a person who ceases to be a director continues to be subject to the duty to avoid conflicts of interest in section 175 as regards the exploitation of any "property, *information* or *opportunity*" (emphasis provided), of which he became aware at a time when he was a director.

One difference between the appropriation of corporate opportunities and the misuse of confidential information is that the appropriation of a corporate opportunity may involve information which is not confidential in nature,[86] while the misuse of confidential information involves confidential information. Another difference is that the bases of liability may differ.[87]

82 *Southern Real Estate Pty Ltd v Valerie Dellow and Wayne Arnold* [2003] SASC 318.
83 *Courtenay Polymers Pty Ltd v Deang* [2005] VSC 318 para 90.
84 *Advanced Fuels Technology v Blythe* [2018] VSC 286 (hereafter *AFT v Blythe*) para 328.
85 *Faccenda Chicken Ltd v Fowler* [1986] 1 All ER 617 (CA) 625-626; Blackman *et al Commentary on the Companies Act* 8-186.
86 Havenga 1996 *SA Merc LJ* 243.
87 Havenga 1996 *SA Merc LJ* 244.

While the liability for the appropriation of a corporate opportunity is based on a director's fiduciary obligation, a company is entitled to rely on two distinct causes of action if a director misuses confidential information, namely unfair competition (under the *Aquilian* action) and breach of fiduciary duty.[88] When a director misuses confidential information he or she incurs liability for this reason, and it is irrelevant whether the information is used to compete with the company.[89] In contrast, when a director appropriates a corporate opportunity, his or her action is in competition with the company (by virtue of the fact that the opportunity is a corporate one).[90] It is respectfully submitted that, contrary to what the court stated in *Big Catch v Kemp*, it is not correct to hold that the fiduciary duties of a director would be breached post-resignation only if confidential information is misused.

In *Big Catch v Kemp* the court held that the applicants could not point to any trips to be undertaken by the respondents in the future which amounted to a "business opportunity" that accrued to Big Catch while Kemp was a director.[91] The appropriation of a corporate opportunity is not, however, the only instance when the corporate opportunity rule continues post-resignation. Another such instance is when the director's resignation was prompted or influenced by a wish to acquire the opportunity for himself or herself.[92] Furthermore, if a director, acting in his or her private capacity, becomes aware of an opportunity which, if known by the company, it might wish to pursue, and the director resigns to pursue the opportunity personally, he or she would also breach the corporate opportunity rule.[93] A director would also breach the corporate opportunity rule if he or she resigns in order to pursue an opportunity which his or her company is unable to

88 *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 189-196; *Sibex* 63; Blackman *et al Commentary on the Companies Act* 8-186.

89 Havenga 1996 *SA Merc LJ* 245; Blackman *et al Commentary on the Companies Act* 8-185-8-186.

90 Havenga 1996 *SA Merc LJ* 245.

91 *Big Catch v Kemp* para 46.

92 *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162; *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371 para 25; *Sibex* 66; *CyberScene Ltd v i-Kiosk Internet and Information (Pty) Ltd* 2000 3 SA 806 (C); *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 para 91; *Da Silva* para 20.

93 *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162.

take.[94] The SCA in *Da Silva*[95] and *Modise v Tladi Holdings (Pty) Ltd*[96] stated that it is irrelevant that a corporate opportunity would not have materialised – a director remains under a duty to disclose its existence to the company. Section 175(2) of the UK *Companies Act* 2006 explicitly states that in the context of a director's duty to avoid a conflict of interest, it is "immaterial" whether the company could take the property, information or opportunity.[97] It is submitted that, in ascertaining whether the applicants had established a *prima facie* right in their application for an interim interdict in *Big Catch v Kemp*, the court ought also to have considered the applicability of any of these other instances when the corporate opportunity rule continues post-resignation.

