

SOUTH AFRICA / JUDGMENT

M v Sandown Travel Kopanang (Pty) Ltd (J884-16) [2022] ZALCJHB 108 (25 May 2022) [2022] ZALCJHB 108

COURT

Labour Court Johannesburg

BEFORE

Lagrange

CASE / FILE NUMBER

J884-16

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

THE
LABOUR COURT OF SOUTH AFRICA,
HELD
AT JOHANNESBURG

CASE: J884-16
Of
interest to other judges
In
the matter

between: K
M
First Applicant
And
SANDOWN
TRAVEL KOPANANG
First Respondent
(PTY)
LTD
Date
of Hearing: 22,23 August 2019, 23,24 March 2021
Date
of Judgment: This judgment was
handed down electronically by circulation to the parties' legal
representatives by email, publication on
the Labour Court website and
release to SAFLII. The date and time for handing down judgment is
deemed to be 10H00 on 25 May 2022

Summary: (Automatically unfair dismissal – reason related to pregnancy -- National Union of Metalworkers of SA & others & Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) & another (2021) 42 ILJ 67 (CC) approaches to analysis reconcilable – respondent failing to establish on a balance of probability that applicant least qualified for appointment to alternative job – only plausible alternative explanation on the evidence is that it was her pregnancy which led to her non-selection and dismissal – dismissal automatically unfair)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant, Ms KM ('KM'[1]) claims she was automatically unfairly dismissed by the respondent ('STK') on account of pregnancy, or alternatively, that her retrenchment was substantively unfair. Mabelane does not take issue with the procedural fairness of the retrenchment process.

Sandown Travel claims that KM was fairly retrenched at the end of August 2016. KM is not seeking reinstatement, but compensation.

[2] The trial proceeded on a staggered basis. Initially it was enrolled on 2 May 2017, but had to be postponed because KM did not have legal representation. A pre-trial minute was only finalised in October 2017 and an in limine hearing to determine a jurisdictional point raised by Sandown Travel was set down on 24 August 2018. However, on 20 August 2019, Sandown Travel withdrew its objection and the matter was then enrolled for trial for two days on 22 and 23 August 2019. It

could not be concluded and was due to continue on 23 to 27 March

2020. Shortly before it was due to resume one of the respondent's

witnesses and their attorney contracted the Covid virus and the matter had to be postponed. The next time it could be enrolled

was 23 and 24 March 2021. On this occasion the hearing was conducted by agreement using Zoom owing to the prevailing pandemic. Parties filed heads in April 2021 and it was agreed that no oral argument would be heard unless the court directed otherwise.

- [3] KM testified on her own behalf. Ms B Henderson, née Leherb ('Henderson'), KM's line manager, Edenvale branch manager, Ms F Loddo ('Loddo') and the managing director, Mr N Brescia ('Brescia'), testified for Sandown Travel.

Narrative Outline

- [4] At the end of 2014 STK acquired the travel account of Smollan from another company. Smollan was a company with numerous different operating divisions.
- [5] KM was employed as a junior travel consultant on 1 April 2015.
- [6] From April to mid-September 2015, KM was the only junior consultant working on the Smollan account.
- [7] Other junior consultants employed after her were: Ms A Molefe (14 September 2015) and Mr J Sediela (17 December 2015). Also of some relevance to the case is Mr G Kapulua who was employed as an intermediate consultant on 1 February 2016.
- [8] All of the consultants mentioned were engaged in servicing the Smollan account.
- [9] Molefe went on maternity leave in mid-December 2015, three months after starting.
- [10] In February 2016, KM advised her line manager, Henderson, that she was pregnant.
- [11] On 6 July 2016, when KM was more than four months' pregnant, she and other employees working on the Smollan account were formally notified of possible retrenchment as STK had lost the Smollan account and needed to restructure the company as all nine positions specific to that account were redundant, including those of the junior consultants.
- [12] Three new junior consultant positions were created as alternatives to retrenchment, being two travel consultants and one conference position.
- [13] After the initial meeting at which the s 189(3) notice was presented, three more meetings took place between STK and KM. Whether these meetings constituted consultations meetings or not, it was agreed that there was no procedural unfairness in the process adopted. The main focus of the retrenchment process was on whether alternative employment could be obtained in one of the new positions.
- [14] The junior consultants applied for the three positions.
- [15] On 15 July 2016 they were all interviewed individually by Loddo, who provided a brief report on her interviews to management.
- [16] The successful candidates who were appointed to the three posts were Molefe (conferencing), Sediela (travel consultant) and Kapulua (travel consultant). KM, who had applied for a travel consultant position was unsuccessful.
- [17] On 28 July 2016, KM was notified of her retrenchment with effect from the end of the month.

KM's job as a junior travel consultant

- [18] Commenting on employment criteria for a junior consultant's post, Henderson said normally STK would recruit staff with at least two years' experience and a Galileo certificate. References had to be relevant to corporate bookings. Assessment of applicants was done on an open book basis because it was perceived to be fairer. In observing those who did the three and a half hour assessment, very few candidates consulted their manual. Prior to employing KM and the other junior consultants mentioned, STK had not employed trainees without prior work experience.
- [19] The travel consultant job hierarchy was that ordinarily in the first year of a new consultant's employment they were regarded as trainees irrespective of prior qualifications, and thereafter until they worked for 5 years they were regarded as junior consultants. Intermediate consultants could deal with cross border bookings, excluding Africa beyond the Zambezi. This also took about 5 years. Senior consultants had to make complicated booking around the world with confidence. KM came in as a trainee on three month probation, whereafter she did junior work booking domestic flights, bnb, bus bookings, cars etc.
- [20] Henderson said she had interviewed KM for her initial appointment after receiving her CV from a client. The trainees were recruited by word of mouth. They were not assessed on the computerised Galileo booking system when employed because they had trained on it, but not worked with it. She liked KM and thought her credentials fitted what STK wanted and she had potential. KM testified she had prior work experience in administration, training and sales before joining STK. She also partially completed a travel and tourism diploma and did a course in Galileo. Although she had completed the course, the certificate was not issued as she had fees outstanding. STK ultimately paid the outstanding fees so the certificate could be issued.
- [21] Henderson testified that in December 2014 STK was advised they would get the Smollan account. Four staff were taken on from Blue Label Travel, the agency which previously handled the Smollan account, but which had closed. Brescia said that Smollan became one of Sandown Travel's largest clients at the time. Smollan required Sandown Travel to have a dedicated division to handle its account. When Sandown Travel took on the Smollan account, it was never told it was labour intensive and was led to believe that Sandown Travel would manage with four people. However, they found they were working long hours and hence it was decided to get trainees straight from the colleges. Smollan bookings did not involve hotels as they were told was the case, but rather 85 % of accommodation was with guesthouses. The number of consultants including the four junior consultants servicing the Smollan account had grown to nine by the time STK lost the account.

