

THE PROS AND CONS OF A SIDE HUSTLE IN AN EMPLOYMENT RELATIONSHIP:

*Bakenrug Meat (Pty) Ltd t/a Joostenberg Meat v
CCMA [2022] 4 BLLR 319 (LAC)**

1 Introduction

South Africa's strained economy has cajoled many employees into seeking extra work to complement their primary employment earnings. Most often, employees try to make ends meet by opting to take a second job – in common parlance, a side hustle (see Momentum/Unisa "Science of Success Insights Report" (2021) <https://retail.momentum.co.za/documents/campaigns/scienceofsuccess2021/unisa-science-of-success-insightsreport.pdf> (accessed 2022-03-15) 78–79; Business-tech Staff Writer "Middle-Class South Africans Are Turning to Side Hustles to Make Ends Meet" (31 October 2021) <https://businesstech.co.za/news/business/532794/middle-class-south-africans-are-turning-to-side-hustles-to-make-ends-meet> (accessed 2022-03-15); Abraham and Houseman "Making Ends Meet: The Role of Informal Work in Supplementing Americans' Income" 2019 5 *The Russell Sage Foundation Journal of the Social Sciences* 110–130).

Often, this practice of engaging in a second job is hidden from the main employer because there is a fine line to tread when it comes to moonlighting. Snow and Abramson acknowledge that moonlighting is a "recurring problem in labour relations, and it involves the practice of holding more than one job" (Snow and Abramson "By the Light of Dual Employment: Standards for Employer Regulation of Moonlighting" 1980 55 *Indiana Law Journal* 581).

In this context, employees and employers need to understand their responsibilities and expectations to avoid it flaring into a legal issue. The general rule is that employment relationships are built on trust and confidence (Tshoose and Letseku "The Breakdown of the Trust Relationship Between Employer and Employee as a Ground of Dismissal: Interpreting LAC Decision in *Autozone*" 2020 32 *SA Mercantile Law Journal* 156–174; Okpaluba and Maloka "The Breakdown of the Trust Relationship and Intolerability in the Context of Reinstatement in the Modern Law of Unfair Dismissal (1)" 2021 35 *Speculum Juris* 149; Garbers, Basson, Christianson,

* The authors would like to thank Prof T Maloka for his invaluable comments on the earlier drafts of this case note. The views or opinions expressed herein are those of the authors alone.

Christoph, Le Roux, Mischke and Strydom *The New Essential Labour Law Handbook* (2019) 36; *Central News Agency v Commercial Catering and Allied Workers Union of SA* 1991 (12) ILJ 340 (LAC); Boyle “The Relational Principle of Trust and Confidence” 2007 27 *Oxford Journal of Legal Studies* 633–657).

As the Appellate Division (as it then was, now the Supreme Court of Appeal) found in *Council for Scientific and Industrial Research v Fijen* (1996 (17) ILJ 18 (A) par 26D–E):

“It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitled the “innocent party” to cancel the agreement.”

As such, the cardinal duty lying at the heart of any employment relationship is the common-law duty to act in good faith, owed by employee to employer (*Aquarius Platinum (SA) (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* 2020 (41) ILJ 2059 (LAC); *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA); *Sappi Novoboord (Pty) Ltd v Bolleurs* 1998 (19) ILJ 784 (LAC); *Bidserv Industrial Products (Pty) Ltd v CCMA* 2017 (38) ILJ 860 (LAC) par 17).

However, the concept of good faith has for long been surrounded by considerable mystery (see Bagchi “Unions and the Duty of Good Faith in Employment Contracts” 2003 112 *The Yale Law Journal* 1881–1910; Ehlers “Trust and Perceptions of Compliance, Fairness and Good Faith in Primary Labour Relationships” 2020 23 *South African Journal of Economic and Management* 5).

