

EMPLOYMENT LAW

ALERT

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KIETI LAW LLP, KENYA

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Moonlighting: What is the scope of the duty of good faith owed to an employer?

In the recent decision of *Bakenrug Meat (Pty) t/a Joostenberg Meat Ltd v The Commission for Conciliation Mediation and Arbitration and Others* [2022] JDR 0102 (LAC) the Labour Appeal Court considered the issues of dishonesty, conflict of interest and the scope of the duty of good faith owed by an employee to an employer. Specifically, this case deals with "moonlighting", which is when an employee has a second job in addition to their main or regular job.



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Moonlighting: What is the scope of the duty of good faith owed to an employer?

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In this case, the former employee, Ms Hough, was employed as a sales representative at Joostenberg Meat, which produces and sells a variety of meat products. Unbeknownst to her employer, Hough also ran a side hustle, her own company which ostensibly marketed and sold biltong. When her employer discovered the side hustle it brought disciplinary allegations against her. The gist of the allegations was that she had failed to inform her employer that she ran a business of her own in the meat trade and, as a result of her focus on this business, neglected to give her full attention to her duties with her employer. Hough was found guilty of the allegations and dismissed.

Hough referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration. The evidence before the Commissioner was that Hough operated a formal business, with at least one full-time employee, from a rented premises. Hough could not give her full attention to her duties. Her employer had in fact

communicated her poor performance to her on various occasions. Unsurprisingly, the Commissioner found there was an obligation on Hough to inform her employer of her side business so that it could decide whether this was a conflict or not. Her decision not to do so was dishonest and unacceptable.

CONFLICT OF INTEREST AND DUTY OF GOOD FAITH

Unhappy with the award, Hough launched a review application in the Labour Court. The Labour Court reasoned that Hough mainly ran her business on weekends. The court found that this was acceptable as Hough was not employed by her employer for 24 hours every day and because the business was run on a weekend, it could not affect her work performance. The court further considered that, while there was some dispute about whether Hough’s business sold more than biltong products, Joostenberg Meat only started selling biltong after the allegations were brought against Hough. The Labour Court reviewed

and set aside the arbitration award. Its approach seems to have been that there was no actual conflict of interest and that there was no duty on the employee to inform the employer of a potential conflict of interest.

Joostenberg Meat took the judgment on appeal. Relying on the judgment of *Sappi Novo Board (Pty) Ltd v Bolleurs* [1998] (19) ILJ 784 (LAC), Joostenberg Meat argued that Hough had a duty of good faith towards her employer. Accordingly, anything done by her which was incompatible with her duties as an employee would justify her dismissal. The evidence before the court was that Hough had testified that she would have stopped selling biltong if she had been instructed to do so by her employer. Counsel for Joostenberg Meat argued that this showed that she was aware that she was competing with her employer and that she owed her employer a duty to disclose her outside business interests. To make matters worse for Hough, she had previously concealed her interest in her business when

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completing her income form. She declared only her Joostenberg Meat salary and maintenance payments by her ex-husband as income. In line with *Schwartz v Sasol Polymers and Others* [2017] 38 ILJ 915 (LAC) counsel for Joostenberg Meat argued that the dishonest non-disclosure of a material fact justified a dismissal and a calculated silence in the face of a duty to inform her employer of a material fact amounted to fraudulent non-disclosure.

The Labour Appeal Court found that the evidence showed that Hough had failed to disclose an essential and important fact that she was running a side business even though she may not have been trading in the identical meat products sold by her employer. Whether this affected her work performance was irrelevant. It found that the conclusion reached by the Commissioner that “employees act in bad faith if conflict of interest

may arise even though no real competition actually exists” was unassailable. The Commissioner’s finding that Hough had acted in a dishonest and unacceptable manner was a reasonable conclusion, and the appeal was granted.

This judgment by the Labour Appeal Court brings some welcome clarity to the debate about whether there can be a conflict of interest where there is no direct competition between an employee’s side hustle and the business of the employer. An employee has a duty of good faith to their employer. This would include a disclosure to their employer of any outside interests. Where an employee fails to disclose material activities to an employer, they act in violation of the duty of good faith towards their employer and may be dismissed.

**CLAUDIA GROBLER AND
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Cliffe Dekker Hofmeyr

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Aadil Patel

Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Anli Bezuidenhout

Director
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Jose Jorge

Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Fiona Leppan

Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Gillian Lumb

Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Imraan Mahomed

Director
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com



Bongani Masuku

Director
T +27 (0)11 562 1498
E bongani.masuku@cdhlegal.com



Phetheni Nkuna

Director
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com



Desmond Odhiambo

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com



Hugo Pienaar

Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Thabang Rapuleng

Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Hedda Schensema

Director
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com



Njeri Wagacha

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com



Michael Yeates

Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Mohsina Chenia

Executive Consultant
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com



Faan Coetzee

Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com



Jean Ewang

Consultant
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Asma Cachalia
Senior Associate
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com



Jordyne Löser
Senior Associate
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com



Tamsanqa Mila
Senior Associate
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com



Dylan Bouchier
Associate
T +27 (0)11 562 1045
E dylan.bouchier@cdhlegal.com



Abigail Butcher
Associate
T +27 (0)11 562 1506
E abigail.butcher@cdhlegal.com



Rizichi Kashero-Ondego
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com



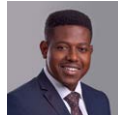
Biron Madisa
Associate
T +27 (0)11 562 1031
E biron.madisa@cdhlegal.com



Christine Mugenyu
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@cdhlegal.com



Peter Mutema
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E peter.mutema@cdhlegal.com



Kgodisho Phashe
Associate
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com



Tshepiso Rasetlola
Associate
T +27 (0)11 562 1260
E tshepiso.rasetlola@cdhlegal.com



Taryn York
Associate
T +27 (0)21 481 6314
E taryn.york@cdhlegal.com



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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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