THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: 2025-011324

In the matter between:

DENZIL KENNEDY Applicant

and

THJANDIE C CHIRWA First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

COMMISSIONER NTJATJA KLAAS APHANE *N.O.* Third Respondent

Heard: 31 July 2025

Delivered: 28 October 2025

JUDGMENT

SASS, AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act. No. 66 of 1995, as amended (the LRA), to review and set aside an arbitration award dated 30 December 2024 (the award) issued by the third respondent (the arbitrator) under the auspices of the second respondent (the CCMA).

[2] In the award, which related to a dispute in terms of section 73(A) of the Basic Conditions of Employment Act No. 75 of 1997, as amended (the BCEA), the arbitrator found that the applicant was indebted to the first respondent in the

sum of R32 996.48 (thirty-two thousand nine hundred and ninety-six rand and forty-eight cents) for unpaid salaries and notice pay.

[3] In the event that the award is reviewed and set aside, the applicant seeks: (i) that the award be substituted, as provided for in terms of section 145(4) of the LRA, with an order that no amounts are due to the first respondent; alternatively, (ii) that the dispute between the applicant and the first respondent be referred back to the second respondent to be arbitrated *de novo* by a commissioner other than the third respondent.

[4] The review application was not opposed by any of the respondents.

Factual background

[5] Whilst the award does not always record the evidence presented at the arbitration proceedings correctly in relation to parties' evidence, if one compares the award to the transcript of the arbitration proceedings (the transcript), the following does appear to be some of the common cause facts.

[6] The first respondent was employed by the applicant since approximately 1 May 2018 as a domestic worker and was dismissed by the applicant on 29 November 2024.

[7] The first respondent's salary for the period 1 March 2022 to the end of November 2024 was follows:

a. R3 300.00 for the period 01 March 2022 to the end of February 2023;

b. R3 500.00 for the period 01 March 2023 to the end of February 2024; and

c. R3 800.00 for the period 01 March 2024 to the end of November 2024.

[8] The applicant does dispute in his founding affidavit as well (as his heads of argument) that the above amounts were not common cause. The applicant contends that the first respondent's salary for 2022 was R3 500.00 (instead of R3 300 as stated in the award) and for 2023 was R3 700.00 (instead of

R3 500.00 as stated in the award). The applicant's founding affidavit does not, however, dispute that the first respondent's salary for 2024 was R3 800.00.

[9] The amounts set out above (and also in paragraph 19 and paragraphs 28 to 30 of the award) by and large accord with the first respondent's evidence as reflected in the transcript (page 3, line 78 to page 4, line 12). I could not find any evidence from the applicant in the transcript that effectively disputed these amounts. The applicant did confirm during his evidence that the first respondent's salary for 2024 was R3 800.00. I also considered the applicant's bundle of documents which he provided to the arbitrator (Bundle R). The bundle of documents was not traversed in evidence by the applicant during the arbitration proceedings. Even so, I could not identify any document which would place in dispute the first respondent's version in relation to her salary for 2022 (being R3 300.00) and 2023 (being R3 500.00). It is therefore unclear to me on what basis the applicant disputes these amounts.

[10] The applicable minimum hourly rates of pay in terms of the NMW Act were as follows:

a. R23.10 for the period 01 March 2022 to the end of February 2023;

b. R25.43 for the period 01 March 2023 to the end of February 2024; and

c. R27.58 for the period 01 March 2024 to the end of November 2024.

[11] The applicant did not pay the first respondent any notice pay, although it does not appear that any evidence was led during the arbitration proceedings by any of the parties in respect of whether the first respondent had been dismissed with immediate effect (i.e., summarily) or whether the first respondent failed and/or refused to work a notice period after being dismissed (as contended by the applicant in paragraph 16 of his founding affidavit).

<u>The award</u>

[12] The unpaid salaries portion of the sum of R32 996.48 amounted to R28 219. 92 (twenty-eight thousand two hundred and nineteen rand and ninety-two cents) and related to amounts owing to the first respondent for the period 1

March 2022 until the end of 31 November 2024 as a consequence of her being paid an hourly rate which was less than the minimum hourly rate prescribed for a domestic worker in terms of the National Minimum Wage Act, 2018 (the NMW Act) by the applicant. I shall refer to this as 'the short-pay component' of the award.