Nevertheless, the amplification and extension of the good-faith concept has spawned more extensive academic and court jurisprudence in the context of derivative misconduct (see the seminal case of *FAWU v ABI Ltd* 1994 (15) ILJ 1057 (LAC) and *Chauke v Leeson Motors* 1998 (19) ILJ 1441 (LAC)). Further refinement of derivative misconduct can be seen in *Western Platinum Refinery Ltd v Hlebela* (2015 (36) ILJ 2280 (LAC)) and *NUMSA v Dunlop Mixing & Technical Services (Pty) Ltd* (2019 (40) ILJ 1731 (CC)) (see generally, Maqutu “Collective Misconduct in the Workplace: Is ‘Team Misconduct’ ... Good Faith in the Law of Contract” 2018 29 *Stell LR* 379; Poppequ “The Sounds of Silence: The Evolution of the Concept of Derivative Misconduct and the Role of Inferences” 2018 39 *ILJ* 35); Maloka “Derivative Misconduct and Forms Thereof: *Western Refinery Ltd v Hlebela* 2015 36 ILJ 2280 (LAC)” 2016 19 *PER/PELJ* 1). The contours of good faith and fiduciary duties have been authoritatively elaborated upon in *Volvo (Southern Africa) (Pty) Ltd v Yssel* (2009 (4) All SA 497 (SCA) (*Volvo*)) (see Idensohn “Towards a Theoretical Framework of Fiduciary Principles: *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009 4 All SA 497 (SCA)” 2010 2 *Speculum Juris* 142).

This case note thus centres on the duty of good faith, with a particular emphasis on moonlighting. Determination of the scope of the duty of good faith was the crux of the judgment of the Labour Appeal Court (LAC) in *Bakenrug Meat t/a Joostenburg Meat v CCMA* (2022 (4) BLLR 319 (LAC))

(*Bakenrug*). By inquiring into the “scope”, the case note highlights that the duty is wide and has numerous dimensions. Thus, lack of clarity and confusion by courts creates difficulties for the fairness or otherwise of dismissals for alleged moonlighting. Compounding this challenge, a recurring problem in labour relations involves the extent to which employers discipline employees for moonlighting (the practice of holding more than one job).

After outlining the salient facts, the case note engages with the CCMA award, the decision of the Labour Court (LC) and the judgment of the LAC. The balance of analysis is structured in the following way. First, there is an evaluation of the concept of the “duty of good faith” in circumstances of moonlighting. Secondly, the case note unpacks the notion of “conflict of interest” in employment relations. Thirdly, misconduct as a ground that warrants dismissal is viewed in the context of moonlighting. Finally, the note makes some concluding remarks.

2 Overview of the salient facts

The employee in the *Bakenrug* case was employed as a sales representative on 28 October 2013. The company was engaged in the marketing and distribution of various types of cold meat product. In September 2016, the company added biltong production to its business.

The employee also operated a formal business of her own but only on weekends. It was accepted based on uncontested evidence that the employee’s independent business included:

“Cutting up of meat, goat, lamb, pork etc. Deboning of carcasses and cuts, cutting up of bones, goulash [recipes], and steak. It is all business, all activities that we are busy with. This business is competing directly with what we do and then game meat processing, dry *wors*, biltong, packing, packing into smaller packages.” (*Bakenrug supra* par 11)

The employee also sold biltong products. She did not inform the employer about her business activities.

The employee was dismissed on a charge of dishonesty. To be precise, the employee failed to inform the employer that she operated her own business that marketed dried meat products. She thus failed to give full attention to marketing the meat products produced by the company (*Bakenrug supra* par 1).

3 Proceedings before the CCMA

Aggrieved by the outcome of the disciplinary proceedings, the employee referred an unfair dismissal claim to the Commission for Conciliation Mediation and Arbitration (CCMA). The CCMA found that the employee’s dismissal was substantively fair. The CCMA reasoned concisely:

“The respondent (appellant *in casu*) marketed meat products and at the very least it should have been aware of the applicant’s (third respondent) activities so that it could decide whether the applicant’s activities were in conflict. The

applicant chose to not tell the respondent. It was dishonest not to do so. The effect was that she could not have given full attention to her duties. The respondent provided evidence that it was constantly attempting to impress upon the applicant that she was not performing her duties." (*Bakenrug supra* par 4)

