THE SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL

VOLUME 5
ISSUE 1
2022

REFRESHING AND ENHANCING JUDGMENT WRITING SKILLS[*]

JUSTICE LEONA THERON
Constitutional Court, South Africa

I INTRODUCTION

Judgment writing is an art that requires not only legal skills but also creative expression, common sense and human understanding.[1] The primary purpose of judgment writing is to communicate the decision, and the reasoning underlying it, accurately through the written word. Not everyone has the natural ability to communicate effectively. However, with study and practice the quality of judicial writing can be improved. There are as many opinions about what makes a good judgment as there are lawyers. I will explore some of the considerations that are relevant to judgment writing, in the hope that, if these considerations are kept in mind, we will be able to communicate judicial decisions effectively to interested parties.

[*] This article is an adaptation of an address delivered by Justice L Theron at a Judges' Seminar conducted by the South African Judicial Education Institute (SAJEI) on 17 January 2019 at Johannesburg.

[1] Address delivered by the former Chief Justice of the Constitutional Court S Ngcobo entitled 'Judgment Writing'.

II WHY DO WE NEED JUDGMENTS?

Judgment writing goes to the very heart of the exercise of the judicial function.[2] The giving of reasons for judicial decisions is part and parcel of the duty of the judiciary to conduct judicial proceedings fairly, respecting the rights of the parties involved.

In *Mvumbi*, the Constitutional Court explained that –

> *[I]t is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process.*[3]

In *Mphahlele*, the Constitutional Court held that furnishing reasons –

> *explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters.*[4]

It is therefore in the interest of the open and proper administration of justice that courts state publicly the reasons for their decisions.[5] The rendering of reasons gives some assurance that the court in question gave due consideration to the dispute and did not act arbitrarily. And this in turn is crucial to the maintenance of public confidence in the judiciary and, ultimately, the maintenance of the rule of law.

A written judgment should be given where:

(a) the case involves complicated issues of fact and law that require resolution;

(b) there is a possibility of an appeal no matter what the decision is;

(c) the court issues an order declaring an Act of Parliament or a provincial Act or the conduct of the President unconstitutional;

---

[2] Address at the First Orientation Course for New Judges held at Magaliesberg on 21 July 1997 delivered by the former Chief Justice of the Supreme Court of Appeal M Corbett entitled 'Writing a Judgement'.

[3] *Strategic Liquor Services v Mvumbi NO* (2009) 30 *ILJ* 1526 (CC); 2010 (2) SA 92 (CC) para 14.

[4] *Mphahlele v First National Bank of SA Ltd* 1999 (2) SA 667 (CC) para 12.

[5] 'Judgment Writing' (note 1 above).

(d) novel points of law are raised;

(e) there is differing authority on the issues; and

(f) the matter is of great public interest.

The option of making an order with a direction that reasons will be delivered later should be used sparingly. Only when the judge is convinced that the decision that is intended to be given in support of the order is correct should this be resorted to.[6] This option leaves no room for afterthought or a change of mind about the case, so be careful. If the practice is used, reasons must be furnished within a reasonably short time after the order.

III PURPOSES OF WRITING A JUDGMENT

As mentioned, the primary purpose of the judgment is to communicate the decision as well as the reasoning of the court. Judgments are generally read and studied by a number of different people. Therefore, before the writer begins, it is important to identify the group most likely to be interested in the judgment. There are advantages that flow from this. How this audience will respond, its needs and requirements, as well as the intended goal and function of the particular judgment, will determine the form and content of the judgment.

Where the decision is intended for the parties alone, only minimal facts along with an abbreviated legal analysis is necessary. On the other hand, where the judgment is directed to the legal community or the academic fraternity, the analysis, logic and reasoning must be clearly expressed in greater detail.

IV THE STRUCTURE OF A JUDGMENT

What should a judgment consist of or contain?

First, the judgment should begin with an introductory statement setting out the nature of the case and identifying the parties. This statement should be concise and uncluttered by unnecessary detail. References to the pleadings and case law should ordinarily be avoided in the introduction.

For an example of a good introduction, consider the opening paragraph in the Constitutional Court's judgment of *Saidi*.[7] The paragraph reads:

---

[6] 'Judgment Writing' (note 1 above).

[7] *Saidi v Minister of Home Affairs* 2018 (4) SA 333 (CC).

