

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 305/05**

In the matter between:

**SWAZILAND POSTS & TELECOMMUNICATIONS  
CORPORATION**

**APPLICANT**

and

**SWAZILAND POSTS & TELECOMMUNICATIONS  
STAFF ASSOCIATION**

**1<sup>st</sup> RESPONDENT**

**SWAZILAND POSTS & TELECOMMUNICATIONS  
WORKERS UNION & OTHERS**

**2<sup>nd</sup> RESPONDENT**

**AS PER ANNEXURE "A' FURTHER**

**RESPONDENTS**

**CORAM**

NKOSINATHI NKONYANE: ACTING JUDGE

DAN MANGO : MEMBER

GILBERT NDZINISA : MEMBER

FOR THE APPLICANT:

MR. MUSA SIBANDZE CURRIE & SIBANDZE ATTORNEYS

FOR RESPONDENT:

MR. PETER DUNSEITH DUNSEITH ATTORNEYS

## **RULING ON APPLICATION TO STRIKE OUT 02.12.2005**

This matter came before the court on a certificate of urgency on 25.08.2005.

The proceedings were instituted in order to obtain a court order to stop a work stoppage engaged in by a number of the applicant's workers. The work stoppage lasted for a few hours. It is now history that there was once such a work stoppage at some of the applicant's branches.

The matter is however still before the court. We are not sure what useful purpose the judgement of this court will ultimately serve in the promotion of good industrial relations at the workplace.

On behalf of the respondents an Answering Affidavit was filed in opposition of the application. The applicant also filed its Replying Affidavit. On behalf of the respondents a Notice of Application to strike out was thereafter filed.

The court is presently called upon to make a ruling on the application to strike out.

In paragraph one of the Notice of Application to strike out, the respondents ask that certain paragraphs in the applicant's Replying Affidavit be struck down because they contain new allegations of facts, which could and should have been contained in the Founding Affidavit.

The essence of the objection on behalf of the respondents was that the paragraphs have reference to a video footage, which shows the pictures of members of the 1<sup>st</sup> respondent as being present in the meeting of the workers.

On behalf of the applicant it was argued that that was not new evidence. It was argued that as it was denied that members of the 1<sup>st</sup> respondent were present in the meeting, the video footage was evidence that in fact they were present. It was

further argued on behalf of the applicant that when responding to the Answering Affidavit by the respondents, it was entitled to also explain or expand in its defence.

It is a trite rule of pleading that the applicant must establish its case in the Founding Affidavit. It is also a trite rule of pleading in civil matters that the applicant must not introduce new facts in its Replying Affidavit as the respondent will not have a chance to respond thereto, unless of course with the leave of the court.

In the present application we are unable to agree with the respondents that applicant has pleaded new facts. The applicant did make averments in its Founding Affidavit that members of the 1<sup>st</sup> respondent also attended the meeting. In paragraph 10 of the Founding Affidavit it is stated:

"This meeting was attended by the Executive Officers of both 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The Officers' names are contained in Annexure "B" hereto."

In answer to this paragraph the deponent to the Respondents' Answering Affidavit, Mandla Mdluli, stated as follows in paragraph 6:-

"These allegations are denied. The meeting in the car park was a union meeting. It was not attended by the Executive officers of the 1<sup>st</sup> respondent. Furthermore, the Executive officer of the union Kennedy Dlamini was not present."

From the above, it is clear that the applicant was not mentioning for the first time in its Replying Affidavit that the Executive officers of the 1<sup>st</sup> respondent attended the meeting. Since the respondents denied that, the applicant was entitled in its Replying Affidavit to expand in order to refute the denial by the respondents.

The court will therefore dismiss the application to strike out paragraphs enumerated under paragraph 1 of the Notice of Application to strike out. The court will however grant the application to strike out paragraphs 52.2 and 52.4 as the applicant conceded that these contained new facts.

In paragraphs 2 and 3 of the Notice of Application to strike out the respondents ask the court to strike out all direct and indirect reference to the video recording as it was not annexed.

The arguments in court on this point concentrated mainly on the admissibility of such evidence. On the Notice of Application the objection was that the video tape had not been annexed to the applicant's papers.

A video film or videotape constitutes real evidence. If it is relevant, the court will not exclude its production unless there are serious objections thereto. **HOFFMAN AND ZEFFERT** in their book "**THE SOUTH AFRICAN LAW OF EVIDENCE**" (2001) 4<sup>th</sup> edition at page 4067 dealing with the subject of real evidence stated that:-

"It is submitted that both photographs and the visual aspects of cine films constitute real evidence as distinct from documentary evidence."

The court will proceed on the premise that if there is a video tape recording showing who was or was not present, such evidence is relevant and can be brought to the court as real evidence.

As we understood the objection it seems that the respondents are **not** at ease by the reference to a video film that they were not afforded the opportunity to see. The basis of the objection is that the authenticity of the said video tape has not been tested.

The court will uphold this part of the objection. It is a notorious fact that with modern technology, a video film can be manipulated by the maker thereof.

**HOFFMAN AND ZEFFERT** (referred to above) after having dealt with this subject and also referred to the cases of **S.V. RAMGOBIN AND OTHERS (1986 (4) S.A. 117 (N); BALEKA AND OTHERS 1986 (4) S.A. 1005** and that of **S.V. MPUMLO AND OTHERS 1986 (3) S.A. 485** stated at page 411 that:-

"When a court is faced with dangerous evidence it should build a shielding and protective wall around those who may potentially suffer prejudice. It should not

weaken their defences because of academic and impractical considerations however sound they may be in abstract theory .... If it is reasonably possible; the tape should be played in the presence of the parties."

The court is alive to the fact that the cases referred to by the learned authors were criminal cases. The court is of the view that the same degree of circumspection should be exercised even in this matter. The affected party must be given the opportunity to view the video film before it can be used as evidence against it.

On behalf of the applicant the videotape was tendered. There was no explanation why the videotape was not tendered earlier to give the respondents an opportunity to view it. For that, the applicant must bear the costs of this application.

Taking into account all the foregoing observations the court will make a ruling that:

1. ***All paragraphs in the replying affidavit making reference to the video film will be struck out.***
2. ***The parties are to make arrangements for the viewing of the video film.***
3. ***If after viewing, the respondents have no objection as to the authenticity of the video film, the applicant is granted leave to apply to re-instated the paragraphs and/ or evidence that was struck out relating to the video film.***
4. ***The applicants to pay for the costs of this application.***

The members agree.

**NKOSINATHI NKONYANE A.J**

**INDUSTRIAL COURT**