[13] The notice-pay portion of the sum of R32 996.48 amounted to R4 776.56 (four thousand seven hundred and seventy-six rand and fifty-six cents). I shall refer to this as 'the notice-pay component' of the award.

[14] The short-pay component of the award relates to three periods, all falling with the ambit of the NMW Act namely: (i) 01 March 2022 to the end of February 2023 [a period of 12 (twelve) months]; (ii) 01 March 2023 to the end of February 2024 [a period of 12 (twelve) months]; (iii) 01 March 2024 to the end of November 2024 [a period of approximately 9 (nine) months].

[15] The essence of the award was the following - the arbitrator decided that the applicant owed the first respondent the sum of R32 996.48 (thirty-two thousand nine hundred and ninety-six thousand rand and forty-eight cents) being the outstanding balance of her salary for the years 2022, 2023 and 2024 and notice pay.[1]

<u>Grounds of review</u>

[16] The applicant contends that the award is reviewable for a variety of reasons.

[17] Having regard to the applicant's founding affidavit, these reasons include, *inter alia*, that:

a. The arbitrator made the following errors of fact -

   i. finding that the first respondent's working hours is from 08h00 to 16h30 and that she was taking a lunch break for less than an hour, when the evidence presented by the applicant clearly confirms that the original agreement between the parties was the first respondent works from 08h00 to 16h00, which is equal

[1] Award, paragraphs 32 to 34

to eight hours per day with a lunch break and a tea break which is more than an hour[2] *[leaving a balance of seven hours paid hours of work]*;

ii. finding that the first respondent's salary during 2022 was R3 300.00 when in fact it was R3 500.00 and during 2023 the rate was R3 500.00 when in fact it was R3 700.00[3]; and

iii. finding that the first respondent's employment was terminated on 29 November 2024 without giving a notice period, when in fact the first respondent refused and/or failed to work a notice period and is not entitled to any payment in relation to same[4].

b. The arbitrator committed the following gross irregularities:

i. by failing to consider all the evidence submitted in terms of Bundle R by the applicant and capturing a false version of events, which is not a true reflection of the testimony of the applicant[5]; and

ii. by not considering the common cause fact that from 1 September 2024 by mutual agreement between the parties, the first respondent only worked 3 (three) days per week.

c. The arbitrator committed a reviewable error by failing to consider Section 14 of the BCEA which confirms that a lunch break is unpaid and he included in his calculations the lunch hour as being paid therefore making an erroneous calculation.

d. The arbitrator totally disregarded evidence led by the applicant which submitted that the first respondent on a regular basis attended work late and left early and failed to include in his calculation the time that the first respondent did not attend at work, which should be calculated as unpaid.

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[2] Award, para 8
[3] Award, para 19
[4] Award, para 19
[5] Award, para 21

[18] In relation to the applicant's contention that it was a common cause fact that from 1 September 2024 by mutual agreement between the parties, the first respondent only worked 3 (three) days per week and not 5 (five) days per week, I could not find any reference to any oral evidence in this regard in the transcript. There is, however, a document in Bundle R (page 38) which appears to be a message of some kind purportedly dated 27 September 2024 informing the first respondent that she only needed to work three days per week and not five days per week. During the arbitration, the arbitrator asked the parties if there was any bundle of documents which they wanted to exchange. The applicant provided the arbitrator with a bundle of documents (Bundle R) totalling 47 (forty-seven) pages. The transcript does not confirm whether or not the applicant also provided the first respondent with a copy of Bundle R.

[19] The transcript contains no references to the bundle of documents during the applicant's oral evidence, and particularly not the message referred to above (purportedly dated 27 September 2024). The applicant's case commences at page 4, line 92 of the transcript when the arbitrator asks him – "*Employer, do you have any question to the Applicant?*" The applicant's case continues until page 5, line 20 of the transcript when the applicant indicates – "*That's the evidence I have*". It appears that the applicant did not present any oral evidence in respect of the message. He did not refer the first respondent to the message when he cross-examined her. Unlike some of the other messages contained at pages 39 to 42 of Bundle R (which anecdotally appear to be WhatsApp messages), page 38 does not contain any features that would *prima facie* identity it as an SMS message, a WhatsApp message, an email or otherwise. This Court can regrettably not accept that this message served as persuasive evidentiary material properly before the arbitrator.