On the timeframe of when the respective businesses dealt specifically in biltong, Commissioner JJ Kitshoff had this to say:

"The fact that the respondent may not have marketed biltong prior to September 2016 is not an acceptable excuse for the applicant to operate a formal business, marketing meat products, without telling the respondent." (*Bakenrug supra* par 4)

4 Proceedings before the Labour Court

The employee then instituted review proceedings with the LC. The LC reversed the arbitration award on the basis that the CCMA had misconceived the evidence, which did not sustain the charge against the employee. Simply put, the CCMA Commissioner arrived at a decision that no reasonable decision maker could have reached (*Bakenrug supra* par 7). Cele J found in the main that the employee operated her business only on weekends. Accordingly, "there was no nexus between her performance for the third respondent (appellant) and the running of the side-line business" (*Bakenrug supra* par 7). In short, the employee achieved substantial success at the LC. Dissatisfied with the setback at the LC, the employer approached the LAC.

5 Proceedings before the Labour Appeal Court

In the LAC, Davis JA found that the employee failed to disclose an essential and important fact that she was running "a side-line business" in the market for the sale of meat products. Irrespective of the fact that the two businesses at issue might not have been marketing and selling similar products, the employee's failure to disclose her side-entrepreneurial activities cannot be countenanced. As noted by the LAC, whether the employee was able to execute her duties was immaterial. Accordingly, failure to disclose the fact that she conducted a business that involved the sale of biltong "was manifestly in violation of her duty of good faith to her employer" (*Bakenrug supra* par 15).

The LAC stated further that, "when the second respondent found that the third respondent had acted in a dishonest and unacceptable manner, he came to a conclusion which most certainly on the facts, was a reasonable one" (*Bakenrug supra* par 17). In short, the LAC overturned the order of the LC and replaced it with an order dismissing the application to review the CCMA award (see *Herholdt v Nedbank Ltd v COSATU as Amicus Curiae* 2013 (34) ILJ 2795 (SCA)).

6 Commentary

It is extremely important that an employee charged with misconduct within a workplace knows exactly what the charge is (Garbers *et al The New Essential Labour Law Handbook* 184). Employers inevitably make a dismissal decision in view of the available evidence. Courts have held this to be important because, should a dismissed employee challenge the fairness of the dismissal, the employer will be held to the original reason for dismissal (*Kekana v Railway Safety Regulator* [2021] ZALCJHB 395 par 54; *Abernethy v Mott. Hay and Anderson* 1974 ICR 323). Despite occasional overlap among the various types of misconduct, the relevant type should be identified and pursued. Accordingly, a charge of moonlighting against an employee should be clearly identified as a particular type of misconduct. In *Bakerug*, this extremely important duty of localising a charge was overlooked. As such, a number of different forms of misconduct were referred to as finding application to the facts.

6.1 *The scope of the duty of good faith owed by an employee to an employer*

As noted in the introduction, an employment relationship is based on the common-law principle of good faith (McGregor, Dekker, Budeli, Manamela, Manamela, Germishuys and Tshoose *Labour Law Rules* (2021) 25). It is recognised that there is an implied duty on employees to act in good faith and to promote the interests of employers (McGregor *et al Labour Law Rules* 25). The essence of the duty of good faith is eloquently expounded by the Supreme Court of Appeal (SCA) in *Phillips v Fieldstone Africa (Pty) Ltd (supra) (Phillips)*. This matter was an appeal concerning the liability of an employee to account to his employer for secret profits made by the employee out of an opportunity arising in the course of his employment. The facts of the case, briefly, are that the employer carried on a business raising capital for its clients. The clients usually paid the employer for these services by way of an issue of shares to it. The employee bought and sold shares of one of his employer's clients in his own name, although the employer itself was interested in acquiring the shares. The employee sold the shares and made profit.

