

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 390/2004

In the matter between:

HARPETVAN SEGGELEN

Applicant

and

SWAZI SPA HOLDINGS LIMITED

Respondent

CORAM:

P. R. DUNSEITH: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: ADV. P. FLYNN

FOR RESPONDENT: ADV. VAN ZYL

**RULING ON APPLICATION TO COMPEL PRODUCTION OF NOTES
DELIVERED ON 4th FEBRUARY 2008.**

On the 3rd August 2007 when this matter was last before court on trial, counsel for the Respondent applied for an order compelling the Applicant to produce certain notes made by the Applicant whilst under cross-examination for counsel's inspection and possible use during cross-examination.

The Applicant readily admitted making notes of the cross-examination, which he said were for his own record. He was willing to hand over the notes, but his counsel objected on a matter of principle. After hearing brief arguments, the court reserved its ruling.

There is no suggestion that the Applicant was using the notes to refresh his memory with regard to what he had already stated in testimony. We accept that he was keeping a record for his later reference. In our view there is nothing objectionable in principle to a witness making notes of his own testimony. However in so far as this distracts the witness and interrupts the flow of testimony, it is not a practice that we encourage, particularly where the witness is represented by counsel who himself is recording the testimony. For this reason we directed the Applicant to stop taking notes.

As to the application for the notes to be handed to Respondent's counsel for inspection, we do not consider the notes to be evidence. They have not been relied on by the Applicant. They have insufficient relevance to the issues on trial. For that reason alone, we would not be prepared to order their production.

There is another reason: a litigant is not obliged, either before or during the trial, to produce any document which has been brought into existence for the purpose of the litigation.

See **Hoffman: SA Law of Evidence (2nd Ed.) at 195**

S v Yengeni and others (1) 1990 (1) SA 639 C at 644

In our view, notes which the Applicant has made during the trial for his own use in pursuing his case are privileged and he cannot be compelled to produce them for the inspection of his opponent.

For these reasons, the application is refused.

**PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT**