REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR1639/05

In the matter between:

MIRIAM MANECHE	First Applicant
ELIZABETH NTSANE	Second Applicant
MALUSI MAGAWU	Third Applicant
MARTIN STANDER	Fourth Applicant
ESTER BERENG	Fifth Applicant
EVELYN KGANARE	Sixth Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
COMMISSIONER CARMEN WARD	Second Respondent
NORTHERN CAPE MUSHROOMS	Third Respondent

JUDGMENT

A VAN NIEKERK AJ

1. This is an application to review and set aside an arbitration award made by the Second Respondent ('the Commissioner'), who found that the dismissals of the Applicants was procedurally and substantively fair.

2. The arbitration proceedings under review were convened subsequent to the dismissal of the Applicants for insubordination. The circumstances giving rise to their dismissal are canvassed in the award. In brief, the Third Respondent ('the Company') employed the Applicants in its mushroom farming operation. The Applicants commenced work at 7h30, and completed their shift at 17h30. They were periodically required to work overtime. Whether or not this was done in terms of any written agreement is not clear, but there was a practice of working overtime, when necessary, until the Applicants' ‘work was complete’. The need for overtime appears to be driven by the nature of the Company's business. The Commissioner noted that the mushroom industry is a 'volatile industry', and that once mushrooms are picked, the packing procedure must immediately follow, in order to 'secure goodness and freshness'. This procedure, stated the Commissioner, 'lends itself to overtime'.

3. On 11 August 2004, the Applicants left work at 20h30, while the procedure of 'getting the mushrooms ready' was not yet complete. The Applicants' reason for leaving work was that the maximum of 3 hours per day placed on overtime work by the BCEA had been reached.

4. The Company instituted disciplinary action against the Applicants for insubordination. It carefully and consciously refrained from categorising the offence as a refusal to work overtime, but alleged instead that the Applicants had refused to return to their workplace when directed to do so. A disciplinary enquiry was convened, chaired by an official of COFESA, an organisation of which the Company was a member and from which it had been taking advice. The Applicants were found guilty of insubordination and dismissed.

5. In her arbitration award, the Commissioner found that the

Applicants had previously worked overtime, in circumstances where their work had not been completed during normal working hours, in excess of the daily limit imposed by the BCEA. She held as follows-

> *It is clear to me that the employees indeed worked more than the 3-hours per day if the work was not complete.*

6. The Commissioner's conclusions turn on her answer to the question that she posed to herself- whether it was fair that the applicants were expected to work, from time to time, more than the 3-hour per day limit on overtime established by the BCEA. This was her answer:

> *On the face of it, the 'rule' contradicts the law. However, the employees have worked this practice for many years, signed in agreement* [sic] *to work such practice and if the work is complete by 9am or 10am on a Friday, they are released and go home. Also, it would appear that it is not often that overtime exceeds the 3-hours.*

7. The basis of the Commissioner's award is captured in her summary of the substantive aspects of the dispute. She states:

> *In summary then, I'm convinced that the mushroom industry, being as volatile as it is, warrants from time to time, the need to work overtime to complete the job. It would appear that this has been a practice for many years, so ingrained in this practice that the employees automatically work overtime if the work is not complete. Also, the employees have signed in agreement to work overtime. Indeed, overtime in excess, from time to time, crops up. To my mind this is work that is required to be done without delay owing to the circumstances of the volatile product.* [sic: While I can understand an industry being described as 'volatile', a mushroom is surely one of the less volatile organisms in existence] *It is also apparent that the employees could not perform this work during their ordinary hours of work. All said and done, I have found that the entrenched practice of working until the work is done (which only happens from time to time), the volatile product, the agreement to work until the work is done and the fact that it*

cannot be performed during their ordinary hours of work, is fair. It is anyway standing in the minute, uncontested at that time and confirmed by Mr. Taljaard that it would have only taken another 15 to 30 minutes to complete."

8. Section 145 of the LRA provides that a Commissioner's award may be reviewed when any defect in the arbitration proceedings is alleged. Section 145(2) defines a defect to mean:

"(a) *That the Commissioner -*
(i) committed misconduct in relation to the duties of the Commissioner as an arbitrator;
(ii) committed a gross irregularity in the conduct of the arbitration proceedings;
(iii) exceeded the Commissioner's powers; or

(b) That an award has been improperly obtained."

9. The Applicants allege that the Commissioner committed misconduct in relation to her duties as an arbitrator and/or committed a gross irregularity in the conduct of the arbitration proceedings, and/or exceeded his powers in that the Commissioner failed to have regard to those provisions of the BCEA which effectively prohibit overtime work beyond 3 hours per day, and in doing so, failed to have regard to the consequence that the Applicants' leaving their workplace could not constitute an act of insubordination.

10. Section 1 of the BCEA defines a 'basic condition' as a provision of the Act that stipulates a minimum term or condition of employment. Section 4 provides that a basic condition of employment constitutes a term of any employment contract, with certain defined exceptions that are not relevant in the present instance. Section 5 provides that the Act takes precedence over any agreement. The effect of these provisions is that unless variation is agreed or otherwise permitted in terms of the Act, any applicable basic condition of employment is a

term of every employment contract and may be enforced as such. To ignore these provisions and to regard a workplace rule as trumping a basic condition of employment undermines the very fabric of the BCEA. It would permit employers to establish workplace rules that circumvent statutes that are intended to protect workers by establishing minimum conditions of employment, thereby giving effect to their constitutional rights, complying with international obligations and promoting social justice. (These are all purposes that underlie the BCEA – see section 2 of the Act).

11. These protections referred to above are buttressed by section 79 of the BCEA which provides that an employee may not be prejudiced for a failure or refusal to do anything that an employer may not lawfully permit or require them to do. The company was not permitted to require the employees to work beyond 20h30. Their refusal to do so was an exercise of their statutory rights, and they may not be prejudiced, whether in the form of dismissal or otherwise, for doing so.

12. At the hearing of this application, there was no appearance for the Respondents. To the extent that they may have contended, as they did at the arbitration proceedings, that the company's operational requirements or the nature of its business require that the limits on overtime imposed by the BCEA be varied, the Act provides mechanisms (such as a compressed working week or averaging of hours of work) to accommodate an employer’s flexibility demands. Alternatively, it is for the company to re-organise work or its shift patterns so as to ensure that employees did not exceed the maximum working hours prescribed by the Act. To the extent that it might be suggested, as was contended during the arbitration proceedings, that the Applicants were dismissed for insubordination rather than a refusal to work overtime, this is a disingenuous

distinction. The Applicants were not required (indeed they were not permitted) to return to their workplace after being at work for 13 hours. In these circumstances, to refuse to remain at work or heed their employer's call to return is not an act of misconduct. It is the exercise of a statutory right, nothing more, nothing less.

13. It is now well established in this Court that arbitration proceedings conducted under the auspices of the CCMA may be reviewed on the grounds that the Commissioner committed a material error of law. (See *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at p.93, *Mlaba v Masonite (Africa) Ltd and Others* [1998] 3 BLLR 291 (LC) at 301C-302E, *National Commissioner of SA Police Service v Potterill NO and Others* (2003) 24 *ILJ* 1984 (LC) at para 25, *OK Bazaars (A division of Shoprite Checkers) v Commissioner for Conciliation, Mediation and Arbitration & others* (2000) 21 *ILJ* 1188 (LC) at para 10, and *Foschini Group (Pty) Ltd v CCMA and others* (2002) 23 *ILJ* 1048 (LC) at para 25.)

14. The reviewability of an arbitration award on the basis of an error of law on the requirements set out in *Hira v Booysen* was recently approved by the Labour Appeal Court. In *Mlaba's* case, this Court held that the review of CCMA awards on the basis of an error of law is essentially one of materiality (at page 301). The test of materiality may be described as follows:

> *If, in the exercise of this discretion, a Commissioner makes an error of law, this does not render the decision of the Commissioner reviewable unless it is a material error in the sense that it results in the Commissioner asking the wrong question or basing his or her decision on a matter not prescribed by the statute.*

See *Moolman Brothers v Gaylard NO & others* (1998) 19 *ILJ* 150

(LC) at 150 at 156).

15. The Labour Appeal Court has emphasised the importance of the requirement that a Commissioner "ask the right question". In *Stocks Civil Engineering (Pty) Ltd v Rip NO & another* (2002) 23 ILJ 358 (LAC) Van Dijkhorst AJA said -

> *If the decision cannot be arrived at should the correct criterion be applied, it may justifiably be concluded (in the context of an error of law) that the tribunal 'asked itself the wrong question' or 'applied the wrong test' or "based its decision on some matter not prescribed for its decision" or "failed to apply its mind to the relevant issues in accordance with the behest of the statute". Such decision is reviewable.*

16. For the reasons stated above, I am satisfied that the Commissioner committed a material error of law by regarding a basic condition of employment as a standard capable of being trumped by a unilaterally imposed workplace rule or practice. Had the Commissioner applied the provisions of the BCEA, she would have concluded that the Act takes precedence over any agreement or practice, and that Applicants should not have been prejudiced for refusing to return to work after the daily limit on overtime work had been reached. For that reason, the award is reviewable and should be set aside.

17. There is little point in referring the matter back to the CCMA for arbitration before another Commissioner. The Applicants were dismissed in 2004. No purpose would be served in further delay in the resolution of this matter. I am satisfied from a perusal of the record and for the reasons stated above that the Applicants were not insubordinate in leaving work at 20.30 on 11 August 2004. There was no substantively good reason for their dismissal. Having reached this conclusion, it is not necessary for me to consider the Commissioner's findings on fair procedure.

18. I accordingly make the following order:

1 The Second Respondent's award dated 11 May 2005 is reviewed and set aside.

2 The award is substituted by the following:

The dismissal of the Applicants is substantively unfair. The Applicants are reinstated in their employment, without loss of benefit, from the date of their dismissal.

3 The Third Respondent is to pay the costs of this application.

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ANDRÉ VAN NIEKERK,
Acting Judge of the Labour Court

Date of hearing: 7 June 2007

Date of judgment: 5 July 2007

Attorneys for Applicant: Ponoane Attorneys
C/o Kalamore Attorneys

No appearance for the Respondents.