4.3 Adopting a flexible and pragmatic approach to the post-resignation fiduciary duties of directors

As mentioned above, in *Big Catch v Kemp* the court stated that the fiduciary duties of a director will be breached after resignation “only” if it involves the use of confidential information or violates an interest of the company that is worthy of protection in some other way.[98] Apart from the fact that this dictum incorrectly conflates the appropriation of corporate opportunities with the misuse of confidential information, as discussed above, it is submitted that it is also too prescriptive. It is not advisable to lay down a closed list of instances when a director's fiduciary duties would survive after his or her resignation as this issue is "highly fact sensitive", as acknowledged by the

94 *Regal (Hastings) Ltd v Gulliver* 1942 1 All ER 378 (HL) 392; *Gemstone Corp of Australia Ltd v Grasso* (1994) 13 ACSR 695 702; *Warman International Ltd v Dwyer* (1995) 182 CLR 544 558; *In Plus Group Ltd v Pyke* [2002] EWCA Civ 370 para 71; *Bhullar v Bhullar* [2003] 2 BCLC 241 para 41; *Quarter Master UK Ltd v Pyke* [2005] 1 BCLC 245 para 54; *Da Silva* para 19; *CJC Media (Scotland) Ltd v Sinclair* [2019] CSOH 8 para 123; *Modise v Tladi Holdings (Pty) Ltd* [307/19] 2020 ZASCA 112 (29 September 2020) para 38. For a detailed discussion of the circumstances in which a director's duty not to misappropriate a corporate opportunity will survive his or her resignation, see Cassim 2008 *SALJ* 731-753.

95 *Da Silva* para 19. For a discussion of *Da Silva* see Cassim 2009 *SALJ* 61-70.

96 *Modise v Tladi Holdings (Pty) Ltd* [307/19] 2020 ZASCA 112 (29 September 2020) para 38.

97 Some reasons why a company may be unable to take the opportunity may be that the company is financially unable to pursue the opportunity; that the other party is not willing to deal with the company (see *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162 176); there may be restrictions in the company's memorandum of incorporation, or there may be other legal constraints (Havenga 1996 *SA Merc LJ* 236). The rationale for this principle is that if directors were permitted to take opportunities that the company was unable to take, they would be tempted to refrain from exerting their best efforts on behalf of the company (Davies and Worthington *Gower Principles of Modern Company Law* 541).

98 *Big Catch v Kemp* para 36.

UK Court of Appeal in *In Plus Group Ltd v Pyke*[99] and *Foster Bryant Surveying Ltd v Bryant*.[100] In *Da Silva* the SCA likewise emphasised that ultimately, the inquiry will in each case involve a close and careful examination of all the relevant circumstances to determine whether the exploitation of the opportunity by the director gave rise to a conflict between the director's personal interests and those of the company.[101]

The UK Court of Appeal in *Foster Bryant Surveying Ltd v Bryant*,[102] per Rix LJ, noted further that it is difficult to accurately encapsulate the circumstances in which a director may or may not be found to have breached his or her fiduciary duties post-resignation. For this reason, it is suggested that courts should apply the legal principles on post-resignation fiduciary duties with "care and sensitivity" both to the facts and to other principles, such as that of the personal freedom to compete. It is further suggested that courts should adopt pragmatic solutions based on a "commonsense and merits-based approach".[103] In *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)*[104] the Supreme Court of Western Australia also approved a "pragmatic commonsense approach" to the scope of the conflict of interest rule. It is submitted that this approach is a commendable one, and that the instances established by the common law as to when a director's fiduciary duty will continue post-resignation should be regarded as guiding principles and not as inflexible rules.

It is accepted that a director may take preliminary steps to investigate an intention to set up a business in competition with the company after his or her directorship has ceased provided that there is no actual competitive activity, such as diverting opportunities to himself or herself, competitive tendering or actual trading, while he or she remains a director.[105] Directors acquire a general fund of skills, knowledge and expertise in the course of their work.[106] The expertise and experience acquired by a director during

99 *In Plus Group Ltd v Pyke* [2002] EWCA Civ 370 para 75.

100 *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200 para 76.

101 *Da Silva* para 19.

102 *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200 para 76.

103 *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200 para 76.

104 *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 para 4506.

105 *Balston Ltd v Headline Filters Ltd* [1990] FSR 385 412; *Framlington Group plc v Anderson* [1995] BCC 611 629; *Coleman Taymar Ltd v Oakes* [2001] 2 BCLC 749 para 80; *Movie Camera Co (Pty) Ltd v Van Wyk* 2003 2 All SA 291 (C) para 55.

106 *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 para 95; *Odyssey Entertainment Ltd v Kamp* [2012] EWHC 2316 (Ch) paras 218 and 244; *Halcyon House Ltd v Baines* [2014] EWHC 2216 (QB) para 220; Davies and Worthington *Gower Principles of Modern Company Law* 547.

his or her employment period with the company and in general even the personal relationships established during that period belong to him or her and not the company.[107] It is in the public interest that after their relationship with the company comes to an end, subject to any contractual terms, directors should be free to exploit their general fund of skill and knowledge acquired while they were directors, including business contacts and personal connections made as a result of their directorship.[108] In *Da Silva*[109] the SCA stressed that the general policy of the courts is not to impose undue restraints on post-resignation activities. This is particularly important in the light of the constitutional right to choose a trade, occupation and profession freely, guaranteed in section 22 of the Constitution. In terms of section 22, all persons should, in the interests of society be productive and be permitted to engage in trade or commerce or their professions.[110]

Based on the above sentiments, it is submitted that it is not advisable, as the court in *Big Catch v Kemp* attempted to do, to posit a closed list of instances in which a director will be said to have breached his or her fiduciary duties post-resignation. A flexible and pragmatic approach should be adopted to the determination of the post-resignation fiduciary duties of directors.

4.4 Qualifications to the protection of information in a client list

In stating that a director's fiduciary duty will survive post-resignation only if it involves the use of confidential information or violates an interest worthy of protection, the court in *Big Catch v Kemp* gave as an example of such an interest a client list.[111] It must be noted that a client list is not necessarily worthy of protection in all instances – this would be the case only if the client list has the necessary quality of confidence, as discussed further below.

In the Australian case of *AFT v Blythe,* the court usefully shed light on the factors that make a client list confidential. In this case a director had resigned from the company after emailing to himself a list of the company's business and personal contacts.[112] In assessing whether the client list was

107 *Da Silva* para 20.

108 *SA Historical Mint (Pty) Ltd v Sutcliffe* 1983 2 SA 84 (C) 91; *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 para 95; *Halcyon House Ltd v Baines* [2014] EWHC 2216 (QB) para 220; *First Subsea Ltd v Balltech Ltd* [2018] Ch 25 para 21.

109 *Da Silva* para 20.

110 *Reddy v Siemens Telecommunications Pty Ltd* 2007 2 SA 486 (SCA) para 15; *Da Silva* para 20.

111 Other examples could be company databases, suppliers' agreements, and business and sales strategies (see Lowry and Edmunds 2013 *HKLJ* 66).

112 *AFT v Blythe* para 174.

confidential the Supreme Court of Victoria set out certain factors to determine whether information may be considered confidential. These factors include: (i) the extent to which the information was known outside the business; (ii) the extent to which it was known by employees and others involved in the business; (iii) the extent of measures taken to guard the secrecy of the information; (iv) the value of the information to the company and its competitors; (v) the amount of effort or money expended in developing the information; (vi) the ease or difficulty with which the information could be properly acquired or duplicated by others; (vii) whether it was plainly made known that the information was confidential; (viii) the fact that the usages and practices of the industry support the assertions of confidentiality; and (ix) whether the information could be readily identified.[113] The court held that the client list in this case did not constitute confidential information as it simply comprised the names, email addresses and telephone numbers of persons outside the company – some relevant and others irrelevant to the company's business.[114] The list moreover included information available through public sources, it was intermixed with personal contacts, and the contact details of the persons listed could be readily acquired or duplicated by others.[115] The court held that, although some attributes of the data and the manner of its creation pointed to its having the character of confidential information, on balance the information could not be considered to be confidential.[116]