Heher JA upheld the decision of the court *a quo*, on the ground that the employee breached his duty of good faith. The court in *Phillips (supra* par 31) unequivocally pointed out that the duty entails the following:

- a) The rule that an employee is not allowed to make secret profits at the expense of the employer or to be in a position wherein her or his interests' conflict with those of the employer is a firm one that allows little room for exception.
- b) The rule relates not only to actual conflict of interest, but also to conflicts that are real and sensibly possible.
- c) The defences open to a fiduciary in breach of the duty are limited. Only the full consent of the employer after full disclosure will suffice (Van Niekerk, Smit, Christianson and Van Eck *Law@Work* (2018) 94).

As discussed above, an employee owes an employer a fiduciary duty, which is a duty of good faith, trust and confidence. According to *Black's Law Dictionary*, a person with a fiduciary duty owes to another the duties of good faith, trust, confidence and candour, and is required to exercise a high standard of care in managing another's money or property (see Garner *Black's Law Dictionary* 8ed (2004) 702). *Black's Law Dictionary* also indicates that a person in a position of trust with fiduciary duties is expected to act primarily for the benefit of the person/entity to whom the fiduciary duties are owed (The Law Dictionary "Fiduciary Definition and Legal Meaning" (undated) <http://thelawdictionary.org/fiduciary/> (accessed 2022-03-15)). A person in a fiduciary position exercises discretion over the affairs of another (*Volvo supra* par 17). The meaning of the word fiduciary is based on the concepts of honesty, good faith, confidence, reliance and utmost trust (*Volvo supra* par 17). These concepts are centred on the notion of loyalty.

Courts are often required to determine whether fiduciary duties apply to a given relationship but have not been able to articulate a clear standard for making this determination (Coetzee and Van Tonder "The Fiduciary Relationship Between a Company and its Directors" 2002 35 *Obiter* 287). Certain relationships have come to be clearly recognised as encompassing fiduciary duties, while other relationships have not (*Volvo supra* par 16). The concept of a fiduciary relationship is universal and may be found in different categories of relationship – for example, trustee/beneficiary, director/company, agent/principal and attorney/client relationships (*Volvo supra* par 16). The list of fiduciary relationships is not closed (see *Volvo supra* par 16).

The Appellate Division in *Robinson v Randfontein Estates Gold Mining Co Ltd* (1921 AD par 168) (*Robinson*) held that a fiduciary relationship exists where one man stands to another in a position of confidence involving a duty to protect the interests of another (*Robinson supra* par 177–178). Whether a particular relationship should be regarded in law, as being one of trust will depend on the facts of the particular case (*Volvo supra* par 16).

The breach of the duty of good faith is a strict catch-all obligation, often used in charges of misconduct (Van Niekerk *et al Law@Work* 94). As McGregor *et al* opine, this broad obligation demands of employees not to work against the employer's interests, not to compete with the employer, and not to make profit at the expense of the employer, as well as to devote hours of work to promote the business interests of the employer and to act honestly (McGregor *et al Labour Law Rules* 25). It is worth noting that this list is not exhaustive.

6.2 Dishonesty as a form of misconduct viewed in the context of moonlighting

It has been emphasised that "good faith" means honesty or sincerity of intention (*Qonde v Minister of Education, Science and Innovations* LC (JHB) (unreported) (7 September 2021) (J874/21) par 40). By contrast, dishonesty is multidimensional (see e.g., *UKZN v Pillay* 2019 (4) *ILJ* 158 (LAC); *Makoni*

and *McGovern t/a Banana Jam Café* 2020 (41) ILJ 1324 (CCMA); *Maseko and Lonmin Platinum* 2020 (41) ILJ 1333 (CCMA); *TAWUSA obo Sithole and Tosas (Pty) Ltd* 2020 (41) ILJ 1357 (BCA); *Malaka v GPSSBC* 2020 (41) ILJ 2783 (LAC)). Often, theft and fraud are illustrative of dishonesty. In the present case, the employee was dismissed for having been dishonest. The employee's dishonesty emanated from neither fraud nor theft. Rather, the dishonesty arose from concealment of the employee's side-line business, which was in direct competition with the employer.