- [22] Ms M Giovagnoli ('Giovagnoli') did the training. She gave her feedback on how the trainees were progressing. Once she was working under Henderson, KM submitted documents to the administration section who reported to and invoiced Smollan. Henderson said she knew how KM was doing as a consultant, and was copied in on every email that came in from Smollan and Smollan's divisions.
- [23] KM explained that airlines fed in all their booking information into Galileo. When a consultant made booking on Galileo for a particular corporate traveller they had to create a Personal Airline Reference for that traveller. That profile would contain all the passenger's details. The consultants needed to be able to understand the airlines booking rules which had to be expressed simply for the client. Once a booking is made on Galileo, the airline seat is removed from the airline's available seating for that flight. Similarly, most hotel bookings were made directly through Galileo. At the time smaller accommodation services did not use Galileo but this changed over time. A voucher number would be created by the system which guarantee the booking. The bill for the voucher came back to STK. STK would pay the booking and bill the client. Similarly, car hire bookings were done directly on Galileo. Her duties included booking flights, hotel accommodation, car hire, bus bookings and conference bookings for Smollan, which was a major client of the firm. The only difference between hotel and guest house bookings was that guest houses required a direct booking through the guest house, which was then also entered on Galileo. Entering the guest house booking on Galileo was a later development. She agreed most Smollan bookings were guest houses. She said she used Galileo about 60 % of the time because all flight bookings were done on that system. A lot of travel bookings were bus bookings.

KM's work history at STK

- [24] When KM began working for Sandown Travel, there were two other junior consultants, 'Anita' and Keniloe Tshikane ('Tshikane'). After Anita and Tshikane were moved to service another corporate account, for a while KM was the only junior consultant working on the Smollan account until Alexis Molefe ('Molefe'), Molefe arrived five months later in September 2015. Previously, Anita had been a receptionist but had worked her way up to become a junior consultant.
- [25] Molefe, John Sediela ('Sediela') and Gift Kapulua ('Kapulua') were employed on 14 September 2015, 17 December 2015 and 1 January 2016, respectively. When Molefe and Sediela started they were still learning and could only do certain tasks. She claims they worked closely together and sometimes she would advise them how to perform certain tasks.
- [26] KM testified that her workload had increased after Tshikane was moved. Once Kapulua was employed she shared some of her clients with him and eventually they became his clients but the clients still came back to her because they were happy with the way she did the work. With Sediela, he only did limited types of work. KM also got calls from clients of other consultants whom she helped. She agreed that some of the other Smollan divisions approached her to help, including clients of consultants such as Ms L Naidoo and Ms P Kosi,

who were senior and intermediate consultants respectively. Because she assisted more clients, she worked longer hours. It was disputed that she regularly worked as long as she claimed, but it was contended that to the extent she did, this showed she took on too much work and managed her work badly. It was put to KM under cross-examination that her assistance to other consultants was about the internal company processes not Galileo, but she said even Kapulua needed help with codes and likewise he would help her with things she did not know at the time, such as reissuing. When asked how much of the assistance she provided to other junior consultants concerned Galileo she estimated that with Molefe it amounted to 30 % and Sediela about 50%.

Henderson disagreed that other consultants would go to KM for help. They came to herself, and she was seated amongst them where they all worked. This was not put to KM.

KM's unsuccessful application for a junior consultant position.

[27] In the pre-trial minute STK stated that the successful candidates for the three junior posts were the most skilled. By implication, KM was the least skilled of all of them. In the letter advising of the possibility of retrenchment STK described the selection criteria for the new posts:

"The selection criteria to be utilized- the Company is proposing that the you apply for one of the above-stated position for which you have the skills and experience and the company will then interview the individuals accordingly and the individual who is best suited for the position will be offered the position."

[sic]

[28] The accompanying job descriptions were described as follows:

"JUNIOR POSITION x2

Enthusiasm in continual training participation and to request additional training when curiosity takes over

Proven records in lack of errors in processed work

Advanced galileo knowledge and wanting to learn more about the tool

Ability to train new staff on galileo or assist them when necessary

Ability to speak languages outside of our borders

Ability to efficiently and effectively process admin

Effective written communication

JUNIOR/CONFERENCE POSITION

Enthusiasm in continual training participation and to show curiosity in wanting to learn more

Galileo knowledge and wanting to learn more about the tool

Interest and ability to do A-Z with conference planning

to coordinate all details pertaining to conferencing-conference venue [equipment/ tea's/ lunches/ layout of rooms], flights, transfers and"

(sic)

- [29] It was put to Henderson that what would suit company best was for KM to be retrenched as Molefe was unlikely to take maternity leave in the near future and Sediela would not take more than a week or so if he had a child, whereas KM was definitely going to be off for a while on maternity leave. Henderson's response was that what suited the company was to have consultants able to work on different accounts where she could rely on their Galileo and administration skills.
- [30] Helen January, an intermediate consultant, was issued with identical letter on 12 July except in her case the selection criteria proposed was last in first out (LIFO) per job category. She was retrenched as she was the only person in her job category and no other posts were available. LIFO was not applied as a criterion applicable to the junior consultants. It was put to Henderson that LIFO was not used in the case of the junior consultants in order to exclude KM, but her explanation was that the type of work the junior consultants had to perform in the new roles was "totally different" to what they did on the Smollan account and they had to qualify for the new roles. The new roles entailed booking flights, hotel bookings, car reservations, reissuing tickets. By contrast, the Smollan account work was very labour intensive travel management and there were much fewer flight bookings. She maintained that Smollan and corporate accounts were vastly different. Most Smollan bookings were small scale bookings unlike other corporate bookings which entailed bigger numbers. Henderson testified that Galileo was not being used as extensively as it should have been on the Smollan account because guest houses and car bookings were mostly being done directly. Brescia also testified that LIFO was not applied because the selection had to be made on the basis of identifying suitable persons to be employed in an entirely new division in new jobs, with different requirements from the positions they formerly held.
- [31] KM said that even though STK claimed the new positions were different from the existing junior travel consultant jobs, the tasks they would have to perform were no different to what she had done previously. For example, conference booking did not markedly change as a booking task depending on the size of a conference. The fact that the positions were no longer for one dedicated client did not alter the nature of the tasks performed to make booking arrangements, which remained the same whether performed for one or more clients. KM did agree that Galileo would be used more extensively in the new posts.

- [32] KM applied for, but was unsuccessful in her application for any of the three new positions. She contends that, but for her pregnancy, she would have been successful in being appointed for one of the positions because she was trained in all the job requirements, had more experience and had assisted the junior consultants Molefe and Seidela who came after her. STK argued that the successful candidates were more experienced and better skilled than KM, for a variety of reasons and KM did not have an error-free record.

The report on KM's interview with Loddo

- [33] Loddo was appointed to interview the applicants for the new positions, because she was the manager of a different branch and would be more independent according to Henderson and Brescia. After the interviews on 15 July 2016, Loddo sent an email to Henderson and Covini in which she tersely recorded her views of the interviewees, which read:

“JOHN

Ø Very enthusiastic-willing to grow-good with paperwork and Galileo-very positive-honest and willing to work in a team- I see a willingness to better and grow

KM

Ø Sees herself in top management in the next 5 years-wants to work with international people more to grow-still struggles with paperwork and Galileo [refers to her Galileo book]-I see slight attitude-maybe a little arrogance in a way

GIFT

Ø Very sweet-on top of his game with Galileo-honest-willing to grow and work as team-paperwork on top of his game-willing to fix issues correctly-thankful for the training-I see potential

ALEXIS

Ø Very keen-strength-willingness to grow-she wants to maybe branch into conferencing one day-honest-paperwork and Galileo good-I see huge potential-lovely demine”

(Sic)

- [34] Loddo said KM told her she referred to the Galileo manual on numerous occasions and she admitted her administration was not up to scratch. Both these functions were vital and went hand in hand. Clients had to be billed the same day a booking was done. Loddo insisted that her report on her interview with KM reflected what KM had told her. Loddo confirmed she was not provided with any documentation on the performance records of the candidates. She had no explanation why KM might have downplayed her abilities except that honesty would have been important in the interview. Loddo did not try to verify any of the answers she was given.

