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Toiling by the light of the moon: Side-hustling and the duty of good faith – Bakenrug Meat v CCMA and Others

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ABSTRACT

This article discusses the pertinent issue of employer-employee relations in respect of the employee's duty of good faith. In terms of the common law, an employee owes a general duty of good faith to the employer, which includes the obligation not to engage in activity which is in conflict with the employer's interests. This duty brings to the fore the question of the status of an employee who engages in a side business in order to supplement his or her income. Looking through the lens of Bakenrug Meat v CCMA and Others, the article examines the scope of "conflict of interest" and finds that it is an expansive concept that has failed to keep up with the evolving nature of employer-employee relations as well as the socio-economic pressures that have necessitated side businesses as a means to make ends meet. The argument here is that the court's interpretation of the duty of good faith was too wide, owing to the lack of a definition for "good faith". In that light, the article suggests a reconceptualisation of the duty of good faith and calls for its codification to ensure certainty and consistency in its interpretation and application.

Keywords: dismissal; conflict of interest; employee; employer; good faith; labour law; side business

1 INTRODUCTION

This article discusses the contentious issue of the duty of good faith in employment relationships. It comes at a time when prevailing economic hardships, exacerbated by the COVID-19 pandemic, have led to a realisation by many that a single income is not enough to defray their living expenses. Dire economic circumstances have led some employees to seek dual employment and others, to start their own businesses to supplement their income.

To put this into context, a 2022 study by Old Mutual found that 51 per cent of South African working metropolitan households had multiple income streams due to the rising cost of living.[1] Working an extra job, or starting a business to supplement a salary, may seem benign. However, it often creates tensions and complications between employee and employer, especially where the employee makes no disclosure. In certain instances, employers have gone as far as dismissing employees for engaging in extra work or starting their own businesses. The reason often cited by employers is that of breach of the duty of good faith owed to the employer by the employee.

Recent debates on good faith have tended to be confined to the law of contract;[2] however, the effects of this principle are equally pervasive within the law of employment.[3] Good faith within the employment context is a wide and compounded doctrine, often framed around the principle that an employment relationship is built

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1 See Old Mutual *Savings and Investment Monitor 2022* (2022) available at https://www.oldmutual.co.za/v3/assets/blt0554f48052bb4620/blt5fee176506de2e09/62d90f762cae425c988e6aa6/OMSIM_2022_EXTENDED_REPORT.pdf (accessed 25 January 2024) 1 at 5. See also "Side hustling quickly becoming a way of life" (20 July 2022) *Bloem Express* available at https://www.news24.com/news24/community-newspaper/express-news/side-hustling-quickly-becoming-a-way-of-life-20220719 (accessed 25 January 2024).

2 See Louw AM "Yet another call for a greater role for good faith in the South African law of contract: Can we banish the law of the jungle, while avoiding the elephant in the room?" (2013) 16(5) *Potchefstroom Electronic Law Journal* 44; Hutchison A "Good faith in contract: A uniquely South African perspective" (2019) 1 *Journal of Commonwealth Law* 227; Davies P "The basis of contractual duties of good faith" (2019) 1 *Journal of Commonwealth Law* 1; Du Bois F "Developing good faith: Equality, autonomy and fidelity to the bargain" (2022) 12(1) *Constitutional Court Review* 223.

3 See generally Raligilia H & Bokaba KM "Breach of the implied duty to preserve mutual trust and confidence in an employment relationship: A case study of *Moyo v Old Mutual Limited* (22791/2019) [2019] ZAGPJHC 229 (30 July 2019)" (2021) 42(3) *Obiter* 714. See also *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others* 2019 (5) SA 354 (CC) where the duty of good faith was extended to derivative misconduct. See further Mufamadi K & Letsiri K "The implications of derivative misconduct on the right to strike: An analysis of *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd*" (2022) 12(1) *Constitutional Court Review* 107.

on trust and confidence.[4] It touches on trust in the context of misconduct,[5] fiduciary duties[6] and the duty to protect and promote the employer's interests.[7]

In the context of promoting the employer's interests, the doctrine of good faith was recently considered by the South African Labour Appeal Court in *Bakenrug*.[8] This article examines the judgment and seeks to interpret what it means for employees in general. The discussion of the doctrine of good faith as it relates to employment is limited to moonlighting (noting that the doctrine encompasses more than that alone).