A further qualification to consider when evaluating whether a client list is confidential is that the protection afforded to client lists is limited by the fact that the law recognises that on termination of employment, some knowledge of the former employer's clients will inevitably remain in the employee's memory, and that this leaves an employee free to use and disclose such recollected knowledge in his or her own interests, or even the interests of a new employer who competes with the previous one.[117]

4.5 Limited duration of the unfair advantage of confidential information and impact on the application for an interdict

As discussed earlier, in *Big Catch v Kemp* the court said that even if the applicants had relied on the use of confidential information, trade secrets or

113 *AFT v Blythe* para 178. See further *Wright v Gasweld Pty Limited* (1991) ATPR 41-087 52407.
114 *AFT v Blythe* para 179.
115 *AFT v Blythe* para 179.
116 *AFT v Blythe* para 179.
117 *Meter Systems Holdings Ltd v Venter* 1993 1 SA 409 (W) 428.

client lists as a ground for protecting Big Catch against competition from Kemp, any head start or "springboard" conferred by such confidential information would have dissipated by the time the application for an interdict was brought, which was almost a year after Kemp had resigned.[118] The court held that it was unlikely that knowledge about the destinations of the fly-fishing tours, the service providers of Big Catch and its customers interested in visiting them could not be gained over a period of a year.[119]

This highlights the fact that the unfair advantage of a head start or springboard conferred on a director who misuses confidential information is of limited duration, since there will come a time when the information will no longer be secret.[120] Companies should not delay in bringing legal proceedings against former directors for the misuse of their confidential information, as the longer the period post-resignation, the less likely the prospects of establishing that the former director is misusing the company's confidential information. It is illustrated in *Multi Tube Systems (Pty) Ltd v Ponting*[121] that even if an applicant is successfully able to establish a *prima facie* right, an interdict will not be warranted if the applicant's delay in bringing the proceedings resulted in the advantage conferred by the confidential information abating, or even disappearing, by the time of the application.

4.6 Distinguishing the different capacities in which a director is involved with the company

Executive directors are full-time employees of the company, while non-executive directors occupy the office of director but are not employees of the company.[122] A person simultaneously employed as an executive director and a board member enjoys a dual status as a director and an employee of the company.[123] A director may, in addition, be a shareholder in the company. When a director is involved with a company in more than one capacity, for instance as an employee and a shareholder, his or her relationship with the company becomes complicated. It is important that a clear distinction is made between the various capacities in which a person

118 *Big Catch v Kemp* para 46.
119 *Big Catch v Kemp* para 46.
120 *Multi Tube Systems (Pty) Ltd v Ponting* 1984 3 SA 182 (D) 189.
121 *Multi Tube Systems (Pty) Ltd v Ponting* 1984 3 SA 182 (D) 189.
122 *Protect a Partner (Pty) Ltd v Laura Machaba-Abiodun* 2013 JOL 31048 (LC) para 48.
123 *Kaimowitz v Delahunt* 2017 3 SA 201 (WCC) para 19.

acts in a company, and that these are not conflated, since different consequences flow from the termination of each of these relationships.

Kemp and Christie were simultaneously directors, employees and shareholders of Big Catch. The shareholders' agreement signed by them appeared to regulate their relationship not only as shareholders, but also as directors and employees of Big Catch. In ruling that the good faith clause in the shareholders' agreement was not relevant to Kemp and Christie's relationship, it is respectfully submitted that the court may not have properly distinguished between the role of a director, an employee and a shareholder. The court held that the shareholders' agreement dealt with Kemp and Christie's relationship while they were "both actively running the company".[124] Shareholders do not "run" a company in their capacity as shareholders – this is the role of directors. This is made clear by section 66(1) of the *Companies Act*, which states that the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the *Companies Act* or the company's memorandum of incorporation provides otherwise. When Kemp resigned as an executive director, he resigned both as a director and as an employee, but remained as a shareholder of Big Catch. This means that, while any clauses of the shareholders' agreement relating to Kemp's role as a director and employee ceased to be relevant after his resignation, any clauses relating to his position as a shareholder of Big Catch, such as clauses regulating the payment of dividends (if any) would continue to apply. In other words, since Kemp remained as a shareholder of Big Catch, the shareholders' agreement subsisted insofar as it regulated his relationship as a shareholder of Big Catch.