- [35] KM was asked to react to the comments made by Loddo. Loddo's questions relating to KM's pregnancy will be dealt with later. For the present only the contents of her written comments on KM will be addressed below. KM was surprised to hear that she said she had a problem with Galileo merely because she said she referred to the manual. She agreed that she said she referred to Galileo but not that she was struggling with it or that she repeatedly consulted the manual. It was never an issue that the manual was referred to and one of the senior consultants also used to refer to it. She denied telling Loddo she was struggling with her paperwork and commented that she was unlikely to undersell her capabilities if she was trying to get the job. Under re-examination KM said she normally looked at the manual a couple of times during a period of few months.
- [36] KM agreed that she aspired to higher positions, but did not understand the basis for Loddo's negative comment that she was, simply because she had said she saw herself eventually as management material as that was something she aspired to. What she found paradoxical was that Loddo had positively appraised two of the other candidates for their 'growth' potential. It was suggested that if Loddo wanted to rely on the Galileo issue to avoid her getting the job she would not have maliciously added a subjective comment that she was arrogant. Henderson agreed that KM was ambitious but it was a tough industry in which one could not hope to be in a management position in five years.
- [37] KM readily volunteered that Kapulua, who was appointed to one of the new junior consultant positions, was more qualified than all the others including herself. In her view he was better suited to a higher position as he was already an intermediate consultant at the time of the retrenchment earning R 11,600 per month. KM, Molefe and Sediela, were all earning R 7,500 , R 7,000 and R 7,000 per month respectively. Loddo's comments on Molefe were fair, but KM still assisted her with her work. In her view, she was more experienced than Molefe and Seidila on Galileo.
- [38] The evidence showed that Molefe had a National Diploma in Tourism Management. KM had completed the same Diploma but did not have the diploma because of an outstanding course fee, which Sandown was aware of. Similarly, she had done the Galileo course but had not been able to obtain the certificate for the same reason, but Sandown had paid her outstanding fees so she could obtain the certificate. Molefe had been a sales assistant prior to employment by Sandown Travel and had five months' shorter service and experience than KM apart from the time she was on maternity leave. Sediela had eight months' less experience than KM and was employed initially to replace Molefe in December 2015 when she went on maternity leave. He had a similar travel qualification

but also no previous experience in the industry. He only did accommodation, vouchers and car hire bookings initially until KM started sharing her conference booking work with him because of her increased workload. She felt he was the weakest of the candidates.

She enjoyed working with Kapalua. Owing to his experience, she could not understand why he was offered one of the junior consultant

positions as he was an intermediate level consultant.

- [39] Henderson testified that she worked closely with the whole Smollan team. KM had required assistance with re-issues, but she did not say when this was. According to Henderson, KM's immediate knowledge of Galileo when a passenger was at the airport and needed a ticket reissued was not sufficient and someone else had to do this. Corporated booking work could entail a number of ticket reissues in a day. Her grasp of Galileo was not up to corporate standard. Henderson conceded that sometimes the manual had to be consulted, but consultants did not look at it for months on end because they had memorised the entries and codes. There were 10 000 or more codes, but consultants needed to know basic entry codes such as booking a car, or a special meal. Henderson said KM's desk was not that far away from her and was visible to her. Henderson could not actually say how often KM consulted the manual, but it was on her desk whereas most consultants kept it in their drawers.
- [40] Henderson agreed '100%' with Loddo's assessment of Sediela, Kapulua and Molefe 100%. KM was arrogant towards her at times. She testified that Brescia and herself decided on who would be retrenched, after considering feedback from administration, compliments from clients and mistakes made. Ultimately Galileo, administration and errors were the criteria relied on. She claimed that Seidela had made a single mistake, whereas KM had made three.
- [41] Henderson agreed Molefe had five months less experience than KM and no prior experience in the travel industry. Because Molefe went on maternity leave, she only worked as a consultant for eight months in all, whereas KM had fifteen months experience by comparison. Despite the disparity in their respective lengths of their service as consultants Henderson disputed that Seidila was the weakest of the all the candidates. His Galileo work was 'error free' his administration work and ticket reissuing was also perfect. Compliments flowed in for him and he never cost the company any money, whereas KM had and her administration was not up to scratch. When it was put to Henderson that nothing in STK's trial documents supported her contentions about KM's supposed failings or provided support for all the plaudits received by other consultants, her explanation for these omissions was that she had not been asked to provide the documentation in question.
- [42] Henderson testified that Smollan consultants had to submit documents to the administration division for payments. Most of the problems with paperwork emanated from KM, whereas Molefe and Sediela had latched on to it more quickly, an issue that was not put to KM. Having regard to KM's written motivation of her suitability for one of the junior posts compared with Henderson's email outlining the qualities sought of the successful applicants, it was put to Henderson that KM should have been appointed. She disagreed, saying that being a consultant on the Smollan account did not involve much use of Galileo and the new posts required them to work with more than one client, in which Galileo would be used 90% of the time. Accordingly, the two jobs could not be compared. Mabelane agreed that the corporate work of the new posts would entail more intensive utilisation of Galileo. It was also put to KM that another important criterion relied on was client

satisfaction, which the interviewer considered, and there was no indication of dissatisfaction with Molefe, Sediala or Kapulua. Mabelane explained that when they were still learning they did not work on their own bookings but assisted with bookings done by other consultants so the bookings were not recorded in their names and they would not be known to the client. She did agree that, by July 2016, the other junior consultant's would have had more experience with client interaction.

- [43] In respect of Molefe, Henderson said she was very quick to grasp the Galileo entries, was willing to learn and would ask if she was not sure. Her Galileo knowledge was good. When she left the Smollan account she worked on complex conference bookings. She had no problems with reissues and had made a notebook for all the codes and did not need to consult her manual. She could handle the stress of reissuing but would always ask someone to double check her work. Henderson said she never saw her going into her manual. Again, these details were not canvassed with KM.
- [44] During KM's cross-examination it was put to her that she made a number of errors. Three instances were mentioned to her, but the only one she could recall related to the issuing of a car voucher. It was put to her that a flight booking on 16 March 2016 was changed but the new time was not recaptured on Galileo, but she could not recall that. She could only recall one penalty she received in 2016 for a hotel booking where she was assisting another consultant. She said that guest house bookings had to be done manually and then entered later on Galileo. It was claimed that the other employees did not make errors on Galileo, but she disputed this saying all the consultants made errors, including the senior ones. No documentary records were provided by STK in substantiation of KM's error record, nor in respect of the other junior consultants.
- [45] KM referred to compliments she had received as evidence of her capability, one of which was an email on 11 June 2015 from a Smollan booking administrator. It was sent to Henderson, and stated:

"Good Day

I just want to say after my bad experience previously. I so impressed with the amazing service and feedback from KM.