2 BAKENRUG MEAT V CCMA AND OTHERS

2.1 Background and facts of the case

Ms Hough was employed on 28 October 2013 as a sales representative at Joostenberg Meat, which produces and sells meat products.[9] Unbeknownst to her employer, the employee also had a company that marketed and sold dried meat.[10] When her employer discovered the business, it brought disciplinary charges of dishonesty against her for failing to inform her employer of the side-line business.[11] The employer alleged that because the employee ran a business in the meat trade, she focused on her business and neglected to give full attention to her duties with her employer.[12] The employee was found guilty of the charges and dismissed on 10 October 2016.

Upon her dismissal, she referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA), where the matter was arbitrated.[13] The

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4 Tshoose CI & Kgaphola JM "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)" (2023) 44(2) *Obiter* 447; Tshoose CI & Letseku R "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.

5 *Food and Allied Workers Union and Others v Amalgamated Beverage Industries* 1994 (15) ILJ 1057 (LAC); *Western Platinum Refinery Ltd v Hlebela* (2015) (36) ILJ 2280 (LAC); *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others* 2019 (5) SA 354 (CC).

6 See *Volvo (Southern Africa) (Pty) Ltd v Yssel* (2009 (4) All SA 497 (SCA); Coetzee L & Van Tonder JL "The fiduciary relationship between a company and its directors" (2014) 35(2) *Obiter* 286; Nel E "A case for some normative content in South African trust law" (2015) 36(3) *Obiter* 601.

7 Tshoose & Kgaphola (2023) at 448–449.

8 *Bakenrug Meat v CCMA and Others* (*Bakenrug Meat (Pty) Ltd t/a Joostenberg Meat v The Commission for Conciliation Mediation and Arbitration and Others* (2022) 43 ILJ 1272 (LAC).

9 *Bakenrug* (2022) at para 1.

10 *Bakenrug* (2022) at para 1.

11 *Bakenrug* (2022) at para 1.

12 *Bakenrug* (2022) at para 1.

13 *Bakenrug* (2022) at para 2.

commissioner found that the dismissal of the employee had been both substantively and procedurally fair, and reasoned as follows:

> The respondent marketed meat products and at the very least it should have been aware of the applicant's 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.[14]

Unhappy with the commissioner's finding, the employee launched a review in the Labour Court, which was successful.[15] The Labour Court found that the employee ran her business only on weekends and was not employed for 24 hours by the employer.[16] It accepted the employee's version that because her business was run only on weekends, there was "no nexus between her performance for the third respondent (appellant) and the running of the side-line business".[17] Be that as it may, the employer was unsatisfied with this finding and approached the Labour Appeal Court for relief. The employer argued that Ms Hough, in her capacity as an employee, owed the appellant a duty of good faith, in line with the principle laid out in the case of *Sappi Novoboard*.[18] The employer also argued that dishonest non-disclosure of a material fact justified a dismissal and that a calculated silence in the face of a duty to inform an employer of a material fact amounted to a fraudulent non-disclosure.[19]

The legal issues to be determined were twofold: first, whether the employee was under an obligation to inform her employer of her side-line business;[20] and, secondly, if she was indeed obligated to inform the employer, whether the non-disclosure was sufficient grounds for dismissal.[21]

2.2 The Labour Appeal Court's decision

After hearing arguments on both sides, the Labour Appeal Court found that the Labour Court had erred in finding for the employee. The order of the Labour Court of 12

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14 *Bakenrug* (2022) at para 4.
15 *Bakenrug* (2022) at para 5.
16 *Bakenrug* (2022) at para 6.
17 *Bakenrug* (2022) at para 7.
18 *Bakenrug* (2022) at para 8. See also *Sappi Novo Board (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 LAC) at para 7, where the judge reasoned that "[i]f an employee does anything incompatible with his due or faithful discharge of his duty to his master, the latter has a right to dismiss him".
19 *Bakenrug* (2022) at para 10.
20 *Bakenrug* (2022) at para 13.
21 *Bakenrug* (2022) at para 15.

