Heads of argument in courts of appeal

By LTC Harms, Deputy President
of the Supreme Court of Appeal

Heads of argument win cases on appeal; and lose them. These truisms are not generally accepted. Counsel believe that they win cases by the force of their personality and oratorical skills. They forget that courts of appeal have the habit of reading the record and heads before a hearing. In fact, the Constitutional Court rules state that counsel has to assume that they have been read. Judges consequently tend to form prima facie views – sometimes fairly strong ones – about the strength and weaknesses of the case. Rather mould the court's views instead of attempting to change them.

What follows are suggestions that counsel ought to bear in mind when drafting heads for appeal purposes. Obviously not all are applicable in every case. The views are by their very nature personal but not necessarily idiosyncratic. They have been formed over a period of 18 years as a result of interaction with colleagues at the SCA. And they conform to views that are generally held. In this regard counsel, who are interested in persuading judges, are referred to Antonin Scalia & Bryan A Garner's recent *Making Your Case* (Thomson/West, 2008). You may dislike Scalia's legal philosophy but you cannot fault his insight into advocacy.

The initial approach

Before you sit down to dictate, type or write, refresh your memory by reading the rules of court and the practice directions. Then take time to think about the case and the point you wish to make, and ponder the value and purpose of some of the issues that have been raised. Consider that the client is paying you to make value judgments and not to say what comes into your, the client's or the attorney's head. Remember that one court has already heard it all and has expressed reservations that may have merit about some of these. A case at the appeal stage is not the same as when the trial began or even ended.

Importantly, contemplate how to make the case easy for the court. If you help the court the chances are that the court will come to your assistance – to the extent it can. Think of the judgment that you would like to see: structure your heads so that they can form the basis of the judgment. Remember that you have to deal with the issues. Don't skirt them or hide them in verbiage. Brevity may take longer to achieve, but it makes one think, and it leads to easier understanding of the issues.

The purpose of heads of argument

The purpose of heads of argument is to convince the court of appeal that the court below has either erred or was correct. This means that the judgment below has to be addressed. Too often counsel simply ignore that judgment and reargue the case, quite regularly by recycling the heads used in the trial court. This approach is not only disrespectful towards the court of first instance – it is also unhelpful and misses the point that appeals are not re-hearings.

The nature of heads of argument

The SCA rule requires the lodging of 'main heads of argument'. There is a clear distinction between 'heads of argument' and written argument – the rules do not require or permit the latter. The operative words are 'main', 'heads' and 'argument':

'main' refers to the most important part of the argument;

'heads' means 'points', not a dissertation; and

'argument' involves a process of reasoning that must be set out in the heads.

In addition, and to emphasise the point, the rule requires the heads of argument to be clear, succinct, and without unnecessary elaboration.

Some years ago two tax appeals were heard on the same day because they raised the same legal issue. One appellant's heads were in excess of 200 pages while that of Shaw QC, for the other appellant on the same point, was less than 20 pages. The court was more interested in Shaw's argument and it is unlikely that the judges had studied the longer heads in any detail. (Come to think of it is it because of Shaw's influence that KZN heads are usually brief and that as a result of Suzman QC's legacy Johannesburg heads are anything but?) Judges have to read a lot, mostly irrelevant material, and it does not do a case any good if the heads are difficult to digest, either because the dish is unpalatable or the plate is heaped.

Typing is another issue. The rules require double spacing – not triple or quadruple. The font size is also important. Judges of appeal are usually of a certain age and abhor the idea of reading with magnifying glasses. Footnotes in particular should have a readable font size.

The structure of the argument

Like anything else an argument must have a beginning, middle, and end. And all this must be divided into consecutively numbered paragraphs. Each paragraph must deal with a single idea but paragraphs that are too short or too long are irritating. For numbering do not use, for example, 'Part R par 21.1.1(a)'; instead use 1 through to 1701 and consider the use of bullet points within a paragraph. They have the advantage of pinpointing an argument. And they prevent you from reading your argument at the hearing.

To divide the different parts of the argument consider the use of headings of the kind used in this article and be kind to the court by providing a short table of contents.

