(1) Reportable: NO
(2) Of interest to other Judges: No
(3) Revised

[redacted] 19/12/2025
Signature Date

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Case no: JR1794/22

In the matter between:

**LUCCHINI SOUTH AFRICA (PTY) LTD** **Applicant**

and

**COMMISSION FOR CONCILIATION MEDIATION**

**AND ARBITRATION** **First Respondent**

**COMMISSIONER MATOME VICTOR SEHUNANE** **Second Respondent**

**VISHEN MAHABEER** **Third Respondent**

**Heard:** 14 August 2025

**Delivered:** 19 December 2025

**Summary:** An application to review an arbitration award which found a dismissal substantively unfair and ordered the maximum compensation of 12 months, as the employee did not wish to be reinstated. There were no irregularities, and the award is reasonable, but the compensation is reduced to 6 months.

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**JUDGMENT**

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**GANDIDZE J**

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Introduction

[1] The application by Lucchini South Africa (Pty) Ltd (Lucchini) is in terms of section 145 of the Labour Relations Act[1], (LRA) and seeks to review, set aside, and substitute an award issued by the Commission for Conciliation, Mediation and Arbitration (CCMA) on 11 August 2022, in case number GAEK6148-21. The award declared Vishen Mahabeer's dismissal substantively unfair, as procedural fairness was not contested, and ordered payment of the maximum compensation of 12 months' salary. Lucchini seeks an order that Mahabeer's dismissal was substantively fair, alternatively an order substituting the compensation award with a reduced compensation order.

[2] Vishen Mahabeer (Mahabeer), the third respondent, opposed the application.

Background

[3] Lucchini manufactures forged freight and railway wheels, including locomotive, freight wagon, and passenger wheels. Mahabeer was appointed its Safety, Health, Risk, and Quality (SHERQ) Manager, effective January 2021. He was dismissed less than six months later, in June 2021, following a disciplinary hearing into alleged misconduct. Before the hearing, he was placed on precautionary suspension pending its outcome. He subsequently faced five misconduct charges, which have been paraphrased for convenience, as the charges themselves are lengthy.

[4] Charge 1 was breach of clause 26(b)(ii) of the employment contract, which prohibits, during the course of employment, taking preparatory steps to become engaged or interested in any business which competes or intends to compete with Lucchini. Mahabeer is alleged to have negotiated his employment with Scaw Metal/Cast Products, a direct competitor of Lucchini, while employed by Lucchini.

[5] Charge 2 was that Mahabeer undermined management and defied authority by, during a telephone call, informing Ms Odette Engle (Engle), the Human

[1] Act 66 of 1995, as amended.

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Resources (HR) Manager, that the Managing Director, Mr Stephan Nel (Nel), should consider how much Lucchini's Intellectual Property (IP) was worth to him. The call occurred while Mahabeer was suspended and while the parties were attempting to conclude a mutual separation agreement (MSA). At the time, Mahabeer had communicated his intention to resign and join Cast Products. Lucchini regarded the statement as a ransom demand and an act of extortion.

[6] Charge 3 was that Mahabeer had withheld crucial information from Lucchini during the retrenchment consultations held between February and March 2021. The charge is that during those consultations, Lucchini's financial, operational and sustainability information was shared with all, including Mahabeer. At the time, Mahabeer was already negotiating his employment with Cast Products and did not disclose this fact, which, according to Lucchini, constitutes dishonesty. The case was further that had Mahabeer disclosed that he was negotiating his employment with Cast Products, the jobs of employees affected by the retrenchments would have been saved, as Mahabeer would have been dismissed for misconduct.

[7] Charge 4 was gross insubordination and mutinous behaviour, including refusal or intentional failure to obey orders or instructions, in that when Mahabeer was informed of his suspension and instructed to hand in company property, he refused to provide Engle with the laptop password despite repeated requests, and told her, '*you can get it from the IT service provider*'.

[8] Charge 5 was gross dishonesty, in that when he was hired, Mahabeer negotiated and received a relocation fee of R20 000, but failed to relocate from Durban to Gauteng, thereby deceiving Lucchini.

[9] The disciplinary hearing was held on 23 June 2021, and Mahabeer was dismissed with immediate effect. The internal appeal failed; hence, the dispute was referred to the CCMA.