The court reasoned that since the duty to pay Kemp the same salary as Christie could not survive the termination of the relationship between Kemp and the company, so too the duty of Kemp to act with good faith towards Christie could not outlast the termination of Kemp's working relationship with the company.[125] This is fallacious reasoning. It is correct that the company no longer had a duty to pay Kemp a salary since his employment relationship had terminated. But, since Kemp remained as a shareholder, the good faith clause, which was explicitly stated to apply during the subsistence of the shareholders' agreement and the parties relationship to

124 *Big Catch v Kemp* para 50.1.
125 *Big Catch v Kemp* para 50.1.

each other as "partners",[126] could arguably have continued to apply to Kemp in his capacity as a shareholder. While this would not necessarily mean that Kemp had to continue to take business to Big Catch, it would mean that in his capacity as a shareholder Kemp still had to act in good faith towards Christie while they remained as shareholders of Big Catch.[127]

An unsigned contract of employment between Big Catch and the second respondent contained a restraint of trade clause which was applicable for a period of eight months.[128] The court stated, *obiter*, that even if this contract was enforceable, which was doubtful, the restraint of trade clause would have expired by the time the application for the interim interdict was brought.[129] There was no restraint of trade clause in the shareholders' agreement or any agreements between Big Catch and Kemp. A useful method for companies to prevent former executive directors from competing with them post-resignation is to insert a reasonable restraint of trade clause in the director's employment agreement. Agreements in restraint of trade are valid and enforceable unless the party seeking to escape the clause shows that they are unreasonable and thus contrary to public policy.[130]

In determining the reasonableness or unreasonableness of a restraint of trade clause, a value judgment must be made in which two policy considerations must be weighed: first the public interest, which requires that parties must comply with their contractual obligations, and second the principle that all persons should in the interests of society be productive and be permitted to engage in trade, commerce or their professions.[131] If the facts assessed in this way disclose that the restraint of trade clause is reasonable, the party seeking the restraint order must succeed, but if the facts disclose that the restraint clause is unreasonable, the party seeking the restraint order must fail.[132] The enquiry to determine the reasonableness of the restraint includes the nature, extent and duration of the restraint, the legitimate interests of the parties, and their respective bargaining powers

126 As mentioned earlier, the reference to the term "partner" in the shareholders' agreement of a company is not correct as a company cannot be equated to a partnership.

127 *Big Catch v Kemp* para 50.1.

128 *Big Catch v Kemp* para 25.

129 *Big Catch v Kemp* para 25.

130 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 898; *Reddy v Siemens Telecommunications Pty Ltd* 2007 2 SA 486 (SCA) para 10.

131 *Reddy v Siemens Telecommunications Pty Ltd* 2007 2 SA 486 (SCA) para 15; *Findaload (Pty) Ltd v CMT Transport (Pty) Ltd* 2019 JOL 46156 (FB) para 24.

132 *Reddy v Siemens Telecommunications Pty Ltd* 2007 2 SA 486 (SCA) para 14.

and interests.[133] The outcome of *Big Catch v Kemp* could have been very different for the applicants had there been an appropriate restraint of trade clause in Kemp's employment agreement. On this basis the applicants may have been able to restrain Kemp from engaging in a similar business in the same geographical location for a certain period of time, and from attempting to solicit clients of Big Catch.

