

# Briewe/Letters

## Law reporting

I refer to the letter from RL Selvan SC of the Johannesburg Bar under the heading "Counsel's arguments in SA Law Reports", published in *Consultus* Volume 4 No 2 October 1991. It would be helpful, I believe, to members of the Bar if I set out briefly the history of and reasons for the decision to cease publication of heads of argument in the SA Law Reports, except in special cases.

It had long been a matter of concern to the editors of the SA Law Reports that heads of argument had been taking up more and more space in the Law Reports (cf, for example, *General Accident Insurance Co SA Ltd v Summers; etc* 1987 (3) SA 577 (A) – heads of argument 22 pages, judgment 18 pages; *Binga v Cabinet for South West Africa and Others* 1988 (3) SA 155 (A) – heads of argument 21 pages, judgment 11 pages). It became apparent that in a substantial number of Appellate Division decisions, if not most of them, published in the Law Reports the heads of argument were longer than the judgment.

The consequences of this development were that more and more pages of the Law Reports were being taken up with heads of argument, and there was a danger of the publication of judgments thereby being delayed or even squeezed out of the Law Reports. However valuable the publication of heads of argument might be, the fact of the matter is that the judgment or judgments in a case are more important.

During 1987 or 1988 when the writer was discussing the Law Reports with the then Chief Justice, Mr Justice PJ Rabie, the latter mentioned that there was concern amongst the Judges of the Appellate Division about the publication of heads of argument in the Law Reports. It was felt that the heads of argument often suffered from prolixity, were repetitious and, as published in the Law Reports, not infrequently contained lengthy argument which was abandoned or not pursued or not dealt with in the appeal (the latter often not being easy for the editors to detect). The Chief Justice questioned the value of their publication and asked the editors to consider whether they should not

cease their publication.

The writer wrote to the Chairman of the General Council of the Bar requesting the views of the Bar on the matter. A reply was received that the matter had been referred to the individual Bars for comment. The editors received one letter commenting on the matter from Adv I Mahomed SC, writing, if I remember correctly, on behalf of the Johannesburg Bar. He argued for the retention of heads of argument in the Law Reports, mentioning points similar to those raised by Mr Selvan. No responses were received from any of the other Bars.

The editors considered the matter and took the decision to cease publication of heads of argument in the Law Reports, subject to the qualification that heads would be published in special cases. The reasons for the decision were mainly centred around costs and time. The production of the Law Reports is a very expensive operation, requiring the editors and the publishers constantly to guard against excessive annual cost increases. There is a physical limit to what can be printed in a volume of law reports and there is a physical limit to the amount of time that the editors can put into the production of the law reports. With more and more pages of the Law Reports being taken up with heads of argument, it was our opinion that it was no longer cost-effective to publish heads as standard practice.

More importantly, however, was the fact that the preparation of heads of argument for publication required far too much of the time of the editors. I hope members of the Bar will not be offended if I point out that the Chief Justice's comment about prolixity and repetition mentioned earlier was fully justified, certainly as far as the preparation of heads of argument for publication in the Law Reports was concerned. Furthermore, we had found that counsel's methods of citation of authority were very varied, inconsistent and frequently inaccurate, requiring time-consuming checking and editing. The removal of quoted extracts from cited authorities (law reports, textbooks, statutes etc) was necessary in order to conserve space, but it was also a very time-consuming process. More often than not, the preparation

for publication of the heads of argument took far longer than the editing of the judgment, the drafting of the headnote, the checking of authority cited in the judgment and the process of indexing and annotating. It was from our point of view not a very wise utilisation of our time. And, apart from the Johannesburg Bar Council, it did not appear to us that the Bar was really very concerned about the matter.

It may be of interest to members of the Bar to know that edited heads of argument in an Appellate Division case will be published in *S v Rudman and Another; S v Mthwana* in the February 1992 issue of the Law Reports. The heads of argument have been substantially "edited down" and yet will run to well over 20 printed pages, again more than the judgments. One editor worked for a full day and a half in preparing the appellants' counsels' heads of argument and another for almost two days on the State's heads of argument. That's what it took – and for an editorial team of six, it is not time-effective.

I can well understand that Mr Selvan and many other members of the Bar would prefer to see the return of heads of argument in the Law Reports. I agree that counsel, and other members of the legal profession, would find them useful sometimes. The fact of the matter is that the logistics involved in their publication are far more problematical than Mr Selvan appreciates.

It might be possible, I think, for some sort of compromise to be reached. Perhaps if counsel could make it a practice to commence each major section of their heads of argument with a paragraph setting out concisely but comprehensively the full submission dealt with in that particular section of the heads, the editors would be able to publish those paragraphs, with the authorities cited in support thereof in that section, in the Law Reports. The detailed arguments elaborating on the commencing paragraph could then be edited out, leaving somewhat briefer heads in the Law Reports, but at least it would, I think, be more satisfactory and useful than the lists of authorities which are presently published. I would appreciate comments from Mr Selvan and anyone else on this suggestion.