The CCMA proceedings

[10] Mahabeer represented himself, and Lucchini was represented by Mr Gert Brink (Brink), who stated that he was an official of the National Labour Association

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(NELA), an employer organisation. On review, it is alleged that Brink misrepresented his capacity, as he was, in fact, Lucchini's attorney. The response to the allegation was that Brink was no longer employed by the law firm representing Lucchini. If the allegation that Brink misrepresented himself as an official of an employer organisation when, in fact, he was an attorney is true, then this constitutes dishonesty, which brings the profession into disrepute. He would have made the misrepresentation because legal representation is not permitted in misconduct dismissals. The third respondent's attorneys are urged to bring this judgment to the attention of the Legal Practice Council (LPC) for further investigation, if Brink is still registered with the LPC.

[11] Returning to the arbitration proceedings, Lucchini called three witnesses, namely Mr Andre Ehlers (Ehlers), a Labour Consultant; Ms Odette Engle (Engle), the Human Resources Manager; and Mr Stephan Nel (Nel), the Managing Director. Mahabeer gave evidence in support of his own case and did not call any witnesses.

[12] The CCMA found Mahabeer's dismissal to be substantively unfair and ordered that he be paid compensation equivalent to 12 months' salary.

Brief synopsis of the review legal principles

[13] An award can be set aside on the grounds set out in section 145 of the LRA. Those grounds are where a commissioner (i) committed misconduct in relation to his duties as an arbitrator, (ii) committed a gross irregularity in the conduct of the arbitration proceedings, or (iii) exceeded his powers or where an award is improperly obtained.

[14] With some exceptions, it is now established that an award can be interfered with on review if it is one that no reasonable decision-maker would have made. It is also trite that the reasonableness or otherwise of an award is considered on the totality of the evidence, and not on a fragmented, piecemeal analysis.

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[15] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[2] (*Fidelity Cash*), the court stated that the test for determining whether an award is a reasonable one is a stringent test, ensuring that awards are not lightly interfered with. In *Phalaborwa Mining Co Ltd v Cheetham and Others*[3] (*Cheetham*), the court found that this court must defer to the commissioner's decision and should interfere with awards only in limited circumstances. The further principle is that there is a distinction between a review and an appeal, and that a party cannot seek to appeal against an award under the guise of a review application.

Grounds of review

[16] Lucchini raised six grounds of review. Five concern the not guilty findings on all five charges, and the sixth concerns the maximum compensation awarded to Mahabeer.

*Charge 1*

[17] Mahabeer was alleged to have breached his employment contract by seeking alternative employment with Cast Products, a competitor of Lucchini, while still employed by Lucchini.

[18] The commissioner accepted that Lucchini and Cast Products were competitors, but found that Mahabeer had a right to seek employment without permission from Lucchini, and that a restraint of trade precludes an employee from being employed by a competitor after leaving an employer.

[19] On review, the submission is made that the commissioner misconceived the nature of the Mahabeer's misconduct by focusing on his right to seek employment with a competitor, losing sight of the fact that clause 26(b)(ii) of Mahabeer's contract of employment provides that:

> 'During your employment you shall not, at any time, (whether during or outside normal working hours) take any preparatory steps to become engaged or

[2] (2008) 29 ILJ 964 (LAC) at para 95.
[3] (2008) 29 ILJ 306 (LAC) at paras 4 -5.

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interested in any capacity whatsoever in any business or venture which is in or is intended to enter into competition with any of the Businesses.'

[20] It was submitted that Mahabeer ought to have been found guilty of the charge because he did not have permission to seek employment while employed by Lucchini, and that the not-guilty finding was unreasonable. It was also submitted that the commissioner failed to consider the probabilities of the versions regarding the permission granted to Mahabeer, which was limited to the automotive industry. It was further submitted that the commissioner misdirected himself by ignoring facts, and that this had a distorting effect on the outcome. Reliance was placed on *Minister of Safety & Security and Another v Madikane and Others,*[4] which held that it is wrong for a commissioner not to take into account all relevant evidence and that a failure to weigh the probabilities to draw inferences and make findings renders an award unreasonable.

[21] It was not in dispute that, before securing the job at Lucchini, Mahabeer disclosed that he had also attended an interview at Cast Products, but that he had ended the negotiations after receiving an employment offer from Lucchini. However, a month after Mahabeer joined Lucchini, a short time was introduced. Shortly thereafter, Lucchini engaged in a section 189 retrenchment process. As a result, Mahabeer decided to reopen negotiations for a position with Cast Products.

