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

treatment, what follows applies to heads just as it does to other legal writing. Introductions to reasoning are helpful – if not essential. That does not mean that one must start with a paragraph labelled 'Introduction'. It does mean that the writer must start with a strong introduction – one that tells the reader what the essence of the work is: where it starts and ends and how it will reach the end point. Starting with peripheral or minor points, just to get them out the way, does not alert the reader to the important fact or principle really in issue. Make the crucial point first and then provide the context.

The most important unit of an argument, an opinion or a judgment is the paragraph. It should express an idea or a principle. The beginning of each paragraph signals to the reader that a new step in the development of the argument has been reached and should suggest what the transition in the argument is. The length of any paragraph will depend on the simplicity or the complexity of the idea or principle. But it should as a rule comprise more than one sentence. Sometimes, however, where the step is complex and long, it is useful to break up the paragraph, even when there is no logical break, because lengthy blocks of words can be daunting to the reader.

Headings in long documents are helpful if they tell the reader what the structure of the work is. And simply considering whether a heading is helpful and what it should be may clarify the writer's thinking. But headings serve no purpose if they do not guide both the writer and the reader. Use them sparingly.

Where possible, write in the active voice. It is more direct than the passive. So, for example, 'The firearm was aimed at X by Y' is not as powerful a statement as 'Y aimed the firearm at X.' Use positive rather than negative language: it is better to say 'Counsel arrived late for the hearing 'than 'Counsel was not on time for the hearing.' Tell the reader what is, rather than what is not; use 'dishonest' instead of 'not honest'; 'trivial' for 'not important'; 'forgot' rather than 'did not remember.' Omit unnecessary words: examples abound in legal writing: 'the question as to whether' instead of simply 'whether'; and 'the fact that' can almost always be left out.

Legal journals and reports have their own house style. These are a matter of choice. When writing heads of argument, affidavits, pleadings or opinions one is not bound by such choices. Counsel tend, however, to adopt conventions and to stick to them with religious fervour. Some of these flout the rules already suggested – particularly by using several words when one will do. Stating that something is blatantly obvious will inevitably make hackles rise. And why refer to all rights and entitlements and interests when rights cover the latter two? Using single sentence paragraphs also maddens, and failing to make plain the structure of the argument at the outset is inexcusable.

The advent of the computer has made matters worse. Formatting of documents results in single points with many subpoints stretching over many pages and leaving much white space on the margins and in between points. It is distracting for a reader to have to turn several pages in order to read one idea. Legal writing should not look like a statute or a mathematical table. Avoid indentations and great white spaces in so far as possible. And resist the temptation to cut and paste from other work: it is tempting, when one has written previously on similar matters, but it rarely works well, and generally adds to the length and distorts the structure.

Latin words and phrases are familiar to few. Most can and should be translated into the language of the work one is writing. Of course some are not easily or shortly translated: *sui generis, prima facie, mutatis mutandis, coram, noscitur a sociis* and so on are words or phrases that have served well in the past because they are shorthand expressions of a principle or idea. But they are translatable and are more easily understood by most readers in translation. The misuse of Latin phrases is a particular irritant: the phrase '*in casu*' is frequently used to mean 'in this case.' It means nothing of the sort.[3]

Journals and law reports have stopped using stops for abbreviations. The idea is to obviate clutter: the more the eye sees the less it absorbs. Some courts have adopted the same style, for the same reason. In the Supreme Court of Appeal we use as little adornment as possible: unless necessary we do not use capital letters, stops or even apostrophes in abbreviated plurals or with dates (for example, CVs, MPs, 1990s). We do, however, have constant discussions about the use of commas, so the least said here on the subject the better.

Footnotes are useful for references or citations. Counsel use them increasingly in heads of argument, and judges in judgments. In my view, footnotes are a distraction and should be used sparingly. If something is worth saying then it should be in the body of the text. It is difficult for the reader to move between text and footnotes. If there is argument in a footnote, or even a quotation, the reader's train of thought may be broken by moving between the logic of the text and the distraction of the footnote.

Lawyers tend to think of their clients in terms of their roles in litigation – as plaintiffs and appellants and respondents. The use of these terms is often confusing. Make the task of the reader simple. Provide a cast list (definitions) at the start of your piece and name the parties. The reader will more readily identify the parties, and the writer is less likely to confuse them too.

Gender equality brings a host of problems to written work. One has to make a choice whether to be inclusive, chauvinist or confusing. The legislature has chosen to deal with the problem by ignoring rules as to the use of singular and plural nouns: 'If any person is affected they may …' I think it better to be inclusive by referring to he and she. Using the pronouns interchangeably, as some academic writers do, is very confusing. Restructuring a sentence is often a better option. The following example illustrates the point. Instead of writing 'If a person breaches a contract he or she may be liable' write 'A person who breaches a contract is liable'.