To recap, the employer's line of business entailed marketing and distribution of cold meat products, including biltong. The employee's side hustling activities overlapped with those of her employer: she marketed dried meat products. It is also important to note that dishonest non-disclosure of a material fact justifies a dismissal. Moreover, a calculated silence in the face of a duty to inform an employer of material facts amounts to fraudulent nondisclosure (*Schwartz v Sasol Polymers* 2017 (38) ILJ 915 (LAC) par 30).

6.3 *Unpacking the notion of conflict of interest in employment relations*

The Constitution of the Republic of South Africa, 1996 in section 22 protects the rights of everyone to be economically active. Inevitably, people seek to do business with one another and some people exercise their rights to employment. The workplace is often characterised by competing interests of the employer and employee (Sørensen "Capital and Labour: Can the Conflict Be Solved?" 2006 4 *Interdisciplinary Journal of International Studies* 29–46). Both parties have the right to have their interests protected, but not at the expense of the other, unless there are genuine interests to be protected.

In an effort to protect their interests, employers typically design policies that prevent employees from entering into situations that may be in conflict with the interests of their business. Unfortunately, and owing to compelling interests, employees often entangle themselves in compromised situations and enter into interests that are in conflict with the employer. Once the employer finds out, these employees are often dismissed for misconduct owing to their failure to disclose their conflict of interest and involvement in such situations (see *Martin & East (Pty) Ltd v Bulbring No* 2016 (5) BLLR 475 (LC); *City of Cape Town v SALGBC* [2017] ZALCCT 35; *SAMA obo Craven v Department of Health* 2005 (12) BALR 1259; *Biyela v Nelson Mandela Children's Fund* 2004 (10) BALR 1210; *Steyn v Crown National (Pty) Ltd* 2002 (5) BALR 546).

It is well recognised at common law that employees have an implied duty to render services in good faith. As such, employees are obliged to further the business interests of their employers (Van Niekerk *et al Law@Work* 93). As discussed in the foregoing paragraphs a contract of employment is inherently based on mutual trust and confidence. As such, an employee must, among other things, not work against the employer's interests (see *Robinson supra* par 168). Employees are also required to devote hours of work to the business interests of the employer. In this regard, any conduct

that is likely to affect the business interests of the employer detrimentally may warrant disciplinary action. Direct competition by an employee with the employer is a most flagrant conflict of interest (Van Niekerk *et al Law@Work* 298). The degree of dishonesty in this form of misconduct ordinarily cries out for dismissal. Be that as it may, the LAC decision of *De Beers Consolidated Mines v National Union of Mineworkers* ([2019] ZALAC 72), has shown that even with conflict-of-interest disputes, a dismissal is not automatic, and one still has to assess the prejudice or potential prejudice to the employer and whether damages are real.

Nevertheless, what is the position where an employee seeks extra earnings outside of working hours? This is commonly known as moonlighting. Does this warrant a dismissal, and if so, why? Van Niekerk *et al* hold that, if the employee uses the employer's assets or if the employee neglects their responsibilities with the employer, while advancing outside interests, such conducts *could* constitute misconduct warranting dismissal (Van Niekerk *et al Law@Work* 299). In the absence of any element of dishonesty, the argument goes, a moonlighting employee will not *ordinarily* be in a conflict of interests with their employer.

In *Bakenrug* (*supra*), the LAC agreed with the conclusion of the CCMA to the extent that a "conflict of interest may arise even where no real competition actually arises" (*Bakenrug supra* par 16). This conclusion is at exact variance with that reached by the LC (*Bakenrug supra* par 13). According to the LAC, an employee is in a conflict of interests with their employer where they do not disclose material activities relating to their employer's business.

6.4 *Moonlighting as a ground for discipline and dismissal*

Few would dispute that moonlighting presents a catch-22 situation. Judicial practitioners are vigilant in safeguarding an employer whose employee acts part-time in competition with it. Equally, the courts will not prohibit an individual's legitimate spare-time activities. Lord Greene described the extent to which the court will go to protect this delicate balance in *Hivac Ltd v Park Royal Instruments* (1946 1 All ER 350 par 356), when he stated that it would be deplorable if an employee could consistently, knowingly, deliberately and secretly inflict great harm on his employer's business. In that case, two weekday employees of the plaintiff company spent their Sundays working on highly specialised tasks for the defendant firm, which was in direct competition with the plaintiff. An interdict was granted against continuing this arrangement, because their actions infringed the general duty of good faith.