I hope this letter will contribute towards a greater understanding of the reason for our decision not to publish heads of argument in the Law Reports. I hope, too, that the suggestion in the previous paragraph will either be an acceptable solution or provoke discussion in your columns which could lead to a more satisfactory solution from the point of view of the Bench, Bar and the rest of the legal profession, as well from our point of view.

One final matter. In the letter under reply, the following appears: "How did this sorry change come about? There was simply a bland announcement from the publishers that the exigencies of time required the change. *One supposes that because of pressures of work they will dispense with the headnotes next.*" [My emphasis.] I was saddened to see this paragraph, particularly the italicised sentence, in the letter. It was a sarcastic and unkind remark that the editors found offensive. In addition, it can hardly be said to have advanced the arguments set out in the letter. Indeed, the remark was not, I believe, worthy of those arguments which had been raised.

DS Fisher

Editor: SA Law Reports

### **A copy of Mr Fisher's letter was referred to Mr RL Selvan SC. He responded as follows:**

I am grateful for being allowed the opportunity of replying to the above letter from the editors of the South African Law Reports.

It is of course true that heads of arguments nowadays are much longer than they were in the past. Indeed the description "Heads of Argument" is no longer apt. What

most counsel now produce is fairly full written argument. This is not necessarily a bad thing – it has the approval of Trollip JA as expressed in his forward to the second edition of the late Eric Morris' valuable work – *Technique in Litigation*. Both Eric Morris and the distinguished Judge warn against diffuseness and repetition. If such is present, it is to the disadvantage of counsel's argument and may even merit express condemnation from a court.

But, and this is the point which I consider not really answered by the editors – it is their function to select, summarise and compress.

With respect to the editors, their complaints about time taken up in editing heads of argument is simply not acceptable. The number of judgments which fall to be dealt with by the editors of the Law Reports in England must by far exceed those which land on the desks of the editors of the South African Law Reports. In other series of reports in Great Britain, some if not all, of counsel's arguments appear.

If, in order to cope with an increased volume of work, additional people have to be employed, so be it. I, for one, would prefer to pay larger subscriptions rather than receive a flawed product.

I accept, of course, that before reaching a decision an attempt was made to sound out opinion at the Bar. When I wrote my first letter I did not know this or had forgotten. There was therefore some attempt at *audi alterem partem*, although the attorneys' profession and the academics, not to mention the Bench, might think otherwise. Even so, it cannot be gainsaid that the editors have acted as judges in their own cause. In the

absence of such a body as the Incorporated Council of Law Reporting for England and Wales which supervises law reporting in England, they had no option but to do so. However, so much greater then was their responsibility in putting an end to a practice which had obtained for so many years.

I do not think that the compromise suggested by the editors is feasible. Counsel's purpose in preparing heads of argument is to present to the court as attractively as possible his client's case. Any attempt at the same time to facilitate the task of the editors might detract from such purpose. It occurred to me that possibly counsel could attach to his heads of argument a summary or skeleton thereof. But even assuming a willingness to do so, this would surely be to usurp the editors' function.

I persist in my claim.

## **Material on Advocate Harry Snitcher QC**

Would you be so kind and insert the following appeal in your journal:

The present writer is embarking on what may be a series of books on great South African legal figures, their most important cases and the effect of judgements they won on the legal history of the country in all aspects of the law, political, civil, criminal. The writer is presently doing research into the life of Advocate Harry Snitcher. This will be autobiographical in tone with details of seminal cases from the 1930's onwards. The writer is appealing to those who have had dealings with Advocate Snitcher over the years both in the law and as colleagues, friends and adversaries. What is sought here is lively anecdotal material to illustrate the man, his style, his approach to cases, his successes, his mistakes. The writer is not looking for gross flatteries except where they are deserved! But to create a whole personality who operated in a time period of some 60 years. Reminiscences of contacts with Snitcher during this time, correspondence, diary entries, memorabilia of any kind is solicited urgently. The author may be contacted at 149 Second Avenue Kenilworth 7700 Tel 021-616831 or Fax 021-642568 or through Advocate Snitcher's Chambers, Cape Town Tel 021-233354

James Ambrose Brown

### **Note**

**It will be appreciated if judges, advocates, attorneys, academics, officials of the Department of Justice and other interested persons will consider submitting their views to *Consultus* on the matter broached by Mr Selvan and also other matters concerning law reporting generally. Please also deal with the question whether a body such as the Incorporated Council of Law Reporting for England and Wales (similar bodies exist in other Commonwealth countries) should not be established in South Africa. Such a body can consist of representatives of the Government, Bench, General Council of the Bar, Association of Law Societies and the Society of University Teachers of Law. Judgments of the superior courts constitute an important source of our law and the question arises whether the time has not arrived that effective supervision over law reporting should be brought into being in South Africa particularly in view of the more important role that the courts will play by reason of the proposed enactment of a justiciable bill of rights. – Editor**