Thank you KM (smiley face emoji)"

Another, dated 17 July 2015, was from a guest house complimenting her on her efficiency and wishing all their corporate clients were as efficient as her. An internal email from another STK consultant thanked her for her assistance in issuing vouchers. The STK trainers, Ms M Giovagnoli ('Giovagnoli') and Henderson acknowledged the compliments by way of internal emails. Two other emails were from Smollan staff sent in December 2016 and January 2016, complimenting her on the service she had rendered to them. KM said these were received at her personal email address, which she had sometimes used when the firm's internet was slow. One of the two senders of these messages had obtained her email from Henderson and the other had sent the

message of commendation after contacting KM and learning that she had been retrenched. Another internal email message in April 2016 was from

Giovagnoli congratulating KM on remembering certain corporate deal codes.

[46] In relation to a compliment received by KM from a guest house in May 2015, Henderson did not see anything extraordinary in the issuing of vouchers which KM had been complemented for, because all consultants were expected to issue accurate vouchers and it was simply part of their job. KM said that there were other emails she did not have a chance to retrieve from her computer when she was retrenched, because the retrenched consultants were unexpectedly barred from accessing their computers. According to Henderson there was no shortage of compliments for the other junior consultants, but these had not been included in trial documents because they “were not part of the equation here”. Under re-examination, Henderson also said that the two compliments emanating from Smollan had been issued by Smollan ‘bookers’, who were not ‘decision makers’ at Smollan and, accordingly, not much could be attributed to their opinions.

The restructuring decision making process and deciding which of the job applicants were successful

[47] Brescia testified that the nature of the business was that it operated on very small margins and non-productive overheads had to be avoided so it was difficult to employ staff who did not immediately contribute to revenue generation. That is why he was the sole individual involved in sales and he had to continue with this function when he had to take on the additional duties of a managing director. In the eyes of clients travel companies all sold the same services. The only thing that made one company stand apart was its ability to provide an error free service, as far as possible. Staff recruitment was handled by the HR department, but he still would approve all appointments. In making an appointment he was reliant on the advice of HR and the divisional manager on what the job requirements were.

[48] Brescia confirmed that his own interaction with junior staff was almost non-existent and he relied on the divisional managers to deal with their staff. Brescia said he had little to do with individual employee and the day-to-day operations of the company. His position required him to take a ‘bird’s eye view’ of the company and his interaction was with senior management of the company and interfacing with clients.

[49] Under cross-examination Brescia qualified this slightly saying that his responsibility included being aware of significant problems as they occur on a daily basis but he was not involved with staff interactions that had no impact of clients. He said he met with Smollan counterparts to be appraised of any problems. On a number of instances he was also called in on service issues which could have put the contract in jeopardy. Consequently he was informed on an ongoing basis by the divisional manager or any problems. As a result he was well aware of the work of the junior consultants in the sense that he would know of serious issues in their performance because of being informed of the narrative underlying a problem.

- [50] Brescia compiled the restructuring notice in consultation with the various department heads according to the candidate's requirements. Brescia clarified that he needed this information from divisional managers, but said he had his own knowledge of the staff which superceded that of divisional managers, so he had a clear understanding what was required of staff to perform their responsibilities. One of the measures to avoid possible retrenchment, which was identified by the firm in the retrenchment notice, was the creation of three junior positions. One senior consultant post was also created, but has no bearing on the case. Affected individuals were invited to apply for the positions and were advised on the selection criteria. In effect, in the absence of any other alternatives, a candidate for retrenchment would be a person who was unsuccessful in the job application process.
- [51] Henderson had said she was not involved in discussing how the 189 notice was drafted, though Brescia said he had interacted with Henderson in laying out the restructuring process in a way that would be fair and would meet the firm's objectives. Henderson admitted having input into the new junior positions and Giovagnoli had input on the conferencing side.
- [52] Although Brescia had worked in the sales section of Sandown Travel since 2003 as corporate sales manager and thereafter as sales director from 2015, according to Henderson, he was not familiar with the travel consultancy staff and did not even know the names of the consultants when he was appointed as managing director in April 2016. Henderson did not discuss the consultants' work with him. She confirmed Brescia's account that he consulted with HR about errors made and with the finance department about administration. Even though it had been put to KM that Brescia and Henderson decided on the final selection, Henderson disclaimed any role in the selection process and said she was not asked whom she thought should stay. Henderson said her input in the process was confined to providing information on errors and administration and Brescia verified this information.
- [53] On the issue of Loddo conducting the interviews, Brescia said he thought it better to bring in someone from another branch whose views would not be clouded by a prior knowledge of the candidates. Criteria were developed for the interviews and the interviewer communicated the interview results to the HR department, the divisional manager and himself. The suitability of the candidates was determined on a factual basis according to Brescia. Having had a work history with the company, the candidates had a body of work that determined what their capacity was at that point, which enabled the company to make a factual and fair assessment.
- [54] Brescia characterised the interview process as different from normal recruitment exercises in which an employer would not be familiar with the candidates, whereas the ability to offer an error-free service was a paramount consideration because one or two errors could cost the firm a client and it was easy for a client to move their business. As managing director he needed to be confident the firm had a reliable body of consultants who could deliver a service that was as close as possible to having zero errors. Brescia denied that any issue relating to personal issues played a role in the selection process.

- [55] Despite 'skills and experience' being identified as criteria for employment in a new position, in Brescia's view experience was an insignificant factor in determining a consultant's suitability. What was far more important was their ability to achieve a zero error record. From his personal experience of cleaning up errors by consultants on the Smollan account, of which four were made by KM and the others had none, there was a clear factual basis to rely on for making the selection decision. When Brescia was asked why that the selection criteria identified in the section 189 letter of 6 July 2016 were "skill and experience", he pointed out that the more detailed requirements for the post listed "proven records in lack of errors in processed work". The work records of the candidates were available to the company. It was put to Brescia that, if zero errors were the main factor in assessing the candidates, it was anomalous that these were not discovered as part of the documents in the trial. Brescia said he had documents in his possession arising from his interventions recording penalties imposed on KM as a result of her errors, but had no explanation for their absence from STK's bundle of documents.
- [56] It was put to Brescia that there was no dispute about STK granting maternity leave to staff, but KM contended that because Henderson had been disappointed with her becoming pregnant she had influenced Brescia not to select her for one of the new positions despite her experience. Brescia reiterated that the decision not to appoint KM was his and was made solely on the basis of his factual experience. The first time he heard of KM's pregnancy was when he was informed there was a legal matter that had to be attended to. He also said he was unaware of any discussions in the interview or elsewhere about KM's pregnancy. It was a matter of company policy that the managing director would not get involved in employees' personal matters to avoid any suggestion that a senior manager might have a stronger relationship with a staff member than their own line manager.
- [57] It was put to KM that Henderson and the MD took the decision on the final selection and they did so after getting the interview feedback and getting input from Ms M Covini ('Covini'), the HR manager. KM said that Henderson was able to influence the MD if she did not want her to get the job. When Henderson testified she said the final decision in making any appointments rested with Brescia. Brescia said the feedback he received was firstly a very factual account of a candidate's technical capacity to deliver an error free service and, secondly, that person's soft skills of being able to communicate with clients and colleagues.
- [58] When asked how much weight was attached to the interview process, Brescia replied that he found the outcome of the interview fairly straight forward but he focussed on the ability of the consultants to provide error free environments as opposed to soft skills, because the former was easier to measure and less prone to subjective considerations. Brescia examined the history of significant errors made by the candidates as a predictor of what was likely to happen. Later in his testimony, Brescia even went so far as to say he had placed no reliance on Loddo's report on KM as it was a 'matter of opinion'. His decision was based only on factual abilities of a consultant to contribute to a zero error environment. A consultant's own opinion of their performance was less important than the factual history of their

performance.

