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.

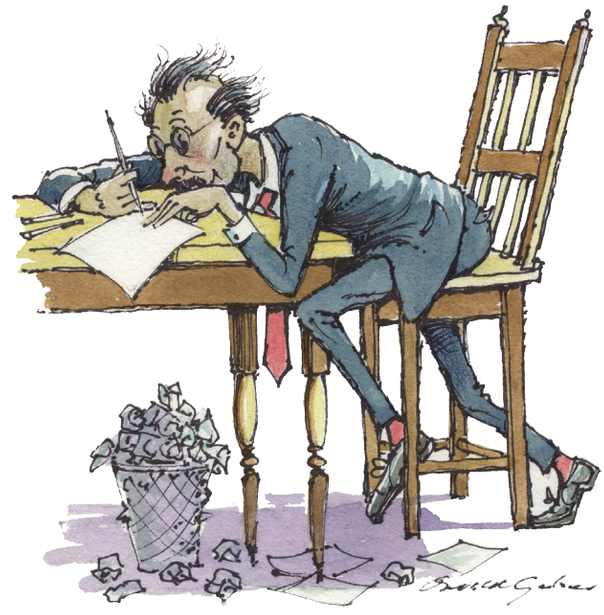
How, then, to write? George Orwell in his great essay, *Politics and the English Language*, offers these simple rules

- 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

has written of gratuitous editing suggestions (such as silks like to inflict on juniors) that '[consist] of small changes (usually too boring to describe to anyone else) that flatten a writer's style, slow down his argument, neutralise his irony; that ruin the rhythm of a sentence or the balance of paragraph, that deaden the tone that makes the music.'

Nor is it to be confused with a blokey colloquialism - like an ingratiating arm around the reader's shoulders. There was a KZN (later Constitutional Court) judge who affected a Denningesque simplicity, in one foreword to a commercial law text inserting 'you see', held in place by equally redundant commas, in condescension to the reader. These are verbal curlicues.



What is good legal writing? It conveys the clear thought, or exposes its absence. That thought chooses the words, not the words the thought. The words are elegantly arranged in sentences with rhythm. No more is said than is needed, and the whole arrests attention.

This is true of all legal writing, of course, even when we must allow for a language-use not our own. Take Francis Bacon's sentence, 'What is truth ? said jesting Pilate, and would not stay for an answer'. Take too this passage from his *Essay on Judicature*:

'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the bar; or to show quickness of conceit in cutting off evidence or counsel too short; or to prevent information by questions, though pertinent. The parts of a judge are four; to direct the evidence; to moderate length, repetition or impertinency of speech; to recapitulate, select, and collate the material points of that which hath been said; and to give the rule or sentence. Whatsoever is above these is too much; and proceedeth either of glory and willingness to speak, or of impatience to hear, or of shortness of memory, or of want of a staid and equal attention'.

Or Thomas Erskine, brightest star of the English Bar in the eighteenth century. He was warned not to defend Tom Paine (charged with sedition for writing *The Rights of Man*) by Lord Longhborough himself. This is how he responded, in his unforgettable defence of what it is that advocates do:

'I will forever, at all hazards, assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment that any advocate can be permitted to say that he will, or will not, stand between the Crown and the subject arraigned in the court where he daily sits to practise - from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgment; and, in proportion to his rank and reputation puts the heavy influence of perhaps a mistaken opinion into the scales against the accused, in whose favour the benevolent principle of English law makes all presumption, and which commands the very judge to be his counsel.'

We would think each other histrionic to write or speak now in such terms. But reread his words, and mark the unerring choice and sense of rhythm. They speak across the ages.

In legal writing in South Africa, we have our own models of lucidity. Thus Innes CJ in *Blower v Van Noorden* 1909 TS 890 at 905:

'There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the legislature.'

The same judge warned in *Shidiack v Union Government* 1912 AD 642 against 'a grave tendency in modern legislation to clothe with finality the decisions of public officials in matters which seriously affect the rights of the public [auguring] a serious menace to the liberty of the subject.'

Finally in his autobiography (edited by BA Tindall, also an AD judge) he expressed thus his profound and practical mistrust of granting officials poorly defined discretionary powers:

'Officials, whose activities are, for the time being, practically unhampered, are vested with authority to an extent which is a searching test of character. The conduct of the ordinary man, under ordinary circumstances, is largely determined by convention. The atmosphere of his environment, the public opinion of the community, are restraining factors which operate automatically. But when these restraints are removed, when the officer is a law unto himself, when publicity is darkened and criticism is silent, it is only a strong man who can preserve an equal mind and a balanced judgment. And the administrators of the system are not universally the strongest men.'

There are many other examples. A last one: Van den Heever JA's splendid apophthegm that the concept of the bonus paterfamilias 'is not that of the timorous faintheart .....on the contrary, he ventures out into the world, engages in affairs and takes reasonable chances' (*Herschel v Mrupe* 1953 (3) SA 464 (A) at 490F).

These are voices reaching down the years. What they teach is that when the blank page stares at you, think first the clear thought, and only then the word. When all is done, reread critically, and think of the tired judge at whom it is aimed. If all this seems hard, remember Robert Browning:

'A man's reach may exceed his grasp

Or what's heaven for?'