September 2019 was set aside and replaced with the following: "the application to review the arbitration award issued by the second respondent on 22 March 2017 under case number WECT 17540-16 is dismissed".[22]

The essence of the decision of the Labour Appeal Court is that the arbitration ruling awarded to the employer in the CCMA was deemed to have been reasonable and that the Labour Court had failed to apply the review test correctly. In that vein, the court found 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. Expressed differently, there was no basis on the evidence, which constituted the record of the arbitration hearing, that a conclusion could justifiably be reached that the outcome reached by the second respondent was one that could not reasonably be reached.[23]

The employee was, therefore, deemed to have been fairly dismissed. In reaching this decision, the Labour Appeal Court found that the decision of the Labour Court was predicated on the notion that unless an employee informed her employer that she was moonlighting to the extent that there was some competition with her employer's business, no dismissible offence had been conducted.[24] It was common cause that the employee had failed to disclose an essential fact that she was running a side-line business in the market for the sale of meat products, albeit that the products might not have been identical to the meat products which the employer sold.[25] The court found that the conclusion reached by the commissioner in the CCMA that "employees act in bad faith if conflict of interest may arise even though no real competition actually results" was reasonable and thus unassailable.[26]

It further reasoned that, based on the uncontested evidence that the employee had operated a formal business from rented premises with at least one full-time employee and marketed at least one category of meat product without informing the employer, the finding in the CCMA was rational. There was no basis on the evidence constituting

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[22] *Bakenrug* (2022) at para 18.
[23] *Bakenrug* (2022) at para 17.
[24] *Bakenrug* (2022) at para 13.
[25] *Bakenrug* (2022) at para 15.
[26] *Bakenrug* (2022) at para 16.

the record of the arbitration hearing that a conclusion could justifiably be made that the outcome reached by the CCMA commissioner was one that could not reasonably be reached.[27] Accordingly, the Labour Appeal Court found the decision of the commissioner to be reasonable and justifiable in view of the duty of good faith (encompassing the obligation to be honest), which the employee had breached.

3 ANALYSIS OF THE LABOUR APPEAL COURT'S DECISION

Although short and seemingly uncomplicated, the case has significant implications for the position of common law in South Africa generally and the labour sphere specifically. It reiterated the existence of the common law principle of good faith in employment contracts and the corresponding notion that employees are under an obligation always to execute their duties in good faith. However, in reasserting the existence and applicability of the duty of good faith, the case also highlighted the shortcomings of common law interpretation and the need to codify the principles governed by the duty of good faith.

3.1 The duty of good faith in South African employment law

It is trite that the common law principle of good faith forms an integral part of South African law, especially so contract law. The obligation on an employee to act in good faith manifests itself in two ways.

First, employees are expected to act in good faith because they owe the employer a fiduciary duty. A fiduciary duty is a duty that applies to persons who have access to, or power in relation to, the affairs of a beneficiary and that must be exercised for the sole purpose of promoting the beneficiary's interests.[28] The protection of an employer's proprietary information as well as the employee's fulfilment of the obligation arising out of this fiduciary duty is usually achieved through the inclusion of a restraint of trade agreement in the contract of employment.

A restraint of trade is an agreement between an employer and employee, or a provision in an employment contract, which restricts an employee from entering into employment with a competitor of the employer, or establishing a business in

[27] *Bakenrug* (2022) at para 17.