- [59] Brescia reiterated how he became aware of errors made by consultants. When a client became aware something was wrong with a booking, the matter was escalated to the divisional manager. The four candidates fell under Henderson and would receive error reports and notify Brescia of it. Brescia was aware of past errors and these were confirmed by Loddo, Henderson and Covini. The manager then compiled a history of the error and presented it to Brescia. The possible client and monetary ramifications of the error would be discussed. The consultant apparently responsible would then be given the details of the client's complaint and would have a chance to give their side of the story. An assessment would be made if the consultant had made a significant error. Brescia would then try and appease the client, explain how it happened and any changes that would be made to prevent a recurrence. Brescia would then have to record it and whether any penalty was imposed on a consultant.
- [60] Under cross examination Brescia said that Henderson had to keep him informed when these issues arose and KM was responsible for more of them than her colleagues. It was only to this extent that he was reliant on Henderson in making the decision on the successful candidates. The fact that on 15 July 2016, Henderson had spoken of 'our decision' regarding the consultants in an email thanking Loddo for her assessment, did not detract from the reality that, according to Brescia, he took the decision after considering Loddo's report and his information regarding errors. He conceded he did meet with Giovagnoli and Henderson before making his decision.

Pregnancy as an issue in the workplace and in KM's selection interview

- [61] KM cited a number of instances which she believed were indicative of a workplace in which female employees were discouraged from falling pregnant. She also believes that her own relationship with Henderson deteriorated after she told her that she was pregnant in February 2016. STK disputes this. On the contrary, it claims it was a female dominated firm and maternity leave and the need to accommodate parents with child related commitments was part of its standard practices. In relation to KM, it concedes that her relationship with Henderson cooled after she advised her of her pregnancy but that had nothing to with her falling pregnant as such, but the background circumstances in which it occurred. STK agreed that Loddo had asked KM how she would cope after her twins were born, but denied this played any part in the appointment process.

The gender composition of STK staff and maternity leave

- [62] Henderson testified KM agreed that the industry was a female dominated one. She could not say how often staff went on maternity leave, but it did happen. She was only aware of Molefe's pregnancy. Henderson testified that female staff at the firm made up 80 % of the staff. Brescia put the percentage of female staff even higher. The procedure followed by the firm when a staff member became pregnant was that they would report the pregnancy to Henderson and the HR department would complete the necessary leave forms. It was up to

each individual how much leave they applied for and Brescia would approve the leave requested. Brescia said his only role in relation to pregnant staff was to acknowledge the application and to enquire about the relevant sections ability to cope during that person's leave and whether it was necessary to shift staff around temporarily.

Once he was happy about it he would sign it off if the leave was in line with legislation and the leave required, but it was the

responsibility of the company to ensure staff could take maternity leave. He added that the high number of female staff meant that

granting maternity leave was a regular feature of the work and leave had also been willingly granted for related events such as baby showers. Historically, all employees who had been given maternity leave returned to work afterwards. Pregnancy had never been seen as an issue in the firm.

[63] Henderson also testified that even though Molefe had not been honest about the advanced state of her pregnancy when she was employed, and that she had to take maternity leave much earlier than expected, she forgave her for not disclosing the true position. After Molefe returned to work, her child stayed with Molefe's mother.

Events prior to and at the time of KM's pregnancy in February 2016

[64] Issues pertaining to the context in which her pregnancy had arisen were raised with KM under cross-examination. KM could not understand why the events relating to the circumstances of her pregnancy had been raised by Sandown in the proceedings as she could not see how it was relevant to her case. Nonetheless, given her own allegations about Henderson's attitude to her pregnancy in February 2016, it was not inappropriate to explore the background events.

[65] The events surrounding KM's pregnancy were particularly traumatic and KM had confided in Henderson, who advised and assisted her during that difficult time. In October 2015 terminated an unwanted pregnancy. KM testified about the circumstances in which she became pregnant and it was obvious from her state when she did so that it was a matter which still caused her distress. When she told Henderson about the circumstances in which she became pregnant, Henderson gave her money to have an HIV test. Her pregnancy in October 2015 had resulted from being raped. She sent Henderson pictures of her injuries incurred during the assault. After the incident, Henderson had met with her in Covini's office and they had contacted a support group from the HR office. Henderson said she checked up on her after an abortion. Henderson said KM had "poured out her heart to her". She felt like a 'mother hen' to KM at the time because KM felt she could not tell her parents about it.

[66] In February 2016, KM advised Henderson that she was again pregnant. She claimed that Henderson was disappointed to learn of her pregnancy and had asked her if she was going to have an abortion. KM responded that she was thinking about it. She claimed Henderson

said that Giovagnoli would not be happy about it. Henderson agreed she was disappointed to hear that she was pregnant but the reason was because it was the same man who had been the cause of the first unwanted pregnancy which was terminated, and KM had told her the second pregnancy was also a consequence of him raping her. Henderson said she was disappointed because they had advised KM to go for counselling and move away from the man. She felt very strongly about gender based violence which added to her concern. She agreed she asked if KM was going to terminate the pregnancy because KM had been raped twice by the same

man and KM's parents did not approve of him. She was concerned about the implications of giving birth to the children in those circumstances. Although she was disappointed by KM's choice, she felt no less for her as a person. Nothing about her feelings for KM changed. KM conceded the same man was responsible for the second pregnancy but denied telling Henderson of his identity.

[67] KM did testify that she told Henderson she was going to think about an abortion, but when a scan revealed that she was going to have twins, KM advised Henderson that, in the circumstances, she would not terminate the pregnancy. Their relationship did not improve thereafter. Henderson said it was true that after that KM did not confide with her as she had previously but their relationship remained civil. Henderson testified that she had a good relationship with KM and she still felt a lot for her, was an empathetic person. Her feelings towards her had not changed but she did concede that KM might have perceived her differently. KM claimed she also raised Henderson's attitude with Covini, but no meeting was ever convened by her to address the issue. Henderson said she was unaware of this.

[68] In answer to a leading question from Mr Dawson, Henderson said, despite the circumstances of KM's pregnancy, that she never notified Brescia of KM's pregnancy. She claimed Brescia had been newly appointed at the time, she never thought he needed to know about it.

Alleged discouragement of pregnancy and taking time off for pre-natal checks

[69] KM also testified that, during their initial training, Giovagnoli had discouraged female staff from becoming pregnant. At the time it was mentioned, KM said that she did not make much of it. There was another incident when Giovagnoli had told her to focus on her career and not to get pregnant, the day after a male visitor had come to the office and given her flowers. She claimed that Henderson had also said that Giovagnoli would not be pleased to know that she was pregnant when she advised Henderson of her condition in February 2016. It was put to KM that Giovagnoli had consistently encouraged trainees to get their careers off the ground before having children, which did not mean that she was hostile to staff falling pregnant as such. KM said she did not interpret Giovagnoli's comments that way. Giovagnoli did not testify.