The observations of Goddard CJ in *Tisco Ltd v Communication & Energy Workers' Union* (1992 (2) ERNZ 1087, 1092) are apt and acutely describe the plight of employees struggling to make ends meet in a tight contemporary labour market:

“Generally speaking, an employee whose hours of work are done is perfectly at liberty to spend the remainder of the day or week as he or she pleases and therefore free to use some of it to augment his or her earnings by undertaking either secondary employment or self-employment as a contractor. The short point which this case raises is whether this freedom is wide enough to allow the employee to derive earnings from work that is indirectly or potentially in competition with the employer’s business or otherwise injurious to it. It is quite clear that the employee’s freedom is less than absolute but what is less clear is where the line should be drawn in any particular situation (see also *Orbell v Armourguard Security Ltd AT 116/95 (Auckland)* 1995 NZEmpT 792 (24 April 1995); *Blyth Chemicals Ltd v Bushnell* 1933 CLR 66).”

It is trite that employers’ disciplinary jurisdiction extends to off-duty misconduct (Grogan *Dismissal* (2014) 178; Van Niekerk *et al Law@Work* 301–302). The employer has a prerogative to take disciplinary action against an employee accused of an alleged off-duty misconduct relating to moonlighting in particular. However, such a privilege cannot be exercised capriciously and is subject to procedural and substantive fairness. The test is whether the conduct prejudicially affects the employer’s business interests or impairs the relationship between the parties (Van Niekerk *et al Law@Work* 302).

Misconduct itself may take various forms, but the legal basis of a finding for dismissal in all cases is the same: the employee concerned is deemed to have committed a breach of a material term of their contract or destroyed the employment relationship, which justifies its termination (Grogan *Dismissal* 178; see further Tshoose and Letseku 2020 *SA Merc LJ* 156–174). The dismissal must be for sound reasons; otherwise, the dismissal will be unfair with dire repercussions for the employer. Besides automatically unfair reasons for dismissal, Van Niekerk asserts that misconduct is one of three potentially fair reasons for dismissal (Van Niekerk *et al Law@Work* 295).

6.5 *Dereliction of duty*

A recent blatant example is the dismissal of an employee for spending time on social media to the detriment of the employer. The LC in *Lucas Dysel Incorporated v CCMA* ([2021] ZALCCT 3) found that the CCMA commissioner had erred in finding that the employee did not break a workplace rule by dedicating excessive time to private social media and gaming on her work computer at the expense of her work performance. It found that the delinquent employee was guilty of dereliction of duty and the sanction of dismissal was appropriate.

6.6 *Unpacking the notion of conflict of interest in an employment relationship*

As discussed earlier, the employer-employee relationship is based on mutual trust and confidence. A corollary of the duty of mutual trust and confidence is that an employee must, among other things, not work against the employer’s interests, and must also devote hours of work to the business interests of the employer. In this regard, any conduct that is likely to affect the business interests of the employer detrimentally may warrant disciplinary

action. While the employers expect employees to act in their best interests, and this includes ensuring they not pursue any interests that may conflict with the interests of the employer, this notion is anathema to employees (*Kader v Sandvik Mining and Rock Technology (Pty) Ltd* [2021] ZALCJHB 129 par 1).

An employee, in terms of common-law requirements, is expected to act in the furtherance of the employer's business interests. If an employee fails to act in good faith and instead acts in bad faith by competing with the employer's business or conducts private business under the company name without permission, this constitutes a conflict of interest. As Innes CJ in *Robinson* eloquently captured it:

"where one man stands to another in a position of confidence involving a duty to protect the interest of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position." (*Robinson supra* par 177–180)

It is clear that direct competition by an employee with her or his employer is a flagrant manifestation of conflict of interest (*Van Niekerk et al Law@Work* 298). Bull DP in *Berger v United Crib Block Construction Pty Ltd* (2017 FWC 450) held that:

"[a] conflict of interest (pecuniary or otherwise) arises where an employee's non-work-related activities may unduly influence decisions and conflict with the proper performance of an employee's duties, or are simply incompatible with the impartial fulfilment their duties."