[28] *NUMSA v Dunlop* (2019) at paras 55–56; *Sappi Novoboard* at para 7. See also *Jones v East Rand Extension Gold Mining Co Ltd* 1917 TH 325 at para 334.

competition with the employer, for a specified period in a specified geographical area, following termination of employment.[29] While restraints of trade seek to protect the employer's interests post-employment, it may be argued that they apply naturally during the subsistence of the employment contract.

Secondly, an employee owes the employer a general contractual duty to act in good faith, which entails consideration of the other contracting party's interests.[30] The principle of good faith's applicability in South African law was recently scrutinised in *Beadica*,[31] where the Constitutional Court reaffirmed the principle of good faith's role in contracts and its position as one of the cornerstone principles of contract law.[32]

However, its position in employment law has never been as pronounced as it was in *Beadica*, in relation to the law of contract.[33] What is noteworthy and concerning about the Labour Appeal Court's decision in *Bakenrug* is that while the courts accept the principle of good faith in employment law, its parameters have never been defined.[34] As a result, good faith is fluid: as noted by Lord Greene, "How far it extends will depend on the facts of each case."[35] Applying legal principles to each case on its merits it is accepted in law, such that what differs are the merits of the case and not the legal principle being applied; however, when it comes to good faith, the principle seems malleable, and the courts use generalised reasoning in their decisions.

The generalised logic might stem from the expansive and multifaceted nature of the duty of good faith, which comprises several obligations that intersect with other duties of the employee. Among others, employees, under the duty of good faith, must dedicate their time and effort to advancing the employer's business interests. They are also under a compulsion to be honest, not to make secret profits, to avoid conflicts of

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29 See Raphulu L "Restraints of trade: A useful guide for employers" (2016) *Bowmans Law* available at https://bowmanslaw.com/insights/restraints-of-trade-useful-employers-guide/ (accessed 31 July 2024); *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A). See also *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA), where it was authoritatively decided that restraints of trade are valid and enforceable unless they are unreasonable and thus contrary to public policy.

30 *NUMSA v Dunlop* (2019) at paras 57–59.

31 *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC).

32 *Beadica* (2020) at paras 189–195.

33 See Tshoose & Kgaphola (2023) at 448.

34 See *NUMSA v Dunlop* (2019); *Sappi Novoboard* (1998).

35 *Hivac Ltd v Park Royal Scientific Instruments Ltd* 1946 (1) All ER 350.

interest with the employer's business, and to refrain from misconduct.[36] Yet, due to the fact that there is no agreed-upon definition of good faith, the duty has the potential to be misused or abused by employers as a catch-all mechanism by means of which they can dismiss employees for whatever reason.[37] Notably, any misconduct committed by the employee could be deemed a breach of the duty of good faith. This leaves little to no wriggle room for employees, as all an employer has to allege and prove is that the employee failed to maintain *bona fides*.

In its judgment, the Labour Appeal Court limited its findings to the "factual matrix", that of the employee operating a formal business without informing the employer, and did not consider if she was in actual competition with the employer.[38] The implication of the decision is that, in instances of moonlighting, a conflict of interest is enough to breach the employee's duty of good faith. What mattered to the court was that the employee had failed to disclose her side-line business and not that she was in actual competition with the employer: the employee had been dishonest, and had thereby breached the duty of good faith.

Nonetheless, the court's interpretation of the duty of good faith seems very wide, which could be a result of the lack of definition of good faith in an employment relationship. It would seem that, in order to find an employee guilty of breaching the duty of good faith, all an employer needs to establish is lack of truth, lack of vigour in the employee's execution of duties, or lack of trust for whatever reason. Yet although it is acknowledged that "conflict of interest" and "competing with the employer" constitute different forms of misconduct, they are often so intertwined that in some cases it may be necessary to prove competition with the employer to establish conflict of interest. The Labour Appeal Court's failure or omission to consider whether the employee was in actual competition with the employer could thus be viewed as a missed opportunity to provide certainty in regard the two concepts.[39]

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[36] Raligilia & Bokaba (2021) at 716–718.