An important matter concerns the naming of parties in the course of the argument. 'Appellant' may mean the appellant in a lower

appeal court or the one in the particular court. And the term 'respondent' can also have different meanings in a case. For instance, in a matter that began on notice of motion, and has gone through the full court and then arrives on appeal, it may have three meanings. Rather use abbreviated forms of the real names of the parties, excluding their ID numbers. Or use something like 'the Bank' or 'the surety'. But do not use self created or unfamiliar acronyms like TSFPOTC for The Society for the Protection of the Constitution; 'Society' would do.

The introduction

The introduction should preferably begin with a definition in one paragraph of the issue on appeal. The definition should not be meaningless like 'this is an appeal on sentence'; rather 'this appeal raises the question whether a sentence of life imprisonment is appropriate in the special circumstances of the case (the age of the accused) in spite of the minimum sentences provisions.'

The next paragraph should deal with the court's jurisdiction: is the matter appealable? Has leave been granted? Cite the statutory provision that deals with the issue and any particular case law.

The third paragraph should deal with the standard of review, meaning the basis on which the court may deal with the matter. Is the matter discretionary (and if so, what type of discretion is involved)? Is the matter factual and if so, how should the court approach the factual findings of the court below? And so forth. The advantage of this is that it concentrates the mind and the heads. In many US appeal courts, this paragraph is obligatory.

If you intend to raise a constitutional issue, say so at the outset – and say it loud and clear in the fourth paragraph (unless you wish to raise the point for the first time before the Constitutional Court).

The facts

The second part of the heads should deal with the material facts in chronological order. The emphasis is on 'material.' It is not necessary to give dates if they are of no or little consequence. Furthermore, omit unnecessary detail. A court is seldom, if ever, interested in the make or colour of the car or its registration number or the time of the collision or the name of the street corner if the issue is simply whether the light was red or green.

The facts of the case are usually set out by the court of first instance. Unless there are mistakes or omissions, why not simply refer to the judgment below? And if the appellant has stated the facts, why does the respondent have to repeat them?

Record references for facts that are common cause should be given to enable the reader to contextualise them. However, if the particular fact is not common cause or if you are uncertain that it is, the record reference is essential. This must not appear in a footnote (many judges are allergic to footnotes, especially in heads) but does not require a separate line or unnecessary detail. It usually suffices to conclude a statement of fact with '. . . (Plea 1/35/5-7)' or '. . . (Ngubane 3/333/2-20)' instead of '. . . (the defendant's plea at Record volume 1 page 35 lines 5 to 7)' or the like. By the way, do not omit the volume reference unless it is a one volume record (as if we could be so lucky).

The argument

The third part usually consists of argument, whether legal or factual. It is not possible to be prescriptive about the form of argument but there are certain aspects that ought to be borne in mind.

The first concerns the sequence. Not only must it be logical. It must begin with the main argument. Beware of alternatives. They tend to weaken the more important points.

Then, as mentioned, meet the issues head-on. If you do not, the court will make you do so. Deal with the essence of the findings of the court below and deal with your opponent's argument or expected argument.

Thirdly, the argument must be clear and succinct. Do not clutter the argument with unnecessary references. If the point is trite (e.g. 'the Plascon-Evans rule'), do not give a reference. If it is not trite give one reference – usually the leading case but sometimes the latest. A line of cases should only be quoted if the argument depends on the development of the law through them. Again, avoid footnotes. And give a common recognised citation, something the judge will probably have at hand. Tell your junior to look up the neutral citation; it is of great help, especially with foreign cases.

The UK courts have a useful rule that requires that the heads must state, in respect of each authority cited, the proposition of law that the authority states; and if more than one authority is cited for a proposition the reason for citing the additional authorities. Follow it.

The rules proscribe (not 'prescribe') the use of long extracts from the record or from authorities. The eye tends to skip quotations. Rather summarise the extract or use bullet points for the sentences which you wish to emphasise.

The conclusion

The final part of the heads should contain, in clear terms, the relief sought on appeal. It is not good enough to ask that the appeal be upheld or dismissed with costs. More is usually required. If there is a possibility of lesser relief it should also be clearly drafted. Set out the order that you want.

and then . . .

