What irritates judges?

LTC Harms
Judge of the Supreme Court of Appeal, Bloemfontein

The editorial board suggested the title with a request that the article should not exceed two thousand words. Two thousand when the answer is to be found in one: "Lawyers"? On reflection it dawned on me that there might be a hidden agenda behind the request. Is it a gentle, but of course entirely misdirected, hint from the GCB to the author not (to appear) to be so irritable or irritated? Or is there a sequel on its way from the Bar entitled "What irritates lawyers?" with the response "Judges"? What about a Bar course on how to irritate judges? Clearly, more thought is required.

Becoming irritated, as Rumpole would have said, is inherent in the judicial office and any judge is liable, in a moment of impatience, to say something downright silly. He is then denounced in the public prints, his resignation is called for, he is stigmatised as malicious, petty or feeble-minded or at least mad and his bench becomes a bed of nails. (The author does not accept responsibility for Rumpole's sexist language.)

Many things irritate judges, especially at high court level. The Department of Justice; silly statutes; badly drafted statutes; appellate judgments, especially those overruling or even chiding them; the JP; hearing urgent applications for the third week in a row; the circuit court roll; acting judges disagreeing with them, on the ground of being "clearly wrong"; the Old Guard; the Young Turks; appearing before the Judicial Service Commission; not appearing before the Judicial Services Commission. Salaries, salaries and again salaries. But these and other like matters are of little concern to the readers of *Advocate* and can perhaps be left for another not yet conceived journal called *Judge* (not *Judex*, since Latin is not an official language).

Judges by virtue of their profession or age suffer from a peculiar species of Alzheimer's disease. They tend to forget what it was like to have been a practising lawyer. They are also inclined to forget their own imperfections as advocates. But then, since they had none, there is by definition nothing to forget. They never argued a bad case; never missed an authority; never made a bad submission; never charged high fees. With the wisdom of enhanced hindsight they expect counsel to act as they believe they would have done. Adv Point-taker becomes in his own eyes the Hon Mr Justice Justice-must-be-seen-to-be-done and, in the eyes of the Bar, Mr Justice-must-be-seen-to-be-believed; and Adv Langdradig is transformed into Judge Kort-van-draad. The disease is contagious, incurable and sometimes fatal.

This may explain a number of idiosyncratic and personal irritations. Some dislike deciding cases or even hearing them. Others hate hearing cases towards the end of term or, better still, at its beginning. A judge who shall remain nameless (for the sake of argument let's call him Joppo) is reputed to have asked counsel who were unable to settle a matter whether they thought that judges should spend their time hearing cases. Certain judges dislike being contradicted or shown to be wrong in their prima facie views and others abhor the idea of being compelled to change their opinions. There are those who are habitually irritated with the prosecution and others with the defence. Some are forever comparing their incomes with those of counsel, bewailing their folly in accepting an appointment. The list is never-ending.

Bad cases are perhaps the greatest source of irritation. Understandably, since they waste time and money. They create unnecessary work. Nothing can be worse than a bad case badly argued, especially if counsel is intent on making a meal (ticket) of it. One sometimes gains the impression that counsel's attitude towards a bad case is that *if I cannot convince the court, the least I can do is to irritate the court.* But poor cases, if argued well, can be fun; and the ability to do so is the sign of good advocacy which, for the judge, is a source of admiration and delight. On the other hand, good cases badly presented are a close contender as the greatest source of irritation. And difficult cases being made more complicated than what they are should not be forgotten. Counsel are not supposed to present the court with a Spanish omelette; counsel are supposed to put Humpty Dumpty together again.

How to keep appellate judges happy

Having left the provincial bench some ten years ago for the judicial Gulag the author, who also suffers from the well-documented judicial lack of total recall, is at something of a loss and finds it difficult to deal more comprehensively with the irritations at local level. Hence this sub-title.

Counsel appearing before the SCA or the CC are at a disadvantage. They do not know the judges individually or their pet gripes or foibles. Worst of all, there are five or eleven of them, as the case may be, each having his or her well developed individual assortment of irritants and low threshold of irritability. What irritates the one may be balm to the other. The random list that follows is a personal list but it may be of some assistance to astute counsel. Then again, since counsel do not bother to read or heed our judgments, why should one expect them to read or heed this article?

Rule number one is to know your rules. For most advocates an appearance in these courts is the exception rather than the rule. Few attorneys ever have appeals at this level. Practitioners are generally not conversant with the rules and practices of these courts and they do not bother to determine what they are. Consequently, one after the other fall into the same trap about the

Judge Louis Harms practised in Pretoria and was a member of the Pretoria Bar Council. He is the author of, inter alia, Civil Procedure in the Supreme Court *and* Amler's Precedents of Pleadings (Fifth Edition).

notice of appeal, the record, the heads of argument and the practice note. A condonation application or two precedes every second appeal. *'n Ramkiekie met een snaar: 'Skuus, ek pleit onkunde.'* The rules should be read when applying for leave to appeal, reread before the notice of appeal is filed and they should be brought to the attention of the attorney earlier rather than later. If they are followed in the right spirit most irritants will not arise.

Laat die ... lees appears to be counsel's gut reaction to the practice note which requires of them to identify the irrelevant portions of the record. Refuse to consider the preparation of a core bundle. (Yes, the rules provide for such an animal. It is hardly used.) Often an appeal can be disposed of with reference to the judgment in the court below without more, but why be kind to the court?

The second rule is to be prepared. Know your case and the authorities. Misrepresenting the facts or the authorities does not endear you to the court and judges have, as far as counsel's behaviour is concerned, a long albeit imperfect memory. Lest one forgets, your colleagues will remind you. A wrong against one judge is a wrong against all. It is not unknown for counsel who left the record at home, to feign surprise when questions are asked about it. It is not uncommon to find that counsel are blithely ignorant of the most recent law reports, that a case cited has been overruled, or have failed to check the state of the law on the easily accessible Internet sites. Outdated heads of argument do not win cases.

Adam Smith, as early as 1776, complained about the fact that attorneys have contrived to multiply words beyond all necessity, to the corruption of the law language, all because of the way the tariff of fees works. The infection has spread to the Bar and since counsel are paid on an hourly basis, it pays to pad. Padding has many forms: typing two lines on a page; quoting cases which counsel did not read and have no intention of using; regurgitating obvious facts and trite legal principles; or providing long extracts from the record or authorities.

Another form of padding is taking too many points. It is indicative of counsel's lack of confidence in the matter. Cases usually turn on one point, occasionally on a few. Too many points tend to obfuscate the good ones. Counsel should be astute enough to make a firm decision of what can and what cannot work. If a member of the court thinks that there may be another point, the judge will raise it with counsel, and feel self-satisfied for having discovered the point.

The object of filing heads of argument is to assist the court in preparing for the hearing, not merely to comply with an irrational rule of court. As a rule of thumb, draft the heads of argument in such a way that the judge writing the judgment can incorporate liberal chunks of it in the judgment (without, of course, acknowledging its source). Expert counsel fall into two classes: the one assumes that the court consists of totally ignorant judges and file a treatise on the subject. The other accepts that the court can follow the jumps in the argument or that there will be one member of the court who may understand. Both are wrong.

New counsel are always dissatisfied with the argument filed and file fresh argument during the hearing or, as a special favour, the afternoon before. Old counsel are often dissatisfied with the argument filed earlier and likewise tend to file new-fangled argument during the hearing or, also as a special favour, the night before. Then there are those who prefer to hide the crux of their argument in a footnote or – surprise, surprise – habitually pull the rabbit from the hat at the hearing. Late points are rarely good points. They are often the end-result of a bad night's sleep. Judges prefer to enter court fully prepared. By then they have formed a prima facie view and instead of building thereon, the new points have to dispel that. It is simply good advocacy to let the good points ferment in the judicial mind for some time. Handing up a bundle of authorities shortly before or on the day of the hearing does not endear counsel. The judges had to search for and read those authorities long before and have prepared their own collection. A collection is not a bad idea but it should then accompany the heads of argument.

Being prepared does not entitle counsel to be overconfident. At least remove your brief from your bag before the court convenes. You may even consider opening the brief. If called upon, be ready to argue. It is bad form to begin the argument by correcting obvious errors in the heads of argument. As bad is commencing with a request to the court to indicate the matters the court wishes to hear argument on. That decision is counsel's responsibility. If the court does not wish to hear argument on any particular aspect, it will inform counsel accordingly.

Argument is a word to be found in most dictionaries and means in this context a *process of reasoning*. A setting out of facts or legal propositions, not germane to the conclusion, is not argument; nor is a mere listing of the errors of the court below. At this level it is inappropriate to read the heads of argument. The judges have read and reread them. If counsel starts reading, one is wont to ask: *Kan ons nie maar 'n stillees periode kry nie?* If senior counsel read the heads one is tempted to enquire whether counsel intends to read everything, but refrains, expecting an answer: *Of course M'Lord, since I have not read them before and do not know what they say.*

The full complement of the court has to decide the case. Do not focus on one particular judge and indulge in a fireside chat, flattering him or her and ignoring the others. There is a myth that the judge who asks the most questions is the one who has been allocated the judgment or is the only one who has read the record. The one who asks the most questions is usually the talkative one. Work on the assumption that all the judges are equally well prepared.