[37] See *NUMSA v Dunlop* (2019) at para 21, where Coppin JA recognised the potential for abuse of the duty of good faith where employees may be obligated (owing to the duty of good faith to the employer) to exonerate themselves in cases of derivative misconduct.

[38] *Bakenrug* (2022) at para 15.

[39] See generally Mupangavanhu B "Yet another missed opportunity to develop the common law of contract? An analysis of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30" (2013) *Speculum Juris* 2013(1) 148, where the author discusses at length the powers of the courts

Had the court interrogated the employee's allegations that there was no real competition, and thus no detriment to the employer, it may have reached a different conclusion. Furthermore, even if this in and of itself would not have guaranteed a different decision, considering the level of competition between the employee and the employer could at least have established whether the employee's activities were detrimental to the employer's interests and also reaffirmed the separate existence of the two forms of misconduct.[40]

As a rider to the above, it is accepted that the employer's disciplinary jurisdiction extends to the employee's off-duty conduct, but the caveat is that such conduct must prejudicially impact the employer or its business.[41] Moreover, it is accepted in principle that employees are allowed to conduct other work or business outside that of the primary employer. As Du Plessis and Fouché note, "If the employee is conducting a private business in his free time, causing the employer no damage whatsoever, he is acting within his rights and may not be dismissed."[42] The consideration in *Bakenrug* should thus have been whether the employer suffered any prejudice, and not whether there was a duty to disclose the employee's side-line business.

As it so happened, the employee in *Bakenrug* contended in the CCMA and Labour Appeal Court that her business was conducted on weekends and did not affect her dedication to, or productivity for, the employer. Cele J, in the Labour Court, accepted her contention and found that there was "no nexus" between the employee's performance

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to develop the common law and the obligation placed upon them to do so by sections 39(2) and 173 of the Constitution of the Republic of South Africa, 1996 ("Constitution").

40 It is submitted that "conflict of interest" and "competition with the employer" are distinct forms of misconduct and may occur separately; however, they are not mutually exclusive. For example, an employee who uses its position, or information obtained by virtue of its position, to benefit a close relation creates a conflict of interest. Employees who open a side business that offers the same or similar goods or services as the employer in the same market enter into competition with the employer. Employees who use their position, or information obtained by virtue of their position with an employer, to aid a close relation in establishing and operating a business that offers the same or similar goods or services in the same market as the employer, in which business the employee has a financial interest, would be guilty of both conflict of interest and being in competition with the employer.

41 Du Plessis JV & Fouché MA *A practical guide to labour law* 9th ed Durban: LexisNexis (2019). See also Raligilia K "A reflection on the duty of mutual trust and confidence: Off-duty misconduct in the case of *Biggar v City of Johannesburg* revisited" (2014) 38(2) *South African Journal of Labour Relations* 70; Fulton K & Mudely E "Off-duty misconduct: To discipline or not to discipline" (n. d.) *Labour Guide* available at https://labourguide.co.za/misconduct/off-duty-misconduct-to-discipline-or-not-to-discipline (accessed 25 January 2024).

42 Du Plessis & Fouché (2019) at 2.

and the running of her side-line business, as this was conducted on weekends and the employee was not employed 24 hours a days by the employer.[43]

We argue that in these circumstances the employee was well within her rights to conduct a side-line business and was not under an obligation to disclose this fact, as there was no discernible prejudice to the employer. The approach favoured by the Labour Appeal Court in the case appears to have been overly wide, hence complicating the already contentious issue of interpreting and applying the principle of good faith.

3.2 The need for legislative development on the duty of good faith

The judgment, to the extent that it provides for a wide interpretation of the duty of good faith – including employees' undertakings while they are off-duty and not doing anything to undermine the employer's interests – highlights the need to develop the common law regarding the duty of good faith and provide clearly defined parameters to make it more certain.