[70] KM also alleged Henderson was unhappy when she had to consult a doctor during working hours because it affected KM's work. Henderson insisted that she had to provide a doctor's note the very same day. Henderson said she had only asked for this because KM had not advised her beforehand that she was going for a checkup, so that she could ensure that someone else was available to deal with her client in her absence. KM said everyone in the office knew that Henderson was not happy that she had taken a day off on the first occasion. Henderson said she should try and consult doctors on the weekend. Henderson disputed this, stating that KM was advised she could visit the clinic during working hours and no time off was deducted from her

pay when she did.

Loddo's interview and the issue of KM's pregnancy

[71] Before the interviews commenced later that week, Henderson called the four junior consultants in and introduced them to Loddo, who was conducting the interviews. Loddo was the manager from Sandown Travel's Edenvale branch, with nineteen years' service with Sandown Travel. Henderson then spoke to the interviewer alone and after that the applicants were interviewed one by one. She could not dispute that Henderson would testify that she had merely discussed the order in which people would be interviewed. Henderson testified that she had told Loddo of the three positions that were available for junior consultants and, on a purely personal note, enquired how she was handling a divorce she was going through. Henderson said that STL's labour consultant advised it would be better to have an outsider doing the interviews. During KM's interview for the new positions, it was common cause she was asked if she would be able to work late after their children were born because that would be a requirement of the new positions. She said she would not have problems working as before and tried to reassure the interviewer that she would still "give 100 %" to her job. KM also advised Loddo she had made arrangements with her mother to look after her children when she was working late. KM came out of the interview feeling unhappy because she felt the interviewer had focused too much on her ability to cope on account of her pregnancy. KM's contract of employment provided for four months unpaid maternity leave, which she did intend taking. Nonetheless, she believed she would still get a position because of her experience and skills. She said her pregnancy discussion took up more time than discussion of her work experience or ethics.

[72] Henderson said Loddo was a single mother with two children and knew that if a call came in from a client just after 17h00, it had to be dealt with. The work is very stressful and it was a natural question to ask. Henderson said that she had been in the industry for 42 years and for single parents it was a huge burden if they did not have anyone to back them up in helping with children. Henderson confirmed that KM had been asked if she would be able to work late once her children were born as this was a requirement for the new position. Henderson could not comment on whether KM's pregnancy was a concern of Loddo's during the interviews, but agreed the new position would require that perhaps two or three days a week the incumbent would be required to work beyond normal hours.

- [73] Henderson claimed that the issue of working late would have been asked whether the person was male or female, though she could not say if Sediela, who had young children also, had been asked the same questions as KM about his ability to cope. Somewhat paradoxically, Henderson felt that Loddo had not mentioned the question of how KM would cope after having children in her email summarising the interviews, because it was not an issue. Under re-examination Henderson said it was normal on Saturdays for children to come to work with their parents and staff commitments to their children were accommodated by rescheduling breaks taken by other staff.
- [74] Loddo testified that she was asked to conduct the interviews for the junior positions at the central branch and was given a list of questions by Henderson and Covini to ask each of them. A copy of the questions was not tendered in evidence. Loddo could not recall what the questions were except that they related to Galileo and how they perceived their own administrative standards. It was true that she asked KM who would look after the children if she had to work after 17h00. KM's answer to that was that she did have an arrangement. Loddo then asked her if she was sure about that because being a mother herself she knew that it was difficult. KM assured her that she had made an arrangement. However, those were personal questions unrelated to the matters she had to cover with them. KM's counsel, Ms S Swartz, pointed out at the start of her cross-examination of Loddo, that Loddo's version of her interaction with KM had not been put to KM under cross-examination

Evaluation

Legal principles

- [75] In cases of automatically unfair dismissal, the employee bears an evidentiary burden, but the employer bears the overall burden of proving that the dismissal was for a substantively fair reason. In *Martin & East (Pty) Ltd v National Union of Mineworkers & others*

(2014) 35 ILJ 2399 (LAC) the Labour Appeal Court summarised the approach thus:

"In Kroukam v SA Airlink (Pty) Ltd (2005) 26 ILJ 2153 (LAC) para 28 this court found that parties in the position of the respondents bear an evidential burden to produce evidence which is —

'[s]ufficient to raise a credible possibility that an automatically unfair dismissal has taken place, after which the company is required to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal'.

If this court drills down into the dictum in the *Kroukam* case, what must be borne in mind is that there is an overall onus placed on an employer to justify the dismissal. There is an initial evidential burden which is borne by the employees, in this case the respondents, to raise the inference that the dismissal falls within the scope of unfair dismissals. See also *Ngoza & others v Scorpions Legal Protection* (2008) 29 ILJ 1039 (LC) at 1045 where it was held that the only onus upon the employee in a s 187 case is to prove that the dismissal falls within s 187 of the Act."^[2]

- [76] The discharge of the evidentiary burden by the employee becomes significant when an employer asks for absolution from the instance. If absolution is not sought and granted, then the determination of the overall onus is the question the court is seized with.
- [77] The prevailing analytical approach which has been adopted by the labour courts in arriving at an outcome in automatically unfair dismissals is to use a two stage inquiry approach, which was first raised in *SA Chemical Workers Union & others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) :

“[32] The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilized here (compare S v Mokgethi & others 1990

- (1) SA 32 (A) at 39D-41A; *Minister of Police v Skosana* 1977
- (1) SA 31 (A) at 34). The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the 'main' or 'dominant', or 'proximate', or 'most likely' cause of the dismissal. There are no hard and fast rules to determine the question of legal causation (compare *S v Mokgethi* at 40). I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable or plausible inference is drawn from circumstantial evidence in civil cases. It is important to remember that at this stage the fairness of the dismissal is not yet an issue (see para [33] below). Only if this test of legal causation also shows that the most probable cause for the dismissal was only participation or support of the protected strike, can it be said that the dismissal was automatically unfair in terms of s 187(1)(a) . If that probable inference cannot be drawn at this stage, the enquiry proceeds a step further.”

(emphasis added)

- [78] Recently, the question of the correctness of this analytical approach has been questioned in the Constitutional Court judgment of Madjet J in *National Union of Metalworkers of SA & others & Aveng Trident Steel (A Division of Aveng Africa (Pty) Ltd) & another* (2021) 42 ILJ 67 (CC) writing for one half of an equally divided bench (the most probable reason approach):

“[126] I find the approach adopted by the majority in Algorax enlightening and persuasive. In order to ascertain the true reason for the employees’ dismissal, Zondo JP did not follow the approach adopted in the earlier decision of that same court in Afrox, by embarking upon a causation enquiry. Instead, he followed the conventional method of evaluating evidence to determine, on a preponderance of probabilities, what the true reason for dismissal was, in the face of two conflicting versions. His evaluation of the evidence featured a full narration of the testimony of the various witnesses, a punctilious analysis thereof and fully reasoned findings on its cogency and reliability. Ultimately, comprehensive reasons were furnished for the acceptance of one version above the other.”

- [79] The judgment of Mathopo AJ, writing for the other half of the court, reaffirmed the usefulness of continuing to adopt the approach espoused in Sacwu (the causation approach):

“[90] In my view, stripped of all the conflicting textual interpretations in this judgment and that of my brother, Majiedt J, the factual determination of the true reason for the dismissal in both judgments remains the same. It is in any event questionable whether the court in Algorax applied a test that is different from the Afrox test. The parties also did not require this court to determine whether the two tests are incompatible. Thus, circumventing the Afrox test merely because it is cumbersome is unsustainable. Algorax does not provide compelling support for the view that factual causation is not the proper enquiry in interpreting s 187(1)(c), and any suggestion that Afrox is no longer good law is, thus, misplaced.”