Answer questions or at least try to do so and if you have no answer, be candid and bold enough to admit it. Questions are put in order to test the submissions. Dodging questions, whether by postponing them or simply ignoring them or rephrasing them does not advance your case and affects the value of oral argument. Losing your cool is a sure way of losing your case. Even worse than dodging is buckling. Questions, even if posed in the form of propositions from the bench, remain questions and are not considered judgments or

may not even reflect prima facie views. They are posed to test the validity of the submission. The other members of the Bench may in any event disagree. *As the Court pleases* is not an answer and does not please. In argument, aim for the following: stress your good points, admire the good points emanating from the Bench, avoid your own bad points, hammer the bad points made by your opponent but deal indulgently with the bad points falling from the Bench.

There are time limits for argument. Injury time is not provided for. As soon as the court adjourns, mark the brief and forget about the client and the case but not about the attorney. And unless your aim is to irritate the judges as a parting shot, do not file further argument. Argument filed after the conclusion of the hearing is not only late; it is too late, even for damage control.

Practice Direction and the Rules

Ensign-Bickford (South Africa) (Pty) Ltd v AECI Explosives and Chemicals Ltd 1998 (2) SA 1085 (SCA) 1091E:

"Litigants who do not in future follow the Rules fully and intelligently will run the risk of being debarred from proceeding with their appeals."

Premier, Free State v Firechem Free State (Pty) Ltd 2000 (4) SA 413 (SCA):

"That leaves the practice note which must accompany the heads of arguments in terms of the Practice Direction set out at 1997 (3) SA 345 (SCA) and the heads of argument themselves. The importance of that part of the Practice Direction requiring an indication of which parts of the record need not be read was explained and stressed in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another* 1998 (3) SA 938 (SCA) at 954H – 955B. Barely any attempt to comply was made by ... who signed the heads. This case cried out for a careful attempt. Further, scant attention was paid to Rule 10(3) in drawing the heads. References to specific pages and paragraphs were absent. No chronology was provided, nor copies of subordinate legislation which had been referred to. Again, this Court has spoken often enough. The order which I propose is that all the fees relating to the appeal of the two counsel concerned be limited to those taxable on a party and party basis, limited both between party and party and in relation to their own client."

Quotations

Van der Westhuizen NO v United Democratic Front 1989 (2) SA 242 (A) 252B-G:

"There is a growing tendency in this Court for counsel to incorporate quotations from the evidence, from the Court a quo's judgment and from the authorities on which they rely, in their heads of argument. I have no doubt that these quotations are intended for the convenience of the Court but they seldom serve that purpose and usually only add to the Court's burden.... Superfluous matter should therefore be omitted and, although all quotations can obviously not be eliminated, they should be kept within reasonable bounds."

Heads of argument

Caterham Car Sales & Coachworks (Pty) Ltd v Birkin Car (Pty) Ltd 1998 (3) SA 938 (SCA):

"There also appears to be a misconception about the function and form of heads of argument. The Rules of this Court require the filing of main heads of argument. The operative words are 'main', 'heads' and 'argument'. 'Main' refers to the most important part of the argument. 'Heads' means 'points', not a dissertation. Lastly, 'argument' involves a process of reasoning which must be set out in the heads." 🕮

Advertising

At the October 2000 executive meeting the proposal for an amendment to rule 4.22 was approved in principle, subject to the propriety of specialities, which the Ethics Committee was asked to consider. It was the view of the Ethics Committee that members should not be allowed to advertise their specialities.

It was resolved that rule 4.22 be amended as follows:

'4.22.3 Notwithstanding rule 4.22.1, information about members or groups of members may be made available to the public in a publication of a Bar or, if sanctioned by a Bar Council, in a publication of a group of members of a Bar, provided that the names of all the members of such Bar or such group, as the case may be, are listed therein.'

The meeting however noted that the 'information' referred to in the amended rule, is not intended to refer to specialisation and that a footnote to that effect be inserted. 🕮

Publishing of Advocate

Advocate will be published by Juta from January 2002. All correspondence and enquiries relating to advertisements and subscriptions (including address changes) should from 2002 be addressed to:
Customer Services Department
JUTA Law
PO Box 24299
Lansdowne 7779
Phone: + 27 (21) 797 5101
Fax: + 27 (21) 761 5861
e-mail: cserv@juta.co.za

See the editorial information on page 1 of this issue for correspondence and enquiries relating to contents and contributions.