Louw correctly points out that "the common law is not what it used to be" and has been reshaped considerably by the promulgation of legislation and infusion of constitutional principles by the judiciary involved in "constitution-making" in terms of section 39(2) of the Constitution.[44] According to this author, fairness plays a distinct and imperative role in employment relationships not only thanks to legislative intervention but also because the Bill of Rights demands that parties to this relationship act fairly towards each other as espoused by the right to fair labour practices, a demand that applies to both employees and employers.[45] Any conduct of the employee or employer within the employment relationship should therefore be underpinned by fairness.[46]

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43 *Bakenrug* (2022) at paras 6–7.

44 Louw AM "The common law is … not what it used to be: Revisiting recognition of a constitutionally-inspired implied duty of fair dealing in the common law contract of employment" (part 3) (2018) 21 *Potchefstroom Electronic Law Journal* 1 at 3. See section 39(2) of the Constitution, which provides for the development of common law through judicial rulemaking.

45 Louw (2018) at 5. See also section 23(1) of the Constitution for the provision on the right to fair labour practices.

46 See *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 (4) SA 383 (LAC); *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration and Others* [2008] 7 BLLR 633 (LC). See also section 30 of the Labour Relations Amendment Act 6 of 2014, which amended section 186 of the Labour Relations Act 66 of 1995 to remove "contract" from the definition of dismissal, thus stressing the shift from contracts of employment to employment relationships grounded in the principle of fairness.

The question arising out of the factual matrix of *Bakenrug*, then, is whether the employee was fairly dismissed or whether the employer's conduct in dismissing the employee for failure to disclose the side-line business was in breach of the principle of fairness. One would hasten to answer no: the employer failed to consider various factors, such as the fact that the employee was a single mother, working over weekends, striving to make ends meet, and not acting in direct competition with the employer.[47] If anything, the employer's conduct confirmed the power imbalance between the parties and the onerous nature of the duties imposed on employees, including the duty of good faith.

The employer failed to consider a variety of "extenuating" factors, ones which are likely to have applied to many other employees in the context of the socio-economic hardships precipitated or exacerbated by the COVID-19 pandemic. It was not inconceivable to have expected a rise in "side-hustling"[48] post-pandemic, considering that the formal economy suffered job losses in excess of 600,000 jobs during the lockdown.[49] Coupled with further job losses post-lockdown (owing to struggling businesses and forced retrenchments), job losses can be estimated to have been in the millions. As a result of the economic hardship brought about by job losses, more and more employees were thus likely to have turned to side-hustling to make up for the lost income of a family member, to boost income, or to cope with a turbulent job market.[50] Moreover, in the post-COVID period, employees have been under financial strain due to factors such as a rise in inflation, stagnating economic growth, geopolitical tensions and trade wars, all of which have had the effect of weakening employees' purchasing power as consumers.[51] Under the circumstances, many employees have turned to exploring alternative sources of income to supplement their wages and, in the process, to more side-hustling.

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47 See *Bakenrug* (2022) at para 14.

48 A "side-hustle" in a general sense is understood to be a secondary, flexible income-generating job or business carried on alongside primary employment. It is typically used to supplement income from primary employment or venture into business while still fully employed.

49 Statistics South Africa "SA loses more than 600k formal sector jobs during COVID-19 lockdown" (2020) *Stats SA* available at https://www.statssa.gov.za/?p=13690 (accessed 30 July 2024).

50 See Bean M "The rise of side hustles" (2024) *Beckers Hospital Review* available at https://www.beckershospitalreview.com/workforce/the-rise-of-side-hustles.html (accessed 30 July 2024).

51 See International Labour Organization (ILO) "Global Wage Report 2022–2023: The impact of inflation and COVID-19 on wages and purchasing power" (2022) *ILO* available at https://www.ilo.org/resource/news/rising-inflation-brings-striking-fall-real-wages-ilo-report-finds (accessed on 30 July 2024).