<u>The review test</u>

[20] The applicable test on review in applications such as this one is now trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[6]*,* the Constitutional Court held that *'the reasonableness standard should now*

[6] (2007) 28 ILJ 2405 (CC).

suffuse s 145 of the LRA', and that the threshold test for the reasonableness of an award was: *'… Is the decision reached by the commissioner one that a reasonable decision maker could not reach? …"*[7]

[21] The Constitutional Court reaffirmed this test in *Duncanmec (Pty) Ltd v Gaylard NO and Others* (2018) 39 *ILJ* 2633, where at paragraph 43 of the judgment, it said the following:

'The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by the rational reasons.'

[22] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* (2014) 35 *ILJ* 943 (LAC), the court held that the review court must ascertain whether the arbitrator considered the principal issue in dispute, evaluated the facts presented at the hearing and came to a conclusion that is reasonable. In essence, the test is a two-stage test. To succeed, an applicant must establish some reviewable irregularity on the part of the arbitrator and given the existence of any such an irregularity, establish that the outcome of the proceedings in the form of the arbitrator's ruling or award, falls outside of a band of decisions to which a reasonable decision-maker could come on the available evidence.

[23] In *Head of the Department of Education v Mofokeng and Others*[8], Murphy AJA provided the following guidance in respect of precisely how this determination is to be made, saying the following:

'[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependant on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis,

[7] Ibid at paras 106 and 110.
[8] [2015] 1 BLLR 50 (LAC) paras 31 and 33

reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act ("PAJA"); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in Herholdt, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

[24] In *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2021] 5 BLLR 475 (LAC), the Labour Appeal Court restated the review test in the following terms:

'The test for review is this: "Is the decision reached by the arbitrator one that a reasonable decision maker could not reach?" To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justifications for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

This court has eschewed a piecemeal approach to a review application by the Labour Court. The proper approach is for the Labour Court to consider the totality of the evidence in deciding "whether the decision made by the arbitrator is one that a reasonable decision maker could make."'

[25] In *casu*, where the primary grounds for review relate to the arbitrator's assessment of the evidence, this Court must be particularly cautious to hold the line between a review and an appeal. As the authorities referred to above disclose, this Court is entitled to intervene if and only if the arbitrator is shown to commit some reviewable irregularity and the outcome of the proceedings under review falls outside of a band of decisions to which a reasonable decision maker could come on the evidence. As the courts have observed more than once, the threshold for review is set high, and deliberately so.

[26] In *Glencore Operations South Africa (Pty) Ltd v Taala and Others*[9], the Labour Appeal Court (LAC) per Van Niekerk JA restated the threshold for interference with a commissioner's arbitration award:

[9] [2025] 6 BLLR 559 (LAC).

'The hurdles that the appellant was required to overcome on review were to establish some misdirection on the part of the arbitrator in his assessment of the evidence and, secondly, that the factual conclusions that he drew were untenable, rendering the award one to which no reasonable decision-maker could come. Implied in the Labour Court's finding is that the arbitrator had regard to relevant evidence, did not take irrelevant evidence into account, and arrived at a conclusion that fell within the bounds of reasonableness.'[10]

[27] In *Makuleni v Standard Bank of SA (Pty) Ltd & others*[11], the LAC per Sunderland JA indeed reminded this Court of the crucial distinction between a review and an appeal. The case highlighted instances where the Labour Court was '*misled into treating the case for a review as if it were an appeal*'. The learned Judge observed:

'The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.'[12]

[28] In short, this Court's review powers are limited to, *inter alia*, scrutinising the rationality and reasonableness of the decision-making process and outcome. The Court's review powers do not extend to it re-adjudicating the merits of the case that was before a commissioner as if it were an appeal. Errors which do not materially impact the substantive rationality of the outcome are to be regarded as superfluous observations and do not, in themselves, constitute a basis for judicial intervention. It is therefore unhelpful to enumerate a catalogue of alleged errors without substantively demonstrating how such errors materially impacted the ultimate outcome.[13] The true inquiry remains

[10] Ibid at para 25.
[11] (2023) 44 ILJ 1005 (LAC).
[12] Ibid at para 4.
[13] See: *Head of Department of Education v Mofokeng & Others* (2015) 36 ILJ 2802 (LAC) at paras 30 – 33.

whether, despite any identified errors, the arbitration award falls within the band of decisions that a reasonable decision-maker could reach.