[22] Lucchini's case that the Mahabeer's contract of employment prohibited him from seeking other work with a competitor while he was in its employment.

[23] Such a contractual provision is unenforceable as it is contrary to public policy. More so for employees whose employers have implemented short-time work and are losing a portion of their salary. While it is true that an employer prefers its employees to stay on board and not jump ship, a rule that prevents them from seeking other opportunities without a quid pro quo is neither valid nor reasonable.

[4] (2015) 36 ILJ 1224 (LAC) para 46.

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[24] Also, no conflict of interest arises when an employee looks for greener pastures, even with a competitor. Mahabeer has a right to freedom of trade, occupation, and profession, guaranteed by section 22 of the Constitution. That right cannot be limited by an employer, in the manner that Lucchini sought to do.

[25] Even with restraint-of-trade covenants, they are enforceable only if there is a protectable interest. A contractual clause that prohibits seeking employment while employed would not pass muster, as there is no proprietary interest worthy of protection. According to Lucchini's own account, Mahabeer played no part in the tender, which Lucchini lost and which was awarded to Cast Products. This raises the question of why Mahabeer's conduct in negotiating his employment with Cast Products was regarded as a conflict of interest.

[26] The commissioner's conclusion that the rule was invalid and that Mahabeer was not guilty is reasonable.

*Charge 2*

[27] The charge was that Mahabeer had tried to extort Lucchini by threatening to use its IP in exchange for a favourable monetary settlement. The commissioner found that Mahabeer had done nothing wrong in raising the issue of IP during settlement negotiations.

[28] On review, it is submitted that the commissioner misconceived the nature of the misconduct by failing to appreciate that Mahabeer used Lucchini's IP as a bargaining tool to obtain a monetary settlement, which could be construed as a ransom demand and extortion, even though the IP never belonged to Mahabeer. It is further submitted that this is an irregularity. The submission was further that Mahabeer was required but did not provide an explanation for his conduct, when this was required of him. In that regard, reliance was placed on *National Union of Metalworkers of SA on behalf of Mathonsi v Scaw Metals (Pty) Ltd & Others*[5].

[5] (2020) 41 ILJ 254 (LC) at para 45.

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[29] The commissioner's finding that it was not wrong to raise the issue of IP during the negotiation of an MSA is one that a reasonable decision-maker could have reached. This is one of those issues where reasonable decision-makers could have reached different conclusions, but provided the conclusion is not one that no reasonable decision-maker could reach, it cannot be interfered with on review.

*Charge 3*

[30] The charge against Mahabeer was that he had taken part in the retrenchment process between February and March 2021 and had failed to disclose that he had been negotiating his employment with a competitor. The argument was that had Mahabeer disclosed this fact, the jobs of other employees would have been saved, because he would then have been dismissed for misconduct in that he had breached the terms of the employment contract, which prohibited him from seeking alternative employment with a competitor of Lucchini.

[31] The commissioner found that Mahabeer could seek alternative employment during the consultation process and that Lucchini's consent was not required.

[32] On review, the submission is that the commissioner committed an irregularity by misconceiving the nature of the misconduct, focusing on the right to seek employment while ignoring that clause 26(b)(ii) of Mahabeer's contract prohibited the conduct complained of.

[33] Mahabeer had no obligation to disclose to Lucchini that he was seeking alternative employment, for the reasons set out above. The ground of review has no substance and must fail.

*Charge 4*

[34] When Mahabeer was suspended, he was instructed to leave the company property behind. He handed in his laptop but did not provide the password, even after it was requested of him on at least two occasions, including at the gate when Mahabeer was about to leave the premises. He informed Engle that

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he did not have to do anything, as he had been suspended, and that Engle could obtain the password from an IT service provider.

[35] The commissioner found that Mahabeer was within his rights to refuse to provide the password, which was his personal property. The commissioner also found that Engle could use an IT service provider to access the laptop.

[36] On review, it was submitted that the commissioner ignored the evidence that the password was required to access the laptop and the information on it, and that the laptop and its contents were Lucchini's property. It was further submitted that the gross irregularity prevented the commissioner from properly evaluating the charge and its elements, resulting in an unfair hearing. It was also submitted that the misconduct irreparably destroyed the trust relationship and that Mahabeer lacked remorse and accountability. The final submission on the charge is that the commissioner misconceived the nature of the misconduct, failed to appreciate the misconduct of insubordination and its elements, failed to properly apply his mind to the evidential material before him, and that had he done so, he would have concluded that Mahabeer was guilty of the misconduct.