In *City of Cape Town v SALGBC (supra)*, the Labour Court found that an employee's failure to declare his involvement in other business entities warranted his dismissal by the employer. The case serves as an important reminder to employees that a failure to declare their involvement in outside enterprises may compromise the duty of good faith owed to their employer and result in their dismissal. In *Arno's Plumbing v L Ziraya* (GATW1601416), the CCMA found that a plumber who contacted the employer's clients and offered to do private jobs that were against the insurance rules and company conduct might lead to the employer losing business. The employee received money for installing a geyser, and the dismissal was upheld.

In summation, a conflict of interest is generally recognised as a grave offence, sufficiently serious to warrant possible dismissal. However, the above case law shows that a number of important conditions must be met before the court or CCMA will agree to such a dismissal.

Israelstam summarises these requirements below:

"(a) The employee must already have jeopardised the interests of the employer by the time the charges were laid. For the employee merely to be contemplating competition with the employer's interests may not be sufficient to constitute conflict of interest. In such a case the employer would need either to wait until the employee sets up the competing

business before acting or prove a specific loss caused by the employee's mere plans for a competing business.

- (b) The employer must also prove that the employee's private business in fact conflicts with the employer's business interests. Merely showing that the employee runs a private business is not enough to prove conflict of interests.
- (c) The employer should show that the employee knew the rule prohibiting conflict of interests. This is a disconcerting requirement, as employees ought to be aware that competing with the employer is wrong even if there is no specific rule to that effect. However, where the industry is such that it is often acceptable for employees to carry out private work, an employer that has a rule to the contrary would need to show that the employee was aware of this." (Israelstam "Beware Dismissing for Conflict of Interests" (2021) <https://www.labourlawadvice.co.za/articles/beware-dismissing-for-conflict-of-interests> (accessed 2022-03-15))

7 Mapping the way forward

One thing is clear from the analysis advanced by this case note. The definition of the duty of good faith is extremely unclear, let alone the proper determination of its scope. This is not made any easier by the frequent reliance by courts on the principle to find misconduct. The common-law conception of misconduct itself is problematic as it has multiple dimensions that are also not clearly defined.

As such, it is suggested that courts limit their generalised reasoning in decisions on the principle of good faith. The starting point should be a specific form of misconduct found applicable to the facts. Continued generalisation of misconduct leads to legal uncertainty and violation of the rule of law, because aggrieved parties who cry substantively unfair dismissals will seldom be clear on the substance of their dismissal. Further recourse is also likely to be hampered owing to this convolution. Accordingly, it is submitted that courts should strive as far as possible to focus their reasoning on particular principles when dealing with the mushrooming incidents of moonlighting in the workplace.

8 Concluding remarks

The decision of the LAC in *Bakenrug* reiterated the common-law principle of good faith expected of employees in the realm of moonlighting. This common-law concept is undeniably multifaceted and dynamic. In modern times, moonlighting is expected to proliferate, given the current state of the economy and ever-rising costs of living. If courts are to continue to rely on the concept of good faith, its application to moonlighting needs to be properly demarcated. The habitual reliance by courts on this principle should be approached with caution owing to the wide scope of the principle. Courts relying on a breach of good faith seldom pinpoint the reason for a dismissal. As evinced in *Bakenrug*, the reason could be dishonesty, conflict of interests, competition or poor work performance, among others. It is crucial, to the interests of the rule of law on the one hand, and to the right to fair labour practices on the other, that courts should strive to identify, as much as possible, the particular form of misconduct with which employees are

charged. It is hoped that courts will develop the ancient principle of good faith to better address the proliferating practice of moonlighting.

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