Avoid legalese and jargon. Write so that the lay reader can understand. There is no magic in the words 'wherefore', 'aforesaid' (or even 'said'). And why say 'in the instant case' rather than 'this case'?

The convention in legal drafting has been to avoid contractions

in written work. 'Don't' and 'can't', for example, are regarded as colloquial and thus sloppy. But as Bryan A Garner in *Making your Case*[4] suggests, 'the decision whether to use a contraction often boils down to this: do I want to sound natural, or do I want to sound stuffy'? His co-author, Antonin Scalia, on the other hand, regards the use of contractions as vulgar: 'Formality bespeaks dignity', he says.[5]

Style, as I have said, is a matter of choice. Sometimes spelling is too (think of words ending either with ise or ize: realise or realize. Some words may only end in ise (unless one is writing American): advertise, compromise, analyse and so forth. If the writer is not bound by another's choice, I suggest that one adopts a style, and spellings, and is then consistent.

Writers often attempt to emphasise by using different fonts, bold, italics, underlining or capital letters (and sometimes more than one method) for the words emphasised. Sentence structure should be such that emphasis is not needed; but if it is necessary, use italics.

When citing authorities use only the most helpful and if possible the most recent (though often the best judgments date back decades). References to every case decided on an issue are not helpful. 'A glut of authority is distracting.'[6] Most importantly, be accurate. It is not only unhelpful when case references are inaccurate: it is also frustrating for the reader who has to find the right reference. Check all references and all quotations. And ensure before using part of a case or an article or book that it really is authority for the proposition made, and that the same piece does not circumscribe the passage cited in another place. And be consistent in the mode of citation.

Quotations should be used sparingly too. First, many readers do not read quotations. Second, if one summarises what is said in one's own words, it is more likely that its import and importance will become clearer to the writer. It may transpire that the passage is unhelpful or is better when summarised. That said, sometimes one cannot say what the original writer said with the same eloquence or clarity. Then a quotation is permissible.

It is often said that it takes longer to write a short argument or judgment than a long one. That is because the shorter work requires more thought. And culling or editing a piece makes one think again. The obvious truth is that the shorter work is better because it has been more carefully considered and structured. Brevity is an art that I think we should all attempt to achieve. It leads to simplicity and clarity which in turn lead to better writing and reading.

Endnotes

[1] Strunk and White's Rule 17.

[2] Op cit p 15.

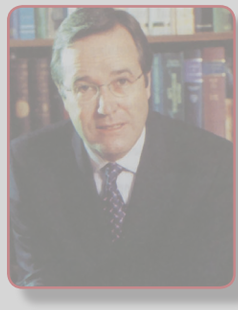
[3] '*Casus*' refers to the voice in which a noun is used in Latin – nominative, vocative etc; to an accident or an unexpected event; or to some risk or peril.

[4] Antonin Scalia and Bryan A Garner *Making Your Case: The Art of Persuading Judges* (2008) 115.

[5] Ibid 117-119.

[6] Ibid 126.

The way we write



By Jeremy Gauntlett SC, Cape and Johannesburg Bars

There is no one way to address a court. We all have different voices, styles, personalities. But just as clear thought and diction are the axles of argument, so legal writing has its requisites – if it is to serve.

The point of departure must be the thought, not the word. Too often lawyers let the word dictate the thought. You near the end of a piece, and a comfortable archaism like 'in the premises', slips into mind, rather than 'thus'. Or you wish, in some vague way, to couple two things or to bring a wandering sentence to an end, so you end with a flourish - 'thereanent', or 'hereinabove'. Or you stack up your arguments like a building plan: paragraph 4.2.2.2.2.

It is all too awful for words.

Picture yourself reading the consequential guff. Picture the morose judge who receives your heads of argument, and with a sigh starts to read. First, they are (despite the SCA's strictures) plump to the touch - after all, why use one word where six will do ? Second, they portentously recite who the parties are, and every other conceivable foothill of the case. Third, they flow, but not in the desired sense. They lumber, without helpful, visible, tight structure. Last and worst, they evidence no critical rereading. The sentences are without cadence and the words seem to have fallen haphazardly into place.

How, then, to write? George Orwell in his great essay, *Politics and the English Language*, offers these simple rules

- Never use a metaphor, simile or other figure of speech which you are used to seeing in print.
- Never use a long word where a short one will do.
- If it is possible to cut a word out, always cut it out.
- Never use the passive where you can use the active.
- Never use a foreign phrase, a scientific word or a jargon word if you can think of an everyday English equivalent.
- Break any of these rules sooner than say anything outright barbarous.

Like a phony accent (commonly confused with good diction), a contrived style is truly repellent. But so is dumbing down. John Gross