[37] For Mahabeer, reliance was placed on *TMT Services & Supplies (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[6], where the court stated that the enquiry into the gravity of insubordination must consider the employer's action before the insubordination, the reasonableness of the instruction and the presence of wilfulness by the employee.

[38] There is no merit to this ground of review, which is clearly an attempt to appeal the award. To bolster its case, allegations are made that Mahabeer initially refused to provide his address and the laptop, and later relented. The charge was confined to giving the laptop password.

[39] In any event, Engle testified that she was not in a position of authority over Mahabeer. The password was Mahabeer's, as he had created it, but the lack of access did not prevent Lucchini from accessing the laptop. He testified that he was upset about being suspended despite having done nothing wrong.

[6] [2019] 2 BLLR 142 (LAC)

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While one reasonable decision-maker could have found that Mahabeer could have provided the password, like the commissioner, other reasonable decision-makers could understand why Mahabeer refused to provide it. Both approaches fall within a band of what is reasonable.

*Charge 5*

[40] The charge was that Mahabeer had been paid R20 000 to relocate from Durban to Johannesburg, yet by the time of his dismissal, he still lived in a guest house rather than purchasing a property or entering into a long-term lease.

[41] The commissioner found that to require Mahabeer to stay at his own home was nonsensical.

[42] On review, it is submitted that at the disciplinary hearing, Mahabeer admitted wrongdoing, stating that he used the money to buy a TV, yet in the arbitration proceedings, he sought to justify his conduct. The submission was further that Mahabeer did not comply with the relocation conditions in that he failed to permanently relocate and therefore defrauded or misappropriated funds intended for relocation costs, thereby irreparably destroying the trust relationship.

[43] The commissioner is once again said to have misconceived the nature of the misconduct, committed a gross irregularity, deprived Lucchini of a fair hearing, and that had the commissioner had regard to the evidential material before him, specifically the concessions by Mahabeer during cross-examination, he would have found Mahabeer guilty and that the conclusion that he was not guilty is unreasonable.

[44] Engle testified that during the recruitment process, Mahabeer requested that the R20 000 allowance be paid to him in cash so that he could purchase new items rather than move his property, and that it was agreed that payment would be made into his bank account upon signature of the employment contract. That version was confirmed by Mahabeer, who explained that during the disciplinary proceedings, he agreed he was wrong, but subsequently remembered the emails confirming Engle's version.

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[45] The relocation allowance was intended for Mahabeer to purchase new furniture, and his account that he bought a large TV with the allowance was not disputed. It was not a term and condition of the relocation allowance that he should enter into a long-term lease or purchase property. He was required to live in Gauteng to be close to work, and it was not suggested that he did not live in Gauteng.

[46] The commissioner found that all the charges made it clear that Lucchini was desperate to get rid of Mahabeer. I agree, and this charge is the perfect example. Mahabeer commenced work with Lucchini in January 2021, yet he was only charged with 'not relocating' in June 2021. Engle knew that Mahabeer lived in a guest house because she had visited him there, and no issues arose until after Mahabeer announced his intention to resign and join Cast Products. This was the real trigger for the charges against Mahabeer, which the commissioner correctly found were trumped-up.

[47] There is no merit to this ground of review.

Compensation awarded

[48] The commissioner awarded Mahabeer 12 months' compensation for the substantively unfair dismissal. In arriving at that quantum, the commissioner recorded that he took into account that Mahabeer was in Lucchini's permanent employment, had six months' service, that his dismissal was grossly unfair as he did not commit any misconduct, that there was no doubt that the manner Mahabeer was dismissed affected him emotionally and psychologically, that Mahabeer was unemployed and therefore had no income. The commissioner found that the charges against Mahabeer were contrived and trumped up, that Lucchini 'barred' Mahabeer from resigning and opted to manufacture charges against him and that the decision to charge Mahabeer was *'wrong'* and *'vengeful'*.