In its costs order the court ordered the Trust and Christie, but not Big Catch, jointly and severally, to pay Kemp's costs.[134] The court reasoned that a costs order against Big Catch would not be appropriate since it would affect Kemp in his capacity as a shareholder. It seems unfair to impose a costs order on the other applicants, jointly and severally, and to exclude the company from this liability when the company was one of the applicants in this matter. This costs order is unusual as it implies that companies that unsuccessfully institute legal action against a shareholding-director would be exempt from paying costs since this would affect the shareholding-director in his or her capacity as a shareholder. This reasoning is also contradictory in that surely, if Big Catch had been the sole applicant and had not been joined by the Trust and Christie in the application, the court would then have imposed a costs order against Big Catch, even though this would have affected Kemp in his capacity as a shareholder.

5 Conclusion

The law on post-resignation fiduciary duties is notoriously complex. It has not enjoyed much attention in South African law. Even though the corporate opportunity and no profit-rules have been given statutory force in section 76 of the *Companies Act*, the *Companies Act*, unlike section 170(2) of the UK *Companies Act* 2006, does not address the post-resignation fiduciary duties of directors. Consequently, courts must ascertain the post-resignation fiduciary duties of directors in accordance with common-law principles. The importance of a company's not delaying in bringing proceedings to protect

133 *Basson v Chilwan* 1993 3 SA 742 (A) 767; *Reeves v Marfield Insurance Brokers CC* 1996 3 SA 766 (A) 776; *Reddy v Siemens Telecommunications Pty Ltd* 2007 2 SA 486 (SCA) para 16.

134 In South African civil procedure the general principle is that costs are generally awarded against the unsuccessful party and that the successful party should be awarded his or her costs (*Union Government v Gass* 1959 4 SA 401 (A) 413; *Gauteng Provincial Legislature v Kilian* 2001 2 SA 68 (SCA) para 24; *Nzimande v Nzimande* 2005 1 SA 83 (W) para 75). The courts may depart from this principle in their discretion since each case must be decided on its own facts (*Gelb v Hawkins* 1960 3 SA 687 (A) 694; *Ward v Sulzer* 1973 3 SA 701 (A) 706; *Intercontinental Exports (Pty) Ltd v Fowles* 1999 2 SA 1045 (SCA) para 25; *Antoy Investments v Rand Water Board* (159/2007) 2008 ZASCA10 (20 March 2008) para 9).

the misuse of confidential information was highlighted in *Big Catch v Kemp* since the unfair advantage of any head start or springboard is of a limited duration. *Big Catch v Kemp* also illustrates the importance of companies' inserting an appropriate and reasonable restraint of trade clause in their employment agreements with executive directors, which Big Catch did not do in this instance. This case further demonstrates the complexity involved when a director is involved with a company in more than one capacity, such as an employee and a shareholder, and the importance of distinguishing between these various capacities.

This article has argued that the court, with respect, incorrectly conflated the legal principles on the appropriation of corporate opportunities with the misuse of confidential information. While both duties may continue after the resignation of a director and may overlap in certain instances, they are separate rules and must not be confused. It has further been submitted in this article that while it is clear that certain lines may not be crossed by a director after his or her resignation, courts should avoid laying down an inflexible closed list of instances when fiduciary duties will continue post-resignation, as *Big Catch v Kemp* attempted to do. This is because the issue is fact-specific and depends on the particular context. In accordance with the approach adopted by the UK Court of Appeal and the Supreme Court of Western Australia, it is submitted that South African courts should adopt a flexible and pragmatic approach to determining when a director's fiduciary duties will survive after his or her resignation. This is particularly important in the light of the constitutional right to choose a trade, occupation and profession freely, as enshrined in section 22 of the Constitution. It is submitted that such an approach would take into account the modern conditions in which directors operate, and would strike an appropriate balance between encouraging entrepreneurship and enterprise efficiency, as required by section 7*(b)*(i) of the *Companies Act*, and would safeguard companies from a breach of fiduciary duties by directors after they resign.

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Southern Real Estate Pty Ltd v Valerie Dellow and Wayne Arnold [2003] SASC 318

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Legislation

Companies Act 71 of 2008

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List of Abbreviations

HKLJ	Hong Kong Law Journal

SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
UK	United Kingdom