While employers may take proactive steps to regulate side-hustling,[52] it is submitted that the duty of good faith is still so broad that it is open to abuse: an employer acting in bad faith could come up with any reason to dismiss an employee and then hide it under the cloak of "good faith". Although some reprieve may be found in the application of *Barkhuizen*[53] insofar as challenging unfairness under public policy is concerned,[54] it is argued that this approach remains piecemeal, applicable only on a case-by-case basis, and insufficient to ward against the risk of bad faith by the employer. For this reason, and until legislative amendments are effected, courts should be more open to recognising and promoting the role of fairness in the employment relationship.

3.3 Delineating "good faith" in employment law: Lessons from New Zealand

The duty of good faith should be defined, and its parameters delineated, with a view to creating certainty and avoiding judicial exploration based on the facts of each case. The example of New Zealand is relevant, as it is a country that regulates good faith in employment relations through its Employment Relations Act (ERA).[55] New Zealand, as opposed to other jurisdictions in Africa, is used as a comparator because no African country has codified the duty of good faith or the duty of fairness in employment law.[56] In that regard, New Zealand's ERA enjoins employers and employees to deal with each other in good faith and goes on to provide that the duty of good faith

> [i]s wider in scope than the implied mutual obligations of trust and confidence; and requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment

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[52] See Esterhuizen M "Side hustle policy: Do I need one?" (2024) *Michalsons* available at https://www.michalsons.com/blog/side-hustles-do-i-need-a-policy/73625 (accessed 30 July 2024).

[53] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) ("*Barkhuizen*").

[54] See *Barkhuizen* (2007) at paras 11, 19 and 29, the crux of which is that a term in a contract or a contract which is inimical to the values enshrined in the Constitution is contrary to public policy and is, therefore, unenforceable.

[55] Employment Relations Act 24 of 2000 (ERA). See also Anderson G & Bryson J "Developing the statutory obligation of good faith in employment law: What might human resource management contribute?" (2006) 37 *Victoria University of Wellington Law Review* 487 at 489.

[56] See, for example, Akinkugbe OD "To recognise or not? Good faith under Nigerian law of contract" (2019) 1 *Journal of Commonwealth Law* 363, where the author laments the minimal focus afforded to the duty of good faith within the context of contract law, let alone that of employment law.

> relationship in which the parties are, among other things, responsive and communicative.[57]

The ERA stipulates that the duty of good faith applies to any matter arising under or in relation to an individual employment agreement while it is in force.[58] Issues around the discipline of an employee, or circumstances where an employee is alleged to have been dishonest, would fall squarely under the provisions of section 4(4)(bb). While the interpretation of the provisions regulating good faith will depend on the merits of each case and not necessarily result in similar outcomes, the section provides a yardstick against which the conduct of a party in an employment relationship may be measured. The provisions relating to the duty of good faith create some degree of certainty in relation to it and help ensure fair and uniform application of the law. To this end, the South African legislature may learn valuable lessons from New Zealand and consider codifying them or at least defining the duty of good faith intelligibly.

4 CONCLUSION

The precedent that the *Bakenrug* judgment sets – and its message to employers and employees – is unsettling, to say the least. To employers, it signals that an employee is disposable, as the employer can simply raise a breach of good faith on whatever basis, an allegation which will be afforded a wide interpretation. To employees, it signals that the employer is the be-all and end-all of their financial dependency; they dare not moonlight or start a side-line business. The effect of the judgment is that, on the one hand, it may embolden employers and open the door to abusing the duty of good faith as a ground for dismissal, while, on the other, it may stifle the entrepreneurial spirit of South Africans trying to side-hustle. Neither outcome is desirable for economic growth, prosperity and the attainment of social justice in broader South African society given its historical background and the need for economic emancipation. This discussion has noted that the codification and proper delineation of the duty of good faith is possible, with New Zealand provided as an example. It is, therefore, not ludicrous to suggest that South Africa should undertake legislative development that recognises and regulates the duty of good faith in accordance with the constitutional principle of fairness.

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[57] Section 4(1A) of the ERA.
[58] Section 4(4)(bb) of the ERA.

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