[29] I now turn to an analysis of the award in light of the grounds of review, the evidentiary that served properly before the arbitrator, and the review test enunciated above. My analysis deals with the short-pay component and the notice-pay component separately.

Analysis: short-pay component of the award

[30] If one has regard to the transcript and not necessarily to what the award may state or imply in this regard, the first respondent's daily number of working hours during the relevant periods which the applicant was obliged to remunerate her for, was not common cause.

[31] According to the award, and in relation to daily working hours, the first respondent contended that she worked five day per week and that her working hours were from 08h00 to 16h30 with a lunch break of less than an hour. The transcript does not reflect any specific evidence to this effect from the first respondent.

[32] The award does not record the applicant's evidence in relation to working hours. It is only if one has regard to the transcript that it becomes apparent that the applicant contended that although the first respondent's working hours were from 08h00 to 16h30 and that was the hours that she was supposed to work, she was only at work for roughly 8 (eight) hours per day, of which she took an hour's lunch. Further, on the applicant's version as reflected in the transcript, he was only required to remunerate the first respondent for a minimum of 7 (seven) hours per day. The following is stated from page 4 line 09 to page 5 line 15 of the transcript in this regard – "*Okay. Her hours are from 08h00 until 16h30. That's the hours she's supposed to work. I have entry and exit evidence that indicates that she's there roughly eight hours a day of which she takes an hour's lunch. If you take the seven hours, multiply it by the correct rate, the R3800 rent is correct. That's the only evidence I have to submit. Prior to that, she's never had an issue with what*

we paid her, because she knows she isn't working the full nine hours or eight hours a day, because she's supposed to be from 8 to 5."

[33] As for the number of working days in a week, the applicant contends in his founding affidavit that the first respondent's working week was reduced from 5 (five) to 3 (three) days per week from 1 September 2025. The transcript does not reflect any evidence being presented in this regard by the applicant. The basis for this contention by the applicant appears to be the message contained at page 38 of Bundle R. The difficulties surrounding accepting this document as part of the evidentiary material that served properly before the arbitrator, has been addressed above. The applicant's own version as presented to this Court contains some inherent contradictions – for example, he contends in his founding affidavit that the three-day working week would apply from 1 September 2024 onwards (paragraph 18 in the founding affidavit) yet the message itself in Bundle R (page 38) is dated 27 September 2024.

[34] If one has regard to the arbitrator's calculations in paragraphs 28, 29 and 30 of the award, and ultimately his decision in relation to how much the applicant owed the first respondent, it appears that he calculated the relevant amounts based on roughly – (i) 173.19 working hours per month; (ii) 39.88 working hours per week; and (ii) 7.97 working hours per day - rounded up to approximately eight hours per day and forty hours per week.

[35] The first respondent did not dispute the applicant's version, set out on page 4 line 09 to page 5 line 18 of the transcript, that the first respondent only worked roughly 7 (seven) hours per day and that he should only be remunerating her for seven hours per day at the applicable minimum hourly rate in terms of the NMW Act.

[36] The arbitrator's decision that the applicant owed the first respondent an amount of R28 219.92 (being the outstanding balance of her salary for the years 2022, 2023 and 2024), and the decision-making process in respect thereof, amounts to a gross irregularity in the proceedings in that the arbitrator made an error of fact as well as a decision and/or outcome that falls outside of

the band or range of decisions to which a reasonable decision-maker could come, having regard to the first respondent bearing the onus of proof, the evidentiary material that served before the arbitrator, and the evidence which was common cause and in dispute (particularly the applicant's version of the disputed facts).

[37] The arbitrator ignored and/or failed to consider material facts relating to the short-pay component of the award being the approximate number of hours in each day that the first respondent worked for the applicant and which the applicant was obliged to remunerate the first respondent for. The only credible version before the arbitrator was that it was approximately a seven-hour working day instead of an approximately eight-hour working day, yet the arbitrator's decision was based on approximately an eight-hour working day. Had the arbitrator based his decision on a seven-hour working day instead of on an eight-hour working day, the result would have been different as a materially lesser amount of short-pay would have been awarded to the first respondent.

[38] Arbitration awards of course only have to contain brief reasons, and it cannot automatically be inferred that the arbitrator's failure to explicitly deal with whether the first respondent worked and would be paid for seven hours per day instead of eight hours per day means that the arbitrator did not consider it.

[39] Notwithstanding that context, however, the only version/s before the arbitrator in respect of the first respondent's working hours per day that the applicant was obliged to remunerate her for, was an approximately seven-hour working day, and this was clearly of great significance or relevance to the award and the arbitrator's decision-making. The arbitrator does not refer to a seven-hour working day in the award. He also does not factor that into his calculations in paragraphs 28 to 30 (seven hours instead of eight hours). Moreover, he does not provide any reasoning for preferring an eight-hour working day over a seven-hour working day. The inference may therefore reasonably be drawn that the arbitrator did not apply his mind to this (which was uncontested evidence on the part of the applicant before him). It cannot be said in the

circumstances that the arbitrator considered this fact (a seven-hour working day) and instead decided to resolve the matter on a different basis (applying an eight-hour working day).

[40] The decision made by the arbitrator in respect of the short-pay component could not reasonably have been reached in light of the evidence and the issues, even if one was to disregard any flawed reasoning on the part of the arbitrator or any gross irregularity in the proceedings in the form of an error of fact being made. Besides the unreasonableness of the outcome, the arbitrator must also have misconceived the inquiry or undertaken the inquiry in a misconceived manner so as to prevent a fair trial of the issues. Errors of fact and/or gross irregularities do not automatically produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. Whether an unreasonable outcome has been produced and/or there is a compelling indication that the arbitrator misconceived the enquiry, will depend on the materiality of the error or irregularity and its relation to the result. But for the error or irregularity in relation to calculating any short pay with reference to eight working hours instead of seven working hours, a different outcome would have been arrived at – the short pay sum would have amounted to 10 219.74 instead of R28 219.92. This material error or irregularity therefore points to an unreasonable result. The arbitrator does not appear to have asked himself the right question when making his decision namely - 'If I have regard to the evidence before me, what was the first respondent's working hours per day which the applicant was obliged to pay her for?' In light of the general nature of the decision in issue, the range of relevant factors informing the decision, the nature of the parties' competing interests impacted upon by the decision, and the decision ultimately not striking a reasonable equilibrium in accordance with the objects of the LRA, the material error or irregularity produced an unreasonable outcome and/or constituted a misconception of the nature of the enquiry so as to lead to no fair trial of the issues.

[41] The decision reached in respect of the amount of short pay that is owing does not meet the requirement of reasonableness as this decision is not justified by

any rational reason/s. The arbitrator's decision is respect of the short-pay component/notice-pay component is not rationally connected to the evidentiary material which served before him. In reaching his finding, the arbitrator appears to have materially misdirected himself in relation to the evidentiary material before him. Both the reasons and the result are unreasonable. The result is not capable of being justified for reasons other than those provided by the arbitrator.

[42] The decision made in respect of the short-pay component falls outside of the band or range of decisions to which a reasonable decision maker could come to in light of the evidentiary material before him. The threshold test for the reasonableness of this award is whether the decision reached by the arbitrator was one that a reasonable decision maker could not reach. The arbitrator misconceived a material aspect of the evidence before him and drew a factual conclusion which was untenable. This renders the arbitrator's decision in respect of the short-pay component one to which no reasonable decision-maker could come.

[43] Ultimately, on a full conspectus of all the relevant issues and having carefully assessed the totality of the evidence before the arbitrator as well as the reasoning underpinning his decision in relation to the short-pay component and the notice-pay component, it is clear that the arbitrator decision that the applicant owed the first respondent the sum of R28 219.92 (R32 996.48 less R4 776.56) in respect of the outstanding balance of her salary for the years 2022, 2023 and 2024 (set out in paragraph 34 of the award) is fundamentally flawed along with the arbitrator's reasoning in paragraphs 28 to 31 of the award which underpins the decision in paragraph 34. Accordingly, I am persuaded that the arbitrator's decision regarding the short-pay component was not one that a reasonable decision maker could reach thus failing to meet the reasonableness threshold.

<u>Analysis: notice-pay component of the award</u>

[44] According to the first respondent's LRA for 7.11: (i) the nature of the dispute which she referred to the CCMA was a dispute in terms of Section 73 BCEA

dispute (Claims for monies owing in terms of the NMW Act); and (ii) it does not appear that a dispute in relation to Section 73 BCEA dispute (Other claims for failure to pay monies owing) was referred to the CCMA.