- [80] In the end, despite the seemingly divergent approaches, both judgments in Aveng came to the same conclusion, namely that the retrenchment of the employees in that case was a result of bona fide operational reasons, which were the main cause of [3], or the most probable or true reason[4] for, the dismissals. The judgments agreed on the outcome, despite the supposedly distinct paths chosen to arrive at the same destination.

On either approach, the ultimate question both decisions were necessarily answering, was whether the employer had discharged the

onus of proving that the reason for the dismissals was a legitimate one and not an impermissible one.

Has STK proven that the reason for dismissing KM was most probably an operational one?

- [81] In this case, the key issue boils down to whether or not KM’s failure to obtain one of the new consultant jobs, thereby precipitating her retrenchment, was most probably based on her level of competency compared with that of her peers or was because of her pregnancy. This is the onus that STK must discharge. Only if it discharges that onus will it be necessary to decide if the dismissal was a substantively fair one for operational reasons.
- [82] STK essentially contended that KM was unsuccessful in obtaining an appointment because unlike Kapulua, Sediela and Molefe, she had not sufficiently proficient in operating Galileo and had a performance history which showed that she did not have proven records of lack of errors in processed work. It was also contended that her administrative capabilities were lacking.

- [83] Before addressing the specifics of KM's own situation, it is necessary to deal with the question of how performance in the previous junior consultant jobs could be used to determine suitability for the corporate junior consultant jobs. From the evidence, it is common cause that: the utilization of Galileo as a booking tool is significantly greater in the new posts, even if there is no agreement on the actual extent of its use; the consultants would be dealing with an unspecified number of corporate clients, as opposed to a single client (Smollan) with separate operating divisions; bookings would be done for larger in number of persons in the new posts than was the case on the Smollan account; work on the Smollan account was more labour intensive because of the number of manual bookings that had to be made with guest houses and then subsequently entered on the Galileo booking system, and there were more bus bookings on the Smollan account than there would be for the new corporate clients. By implication, the booking process in the new positions would be less labour intensive.
- [84] Because all of the candidates for the posts had been working on the Smollan account, in the absence of requiring them or to perform a standard test, STK could only estimate their ability to perform in the new roles by projecting from their capacity to perform in their existing junior consultant roles. KM pointed out that even if the utilization of Galileo would be more intensive in the new positions, the specific booking tasks were all tasks they had done before. This is not really in dispute, but STK's case, as I understand it was that the numerical scale of a booking and the more intensive use of Galileo made the posts qualitatively different. Henderson's characterisation of the jobs as "totally different" should probably be understood this way. On the firm's own version, it effectively claims that it was able to determine suitability for the new positions, based on performance in the previous ones, which necessarily entails accepting that the tasks performed in the new posts would not be completely unlike the Smollan account work, but different in scale and in the utilisation of one booking method rather than another. The procedures for making a booking using the Galileo system would essentially be the same and the various items that might be contained in a booking [accommodation, conference arrangements, plane tickets, transport to a venue, etc.] were ones they had arranged before.
- [85] According to STK's narrative emerging from the evidence, the evaluation of their suitability using their passed work performance was based on their ability to minimize errors in making bookings and internal administration in the recording of bookings for billing purposes. Although skills and experience were expressly cited as selection criteria for the posts, STK relegated the role of experience, of which KM clearly had the most, to virtual irrelevance.
- [86] During the consultation process, the interviews with Loddo were foregrounded as an event in which they would be assessed. They were asked to provide their CV's, qualification and work experience which had to be handed to Henderson by the Friday morning of the interviews. Yet Loddo had no information about the applicants' performance records before her. What she was given was a list of questions for each candidate. All she could recall was

that they related to Galileo and how they perceived their administrative standards.

Accordingly, she only had their responses to those questions to go on. It was never alleged that she was even given the documents submitted by the candidates to Henderson. Her email summary of the interviews did not systematically deal with the candidates responses to each of the questions she was supposed to put to them.

- [87] What was initially portrayed to KM at the trial was that Henderson and Brescia jointly discussed who should be appointed. However, when it came to their evidence, Henderson claimed she had not had any involvement in deciding who should stay and who should go and would have the court believe she was not even asked her opinion on the matter by Brescia, despite being the line manager of the applicants. She merely provided information to Brescia on error records and administration. By the time Brescia gave his evidence at the end of the trial, he claimed to have all but ignored Loddo's feedback from the interviews dismissing it as mere 'opinion'. He insisted that he relied exclusively on the recorded processing error history of the candidates, part of which was within his own knowledge because he had to deal with the fall out which followed.
- [88] Oral evidence was tendered of a total of three errors or mistakes made by KM relating to an original flight booking not being taken off Galileo after it was changed, another relating to a car voucher and a third relating to a hotel booking. KM was only certain about one of them, but testified that all consultants made mistakes, even the senior ones. Henderson and Brescia gave the impression that none of the other consultants committed any errors and were perfect to a fault in their administrative work. It was standard practice at the firm if any penalty was incurred by STK resulting from a booking error that the responsible consultant would pay the penalty. In KM's case it was common cause she had received one penalty. No documentary evidence of any kind was provided as evidence of KM's errors or the lack of any on the part of her peers, despite the fact that a record existed. The evidence of KM's alleged poor administration amounted to little more than Henderson's opinion, as it was not supported with any details on what it was based. KM testified that she was never subject to any performance review relating to her supposedly poor performance record, and no evidence was led in rebuttal of this.
- [89] In relation to positive endorsements received, KM did provide evidence of some email evidence of compliments received while she was employed, including a commendation in April 2016 from Giovagnoli for using the correct corporate codes in a booking. It is true that two of the commendations from Smollan booking staff were received after KM's dismissal, but STK did not question the content thereof. Instead, it sought to devalue the endorsements by characterizing the authors as persons who were not 'decision makers' at Smollan and whose opinion was therefore of little value. Henderson testified in general terms that the other consultants also received compliments, but none were introduced as evidence. Other positive evidence of her capabilities was offered by KM. She claimed that clients of other consultants including more senior ones, sometimes approached her for assistance. She was not challenged about this evidence and no evidence was led in rebuttal by either of the more

senior consultants whom she named in this regard. In relation to her evidence that she helped the other junior consultants, it was put to her that the only advice she provided to them concerned internal procedures of STK and not advice on booking related matters such as Galileo processes. KM denied this.

When Henderson testified, she claimed that the junior consultants only came to herself for help and she was sitting right amongst them. This was not put to KM under cross-examination.

[90] On the evidence presented, is it probable that KM was the only junior consultant who ever made mistakes and whose administration was not satisfactory? In the absence of more tangible evidence to support the assertions made by Henderson and Brescia, it seems somewhat improbable that her two colleagues, Molefe and Seidila, who also had no prior experience in the travel industry before being recruited as trainees by STK, would have attained flawless levels of perfection within a matter of 7 to 8 months, which she had allegedly been unable to attain over 15 months. The claimed meteoric success achieved by Molefe and Seidelia also jars somewhat with the impression created by Henderson that advancement to the level of an intermediate consultant is not normally achieved in under five years, suggesting that experience counts and expertise is acquired over time.