Heads, like good wine, have to mature. Leave them for a few days, print them, and with a red pen revise them. If time permits revise again.

If you are satisfied with your product turn to the practice note. You now know how little of the record is relevant. (Recently, on a point of law, counsel said that all 19 volumes had to be read. When asked why, he had a change of heart and, all of a sudden, nothing had to be read.) Answer the question honestly. If you think that if you make the court read the whole record unnecessarily – in the hope that it might find a point that you have missed – think again.

With this knowledge consider or reconsider a core bundle. You should preferably agree on one with your opponent after both sets of heads have been prepared.

Since you are in the process of buttering up the court, remember to prepare a separate volume of authorities of those that are not readily available. And while you are busy prepare a photocopy or a printout from an electronic database of those provisions of any statute, regulation, rule, ordinance or by-law that are at issue. Bind them separately with plastic comb binders and do not use the same colour binding as your opponent has used. It helps if some pages are not bound upside down or in a wrong sequence.

If you also file a CD with your heads and authorities the court may simply copy and paste your argument and references into the judgment.

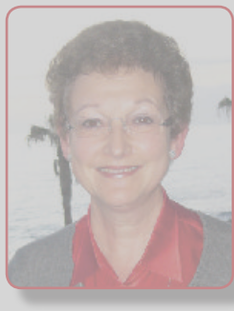
Finale

Your attorney or client may not be impressed with the resulting document. They may think that the value of heads is measured in kilograms or in reams. You ought to know that it takes more effort and time to be brief, as Oscar Galgut J was wont to say, and that your time-based fee will be higher.

You have to choose: who do you wish to satisfy foremost? If winning the case is important consider the views expressed. If another brief from the attorney is foremost in your mind, bear in mind that attorneys do not as a rule rebrief successful counsel in the belief that cases win themselves.

Before the hearing ensure that there is no new law (especially case law) on the issue. If there is, give the court due notice. 'Due' in this context does not mean 'at the hearing.'

And if you lose the appeal in spite of all: consider that statistically you can only win fifty percent of your cases (if you are good).



Good legal writing

By Carole Lewis,
Judge of the Supreme
Court of Appeal

Let me start with a disclaimer. I do not hold myself out as an expert on legal writing. I do, however, have views on improving written work that comes before courts, and these views gain strength the longer I sit on the Supreme Court of Appeal.

There is nothing special about legal writing: lawyers should simply write well. This paper is general and addresses the writing of legal opinions, papers, affidavits, pleadings, heads of argument and any other written work. It is a plea for simplicity and clarity; for jettisoning jargon and legalese and above all, for brevity and clarity.

Brevity is not the same as shortness. It is about being direct and giving the reader information in the most accessible way. Verbiage disguises thought rather than expressing it. In the famous little book *The Elements of Style* (Third Edition, 1979) written by Professor William Strunk in 1929, and updated by his former student, E B White, Strunk said:[1]

'Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all his sentences short, or that he avoid all detail and treat his subjects only in outline, but that every word tell.'

One cannot write clearly and well unless one's thoughts are clear. That entails thinking before writing. This may seem obvious, but the impression often gained when reading heads of argument and even judgments is that the writer has started at the keyboard (or put pen to paper) before being sure what is to be written, in the hope that the pen will lead to the answer. Invariably that approach will lead to an excess of words and to muddled writing.

Lack of thought is particularly apparent in affidavits in motion proceedings. Affidavits are supposed to be about fact. Very often now they contain legal argument and opinion, the deponent explaining that the legal views advanced have been made by legal advisers. A little thought in advance of drafting affidavits (and indeed heads of argument) would save reams of paper and burden those who have to read less.

Think first about the purpose and nature of the document, argument or opinion and its logic: the logic should inform the content. If the ideas are clear then the points will be clear and writing them directly is more likely to make the reader understand what is written. In Strunk and White's words 'The first principle of composition … is to foresee or determine the shape of what is to come and pursue that shape.'[2]

Although the structure of heads of argument warrants separate