[45] The dispute as referred appears to be confined to monies owing in terms of the NMW Act. The arbitrator confirms this in the opening paragraphs of the award (paragraphs 1, 8, 15, 17 and 20). The arbitrator's summary of the parties' evidence also makes no mention of a dispute relating to notice pay.

[46] On a conspectus of the evidentiary material that served before the arbitrator, it does not appear that any evidence was presented by either party in relation to a dispute about notice pay and that either the first respondent's employment was terminated on 29 November 2024 without giving a notice period, alternatively, that the first respondent refused and/or failed to work a notice period and is not entitled to any payment in relation to notice pay.

[47] The arbitrator did not have the authority to determine a dispute not before him and in the circumstances, he exceeded his powers by making a decision on the notice-pay component of the award. Even if there was a notice pay dispute before him, the arbitrator's decision in respect of the notice pay component was not rationally justifiable in that there was no objective basis which connected that decision with the available evidentiary material.

[48] The error or irregularity was also material in that it had a distorting effect on the demarcation of the issues to be determined and the ultimate outcome, thereby resulting in a misconception of the nature of the enquiry so to prevent the parties from fully ventilating their case and leading to an unfair trial of the issues.

[49] The relief granted by the arbitrator in paragraph 34 of the award is reviewed and set aside.

<u>Relief</u>

[50] Having found that the arbitrator's decision in respect of the short-pay component and notice-pay component of the award falls to be reviewed and set aside, that then leaves the issue of relief and whether it is appropriate for

this Court to remit that aspect of the matter back to the CCMA for a hearing *de novo* before another arbitrator or to substitute its own decision for that of the arbitrator.

[51] In *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[14], the court set out the circumstances in which the Labour Court would rather correct the decision than refer it back to the CCMA as being:

'(i) where the end result is a foregone conclusion and it would merely be a waste of time to order the CCMA to reconsider the matter;
(ii) where a further delay would cause unjustified prejudice to the parties;
(iii) where the CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction again; or
(iv) where the court is in as good a position as the CCMA to make the decision itself.'

[52] In *Phakoago v SANCA Witbank Alcohol and Drug Help Centre and Others*[15] the Labour Appeal Court provided guidance on the circumstances in which the Labour Court should remit a matter for a rehearing or, alternatively, substitute its own decision for that of a commissioner. The Labour Appeal Court held as follows:

"[40] In terms of section 145 (4) (a) of the LRA, the Labour Court has the broadest powers to determine a dispute in whatever manner it considers appropriate. In exercising this power, the Labour Court may, after reviewing the proceedings, and if it finds in favour of the applicant by upholding the review, either substitute its decision for that of the commissioner or remit the matter to the CCMA.

[41] In National Union of Metalworkers of South Africa v Commission for Conciliation, Mediation and Arbitration and Others, the Constitutional Court, after noting the wide discretion the Labour Court has in determining a dispute, cautioned against the Labour Court readily substituting its decision for that of the commissioner. The underlying consideration of the caution relates to the risk of the hasty use of discretion undermining the doctrine of separation of powers. The doctrine of separation of powers is critical in this regard because otherwise, the Labour Court could usurp the powers assigned to commissioners of the CCMA. It was for this reason that the Constitutional Court held that the Labour Court should exercise a measure of judicial deference and only substitute decisions in exceptional circumstances." It went

[14] (2010) 31 ILJ 452 (LC)
[15] [2024] 12 BLLR 1271 (LAC) at para 40 onwards.

further and stated that "judicial deference should not be interpreted to mean that the Labour Court does not have the power to substitute… arbitration awards".

[53] The following is evident from the foregoing and the available evidentiary material, that: firstly, this Court does have the power to substitute its decision for that of the arbitrator; secondly, and at a bare minimum, a further delay would cause unjustified prejudice to the parties and this Court is in as good a position as the CCMA to make the decision itself, whilst it is arguable that the end result is a foregone conclusion and it would merely be a waste of time to order the CCMA to reconsider the matter; and thirdly, this Court should exercise a measure of judicial deference and substitute its decision for that of the arbitrator in exceptional circumstances.