[91] In STK's heads of argument it appears to be suggested that KM bore the onus of proving that she was better qualified than at least one of her colleagues competing for the posts. On the contrary, it is for STK to demonstrate that the reason KM was unsuccessful was because she was the least skilled for the job in question. I am not satisfied that there is sufficient evidence to conclude that she was most probably less qualified than even Seidela for the position.

[92] Consequently, I must conclude that her level of competence for the job was not the most probable reason she was not appointed and therefore retrenched.

Was it because KM had fallen pregnant that she was not considered suitable for one of the new positions and therefore dismissed?

[93] KM believed, for a number of reasons, that her line manager Henderson was not in favour of her falling pregnant and that this attitude was also reflected in remarks made by Giovagnoli and Loddo.

[94] It is common cause that Henderson was disappointed when KM fell pregnant for the second time in February 2016. On either KM's version or Henderson's, their relationship was not the same as it had been once KM decided that she was not going to terminate that pregnancy as she had done when she formerly fell pregnant in October 2015. However, the circumstances surrounding KM's pregnancies were fraught and Henderson was clearly genuinely distressed about KM bearing the children of someone who had been so violent towards her. It is apparent that she found it difficult to accept that KM could reconcile herself to that situation and proceed as if the twins had been conceived in normal circumstances. KM did not dispute the support which Henderson gave her during that difficult period, but

attributed the cooling of their relationship, which had been close, to Henderson becoming antagonistic towards her simply because she had fallen pregnant. On the evidence, I am more persuaded that the distance which developed between them, was more probably due to Henderson finding it difficult to understand why KM had decided to proceed with the pregnancy in the circumstances. In this regard, it seems more probable that KM did confide in Henderson about the circumstances of her second pregnancy, as it is less likely she would have been unsure whether to terminate it if that were not the case. In my view there is no reason to believe this played any part in KM's dismissal.

- [95] In relation to Giovagnoli's comments encouraging consultants to establish their careers before having children, there is no reason to believe that they were not made with the interests of the consultants at heart. However, it is difficult to ignore the implication that a decision to have a child early on in one's employment in the firm would, at best, be viewed by management as an unwise decision by the employee, which it would have advised against., and would have interpreted as an indication that the employee might not be very serious about a career in the industry. That said, there is nothing to suggest that Giovagnoli had any direct impact on the decision to retrench KM.
- [96] The next interaction between STK and the applicant on the issue of her pregnancy and her work was more significant. It arose in the context of an interview which ostensibly was for the very purpose of deciding if KM would continue to be employed in the company, but in a different position. It is true that it was not reflected in Loddo's somewhat informal feedback on the interviews, but it is common cause that KM was questioned about how she would manage with her work commitments after the twins were born. When she explained the planned arrangement she had with her mother, Loddo asked if she was sure about that because she herself knew how difficult it could be having the responsibility of a young child. Although there was a dispute about how long this discussion went on, Loddo was clearly expressing a concern that the birth of KM's twins might compromise her ability to do her job unless she had made a reliable arrangement for them to be looked after. In the course of her evidence, Henderson confirmed that it was not infrequent that it would be necessary to deal with a client query after normal hours, particularly if a client had arrived at an airport and needed immediate assistance with their arrangements.
- [97] Despite the fact that Loddo clearly regarded the issue as serious enough to raise and persist with it in the course of the interview, STK contends that the matter went no further and was not part of her report to management on the interviews. Brescia disclaimed any knowledge of the fact that KM was even pregnant, even though Henderson obviously knew.
- [98] Is it plausible that Brescia would have been completely unaware of KM's condition and that Henderson would never have mentioned it to him? When KM testified as to why it would be more suited to the company's needs to employ someone else in the new position instead of her, because she would be off work, it was suggested that the company could simply hire a temporary replacement. However, as it happened, it could and did employ persons who were already familiar with the work and with working arrangements in the company. From

a purely business point of view, it stands to reason it would be preferable to have the continuity of former travel consultants' services than to have assimilate and induct a temporary employee, and thereafter have to rely on a staff member who was also dealing with the heavy burden of raising twins, which would in all probability compromise her after hours working capacity for some time even if she was able to make reasonable care arrangements for her infants. Even if the company ordinarily had no difficulty with employees going on maternity leave, KM's continued employment in the new position would have raised these operational difficulties, which would have to be addressed.

- [99] Even if Loddo had not mentioned anything about KM's pregnancy in her feedback, it seems unlikely that she would have confined her concerns about KM's ability to cope to herself, given that she saw it as an issue that was serious enough to interrogate even though it was not part of the questions she was supposed to canvass. Henderson too was conscious of the demands that would be placed on KM and the firm if she got the position. Similarly, would Henderson have simply said nothing at the time, but would only have broken the news to Brescia that a temporary staff member would have to be employed because KM was about to go off on maternity leave and give birth to twins a couple of months after she was employed in the new position?
- [100] Leaving these inherent probabilities aside, if KM's failure to get the job was not related to her capabilities, it must have been related to some other factor. The circumstances of her pregnancy and its ramifications if she was appointed to the position clearly was a factor which distinguished her from Seidela, and to some extent even from Molefe as it was less likely at that time Molefe would soon be requiring maternity leave in the short term, having a child who was barely six months old at the time. In the circumstances, it seems more likely therefore that this was the reason she was not offered the job and therefore was retrenched. Consequently, her dismissal was for a reason related to her pregnancy and was automatically unfair.

Relief

- [101] KM is no longer seeking reinstatement. I am aware that at the time of her dismissal she had been working for STK for 15 months. The maximum compensation she is entitled to is 24 months remuneration. Had KM not abandoned her claim for reinstatement she probably would have been granted that relief, though not necessarily fully retrospectively. In the circumstances, I do not see any reason why the amount of compensation should be reduced.
- [102] On the issue of costs, there is no reason to depart from the normal approach of this court, which is that each party should bear their own legal costs insofar as they incurred them. In this regard, the court is indebted to the SASLAW pro bono NPC and the applicant's counsel for representing the applicant pro bono.

Order

1. The dismissal of the Applicant by the Respondent was automatically unfair in terms of Section 187(1)(e) of the Labour Relations Act, 66 of 1995.
2. Within fifteen (15) days of receipt of this judgment, the Respondent must pay the Applicant twenty-four months' remuneration as compensation, amounting to one hundred and eighty thousand rands (R 180,000.00), calculated on the basis of her salary of R 7,500 per month
3. No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

Appearances/Representatives

For the Applicant

S Swarts instructed by SASLAW Pro

Bono NPC

For the First and Second

K Nel instructed by Lee and McAdam

Respondents

Attorneys (on 23-24 August 2019) and

G Dawson of Lee and McAdam

Attorneys (on 23 and 24 March 2021).

[1] On account of certain of the evidence the nature of which is very sensitive, the court has considered preferable not to cite the

applicant's name in full in the judgment, even though her name appears in the original citations in the pleadings.

[2] At 2403B-E

[3] At para [103]

[4] At paras [135] and [136].

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2022/108.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/m-v-sandown-unknown-topic-alcjhb-2022>

Prepared on 11 October 2026 · Esheria