

## **New legal case deals with moonlighting and side hustles in South Africa.**

Moonlighting has become more common for those looking to earn additional income, but do employees need to disclose their side businesses to their employers, especially when a conflict of interest is possible?

This was recently dealt with in the case of *Bakenrug meat (PTY) Ltd t/a Joostenberg Meat v CCMA and others* in which this question was considered by the court, said legal firm ENSAfrica.

“The employer’s business in this matter was the production and sale of a range of meat products. The employee was a sales representative at the business. However, the employee also operated a business of her own in which she marketed biltong.

“When the employer became aware of this, she was dismissed after being found guilty of the charge ‘that she took up employment while working in another capacity’. Aggrieved by this, the employee then referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA), alleging that her dismissal was substantively unfair.”

### **CCMA referral**

The CCMA commissioner found that the dismissal was substantively fair because the employee independently operated a formal business that marketed a meat product while the employer was also producing and selling meat products in which she was the salesperson.

“As a result, the employer should have been made aware of the employee’s activities to decide whether there was a conflict of interest. The failure to inform the employer amounted to dishonesty, and it was insignificant that the employee did not market identical meat products in comparison to the employer,” ENSAfrica said.

### **Labour Court**

Aggrieved by the commissioner’s findings, the employee launched a review application in the Labour Court.

The ruling justice Cele found that the dismissal was substantively unfair. He gave two main reasons for this finding:

- Firstly, he accepted that there is no duty for an employee to inform their employer about a potential conflict of interest. An employee is only required to inform an employer of a potential conflict where there is competition of some sort.
- Secondly, on assessing the evidence, Cele found that the employee operated her business on the weekends. Accordingly, there was no “nexus” that her “side-line” business negatively affected/impacted the performance of her duties towards the employer during the week.

Cele then found that the evidence failed to establish that the employee was guilty of the charge that she ‘took on employment whilst also working in another capacity.

“The learned judge concluded that the commissioner’s decision that the dismissal was substantively fair would not have been reached by a reasonable decision-maker, and he set aside the award,” ENSAfrica said.

### **Labour Appeal Court**

The Labour Appeal Court (LAC) overturned the Labour Court’s decision on appeal.

The ruling justice Davis held that there was clear evidence that the employee did not disclose an essential and material fact that she was independently operating a business in marketing meat products, even if the meat products were not identical to the employer’s.

“The fact that operating her business did not affect her performance was insignificant. What was important is that she was employed as a sales representative in a business marketing meat products, while she was also involved in marketing meat products.

“Her failure to inform the employer of these martial activities amounted to dishonesty and a violation of her duty of good faith towards the employer. Davis JA, therefore, found that based on the evidence, the commissioner arrived at a reasonable decision that the dismissal was substantively fair and set aside the judgment of the court a quo.”

### **Conclusion**

“The importance of this case is that it illustrates the extent of the “duty of good faith” that employees owe to their employer and that there can be far-reaching consequences for an employee if this duty is breached,” ENSAfrica said.

- *Commentary by Kerrie-Lee Olivier of ENSAfrica.*