[54] In *Trencon Construction (Pty) Ltd v Industrial Development Cooperation of South Africa Ltd and Another*[16], the Constitutional Court stated the following in relation to the enquiry into what factors were to be taken into account in considering whether to exercise the discretion to substitute the decision of an administrator and how the 'exceptional circumstances' enquiry was to be approached:

'To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.'

[55] The Constitutional Court again emphasised the following factors as holding greater weight when it comes to the exercise of the discretion to substitute, namely whether a court is in as good a position as the administrator/arbitrator to make the decision; whether the decision of an administrator/arbitrator is a foregone conclusion; other relevant factors which may include delay; and, what is described as the 'ultimate consideration', being whether a substitution order is just and equitable.

[16] [2015] ZACC 22

[56] In *casu*, the record before this Court is sufficient to allow for a proper determination of how much the applicant should pay the first respondent in respect of any outstanding balance of her salary for the years 2022, 2023 and 2024 in light of the provisions of the NMW Act. In my analysis, this Court is in as good a position as another commissioner of the CCMA to determine this. Moreover, a remittal of the matter for a rehearing will prolong its determination and not be in the interests of expeditious dispute resolution and justice. I am mindful that the dispute relates to the payment of statutory amounts arising from roughly a three-year period of time that ended almost a year ago (at the end of November 2024). Remitting the matter back to the CCMA for an arbitration *de novo* would delay redress being obtained and frustrate one of the primary objectives of the LRA being the expeditious resolution of disputes. Requiring these parties to go through yet another arbitration would, in my view, be contrary to both the interests of justice and the objectives of the LRA and a substitution order is ultimately just and equitable in the circumstances.

[57] The present case falls into the category of one in which this Court may substitute the decision of an arbitrator, and paragraph 34 of the award stands to be substituted by an order to the effect that the applicant ought to pay the first respondent an amount of R10 219.74 in relation to the short-pay component of the award. I am satisfied that a direct substitution of the arbitrator's decision is appropriate, rather than remitting the matter for a *de novo* hearing.

Costs

[58] In accordance with the requirements of law and fairness, as set out in section 162 of the LRA, I am of the view that an order of costs should not be made in this matter. The requirements of the law and fairness are best served by the applicant bearing his own costs.

Conclusion

[59] For all the reasons set out above, I am of the view that there is merit in the review application and that a proper case has been made out to justify this Court's interference with both the short pay component of the award as well as the notice-pay component of the award. In my assessment, the decision reached by the arbitrator that the applicant owed the first respondent the sum of R32 996.48 consisting of short pay in the sum of R28 219.92 due to a failure to comply with the NMWA and any notice-pay (whether in the sum of R4 776.56 or otherwise) falls to be review and set aside for the reasons set out above. Notwithstanding the threshold for review being set high, it is in the interests of justice and fairness for this Court, as a court of equity, to intervene in the award as recorded above.

[60] As for the relief, I am satisfied that a direct substitution of the arbitrator's award is appropriate, rather than remitting the matter for a *de novo* hearing and paragraph 34 of the award stands to be substituted by an award to the effect that: (i) the applicant ought to pay the first respondent an amount of R10 219.74 (ten thousand two hundred and nineteen rand and seventeen cents) in relation to the short-pay component of the award; and (ii) no amount is owing by the applicant to the first respondent in respect of notice pay.

[61] In the circumstances, I make the following order:

<u>Order</u>

1. The Arbitration Award dated 30 December 2024 under CCMA case reference number GAJB29166-24 is reviewed and set aside in respect of the decision set out in paragraph 34 thereof.

2. The relief granted by the arbitrator in paragraph 34 of the award is substituted with the following relief – *The Respondent, Denzil Kennedy, is ordered to pay the Applicant, Thandie C Chirwa, the amount of R10 219.74 (ten thousand two hundred and nineteen rand and seventy-four cents) being the outstanding balance of her salary for the years 2022, 2023 and 2024.*

3. Payment of the amount of R10 219.74 (ten thousand two hundred and nineteen rand and seventy-four cents), as referred to in paragraph 2 above, is to be made by the applicant to the first respondent within 20 (twenty) court days of the date on which this judgment is handed down.

4. There is no order as to costs.

Mendel Sass

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the applicant: The applicant appeared personally.

For the respondents: No appearances.