[49] On review, the submission was that the commissioner's recordal in the award that Mahabeer was unemployed was factually incorrect, as Mahabeer's version was that he found alternative employment at Wabtec Corporation, effective 1 October 2021. Therefore, so the submission went, Mahabeer suffered a loss of

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less than three months' salary, and the compensation ought to have been limited to this loss. In support of the submission, reliance was placed on decisions of the Labour Appeal Court in *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO & Others,*[7] *(Le Monde)* and *Total SA (Pty) Ltd v Meyer & Others*[8] *(Meyer).*

[50] It was also submitted that 12 months' compensation to an employee with less than six months' service[9] was unreasonable, and that the commissioner ought to have awarded compensation that took into account Mahabeer's disruptive conduct during the arbitration proceedings, including his implication that Nel was a liar and a thief, and his accusation that he was not performing his duties as a managing director.

[51] The submission was also that the commissioner's finding that the dismissal affected Mahabeer emotionally and psychologically was not supported by any evidence.

[52] Finally, it was submitted that the commissioner incorrectly recorded Mahabeer's monthly salary as R109 546, which was the Total Cost to the Company, when it should have been recorded as R101 600, which was the gross salary. This last issue can be easily disposed of. Mahabeer testified that his salary was R109 546, and later in the proceedings, Brink submitted that the gross salary was R101 600. The issue could have easily been resolved by submitting into evidence Mahabeer's payslip. The court was not referred to the 'law' that was relied upon, which prescribes that compensation is based on gross salary rather than the Total Cost to Company. In any event, the final amount to be paid to Mahabeer is subject to lawful deductions such as Pay As You Earn. Therefore, the monthly salary of R109 546 will not be interfered with on review.

[53] Turning then to the maximum compensation awarded, it is correct that Mahabeer testified that he obtained employment on 1 October 2021, that is,

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[7] (2007) 28 ILJ 2238 (LAC) at para 30.
[8] (2021) 42 ILJ 1696 (LAC).
[9] There was short time for a period of four weeks.

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about three months after the dismissal. The question is whether the compensation must be limited to this loss or whether it can also be punitive in nature. Before addressing that question, I address the question of the nature of the discretion that an arbitrator or court exercises when determining whether to grant compensation, and if so, the quantum thereof.

[54] In *McGregor v Public Health & Social Development Sectoral Bargaining Council & Others*[10], the Court stated that when a court awards compensation in terms of section 193(1), the appeal court's powers to interfere with such an award are not circumscribed, and that the court is at large to reach its own decision if it finds that the decision is one no reasonable decision-maker would have reached.

[55] However, when it comes to the quantum of compensation in terms of section 194(1), the reasonableness test does not apply[11] because the arbitrator or the court *a quo* granting the compensation exercises a narrow discretion. This means that on review (of an arbitrator's compensation award) or on appeal (of the court *a quo*'s compensation award), the court's power to interfere is circumscribed and is limited to (i) a failure to exercise a discretion, (ii) exercising the discretion capriciously, or (iii) exercised the discretion upon a wrong principle, (iv) has not brought its unbiased judgment to bear on the question, (v) has not acted for substantial reasons or (vi) has misconducted itself on the facts or (vii) reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. Ultimately, the question is whether the compensation awarded was just and equitable to all the parties, having regard to all the known relevant factors.[12]

[56] In this case, the commissioner erred in recording that, at the time of the arbitration, Mahabeer was unemployed. Mahabeer testified that after his dismissal, he found employment effective 1 October 2021. The question that

[10] (2021) 42 ILJ 1643 (CC) at para 28.
[11] *Edumbe Municipality v Putini and Others* (2020) 41 ILJ 891 (LAC), and *Kukard v GKD Delkor (Pty) Ltd* [2015] 1 BLLR 63 (LAC).
[12] *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC).

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arises is whether an award of compensation must be limited to this financial loss.

[57] While several judgments have held that an employee's financial loss must be taken into account in deciding the compensation to be awarded to an employee, there are also Labour Appeal Court decisions that have found that financial loss or patrimonial loss is an irrelevant consideration.

[58] In *Le Monde,* the court held that the purpose of the compensation is to make good the employee's loss and not to punish the employer. Similarly, in *Minister of Justice and Constitutional Development & Another v Tshishonga*[13], the court considered the financial loss suffered by the employee in arriving at a compensation order. In *Kemp t/a Centralmed v Rawlins*[14] and *Meyer,* the Court also found that financial loss is a relevant consideration in determining the compensation to be awarded to an employee.

[59] However, several decisions have held that compensation is a solatium, and that patrimonial loss is irrelevant.[15] Recently, in *Le Grange v Visser t/a Skukuza Medical Practice & Another*[16] *(Le Grange),* the Labour Appeal Court was called upon to determine whether compensation for a procedurally unfair dismissal should be limited to the three months that an employee was unemployed. The court described the proposition as fallacious and stated this:

> '[24] The proposition is based on a misunderstanding of the difference between patrimonial damages and a solatium. In *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union*, this court explained it as follows:
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> > 'The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a solatium for the loss of the right, and

[13] (2009) 30 ILJ 1799 (LAC) at para 19 and 22.
[14] (2009) 30 ILJ 2677 (LAC) at para 30.
[15] *Zeda Car Leasing (Pty) Ltd v Van Dyk* (2020) 41 ILJ 1360 (LAC), *Association of Mineworkers & Construction Union & Others v Northam Platinum Mine Ltd* (2021) 42 ILJ 2565 (LAC), *ARB Electrical Wholesalers (Pty) Ltd v Hibbert* (2015) 36 ILJ 2989 (LAC), *Bester v Small Enterprise Finance Agency SOC Ltd & Others* (2020) 41 ILJ 877 (LAC), and *Bester v Small Enterprise Finance Agency SOC Ltd & Others* (2020) 41 ILJ 877 (LAC).
[16] (2025) 46 ILJ 947 (LAC).

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> is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress. The party who committed the wrong is usually not allowed to benefit from external factors which might have ameliorated the wrong in some way or another. So too, in this instance.'
>
> [25] Dr Visser totally disregarded Dr Le Grange's rights. She had to endure the indignity of unemployment whilst the other employees returned to work, albeit for a short period. Compensation equal to three months' salary is wholly inadequate.'

[60] The Court awarded compensation in excess of the three months the employee was off work.

[61] After reviewing all the above decisions, my understanding of the legal position is that the quantum of compensation must be just and equitable for both parties, taking into account all relevant factors, including the financial loss or gain suffered or realised by an employee as a result of the dismissal, as applicable. However, the quantum of compensation is not limited to the employee's actual financial loss.

[62] As noted above, the commissioner's finding that Mahabeer remained unemployed at the time of the arbitration proceedings was factually incorrect, as Mahabeer secured alternative employment within three months of his dismissal. There is no doubt that the commissioner's error influenced the decision to award maximum compensation, and this justifies interference with the quantum of the compensation award. However, the compensation cannot be limited to the three months that Mahabeer was out of work.

[63] The commissioner found that the charges against Mahabeer were trumped up and a desperate attempt to dismiss him, and that finding is correct. Mahabeer did nothing wrong other than seek greener pastures, which he was legally permitted to do, and he lost his job for doing what the law allows. Mahabeer testified that being placed on administrative leave and later suspended pending the outcome of the disciplinary hearing caused him humiliation, and this account was not gainsaid. The compensation to be granted must take that into

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account. Taking these factors into account, a just and equitable compensation order, which is not meant to punish Lucchini but acknowledges both the patrimonial and non-patrimonial loss to Mahabeer, is, in my view, six months' compensation. Therefore, the award of maximum compensation will be reduced to six months' salary.

Costs

[64] The parties have been partially successful. However, Mahabeer was put to the great expense of defending a review application that challenged the finding that the dismissal was substantively unfair, when it ought to have been apparent to Lucchini that it was seeking to appeal an arbitration award, which it could not do. Regurgitating the grounds on which an award can be reviewed is not sufficient. Litigants are reminded that the ultimate test is whether the outcome arrived at by the commissioner was one that no reasonable commissioner could have reached, unless a commissioner misconceives the nature of the inquiry, which distorts the outcome. The fact that the compensation award was reduced cannot be used to deprive Mahabeer of the costs he incurred in opposing the review application. In this case, a costs order in accordance with the requirements of law and fairness is that Mahabeer is entitled to his costs on a party-and-party scale.

[65] In the result, the following order is made:

Order

1. The award is reviewed and set aside, but only to the extent that the compensation to Vishen Mahabeer is reduced to six months'.

2. Lucchini South Africa (Pty) Ltd is ordered to pay Vishen Mahabeer's costs.

[redacted]

T Gandidze

Judge of the Labour Court of South Africa

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Appearances:

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|---|---|
| For the applicant: | Mr ASL Van Wyk (Heads drafted by Advocate Grundlingh) |
| Instructed by: | Brink & Van Straaten Attorneys |
| | |
| For the third respondent: | JA Wehncke |
| Instructed by: | Wehncke Inc Attorneys |

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