> *Does a Refugee Reception Officer (RRO) have the power to extend a temporary asylum permit pending the outcome of a review – in terms of the Promotion of Administrative Justice Act (PAJA) – of a decision of a Refugee Status Determination Officer (RSDO) rejecting an application for asylum, including the PAJA review of decisions on internal reviews and appeals? That is the principal question that must be answered in this matter.*

Or consider the opening paragraph of *Pillay*:[8]

> *What is the place of religious and cultural expression in public schools? This case raises vital questions about the nature of discrimination under the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) as well as the extent of protection afforded to cultural and religious rights in the public school setting and possibly beyond. At the centre of the storm is a tiny gold nose stud.*

Second, the facts of the judgment must be laid out in a chronological sequence. It is not necessary to recount every step of the litigation – only the facts or history relevant to the issues to be determined.

Third, the issues should be listed and dealt with separately.

After the issues, the applicable law must be explained. When citing case law, only necessary and relevant portions should be cited. Avoid, if at all possible, citing long passages. Clearly state why the authority is being referred to. Where possible, try paraphrasing instead of direct citation, or insert the citation in a footnote. This approach tends to make judgments more reader friendly.

Thereafter, the law must then be applied to the facts. The conclusion and remedy follow.

The last part of the judgment should tie in with the introduction. The conclusion should resolve the issues identified in the introduction. The conclusion should not contain new material, factual or legal, not previously discussed.

Even if the conclusion or decision is wrong, the reader should be able to understand the reasoning of the judge and how the judge arrived at that particular conclusion.

Returning to *Saidi*, the last paragraph of Langa CJ's judgment directly answers the question posed in the first paragraph:

> *For all these reasons I conclude that section 22(3) [of the Refugee Act] grants the RRO a discretionary power to do two things. These are to extend permits and to amend conditions attached to them. Therefore, I do not support the*

[8] *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC).

> *declaration that the RRO has no discretion and as a result he or she is obliged to extend every permit upon application.*[9]

And *Pillay*:

> *It is worthwhile to explain at this stage, for the benefit of all schools, what the effect of this judgment is, and what it is not. It does not abolish school uniforms; it only requires that, as a general rule, schools make exemptions for sincerely held religious and cultural beliefs and practices. There should be no blanket distinction between religion and culture. There may be specific schools or specific practices where there is a real possibility of disruption if an exemption is granted. Or, a practice may be so insignificant to the person concerned that it does not require a departure from the ordinary uniform. The position may also be different in private schools, although even in those institutions, discrimination is impermissible. Those cases all raise different concerns and may justify refusing exemption. However, a mere desire to preserve uniformity, absent real evidence that permitting the practice will threaten academic standards or discipline, will not.*[10]

V EDITING THE JUDGMENT

Before delivery of the judgment, ensure that all issues have been dealt with, eliminate repetition, delete irrelevant detail, check punctuation, simplify lengthy complex sentences, and scrutinize length and content of paragraphs.

Decisions should be based on sound legal principles. It is essential to carefully evaluate the legal principles upon which a judgment rests. For example, in determining an appropriate sentence, a judicial officer reasoned as follows:

> *In respect of the sentence, I sentenced you in terms of the minimum sentencing provisions for robbery with aggravating circumstances, that is 15 years. The three years that I added on were because my life was threatened by some members of your gangs, that is the information that I was given and that is why I came here under police protection. It had nothing to do with any other case that day, it was your case. And since the National Intervention Unit took that threat seriously I just abided by what they asked me to do.*[11]

The presiding officer was quite clearly not entitled to add three years to the sentence because her life had been threatened. This could have been avoided had she reflected critically on her legal reasoning before handing down the judgment on sentence.

---

[9] *Saidi* (note 7 above) para 87.

[10] *Pillay* (note 8 above) para 114.

[11] *Mthembu v S* [2017] ZAKZPHC 21.

Editing also prevents obvious, patent errors that often creep into judgments. They do not reflect on the competence of the judge, but are nonetheless embarrassing and confusing. For example, in *Madiba*,[12] the Supreme Court of Appeal held that:

> *It is quite clear that [the trial Judge] misdirected himself when he stated that the cumulative effect of the sentence imposed was that the appellant was sentenced to 70 years' imprisonment. Regard being had to the fact that one of these sentences imposed was life imprisonment, it is incomprehensible how [the trial Judge] came to this conclusion.*[13]

VI DO'S AND DON'TS

There are several 'do's and don'ts' that can easily improve judgment writing and delivery.

Do use simple clear language. Verbose, complicated language should be avoided. It helps no one:

> *Innovative nuances of evidential inadequacies, procedural infirmities and interpretational subtleties, advanced in defence, otherwise intangible and inconsequential, ought to be conscientiously cast aside with moral maturity and singular sensitivity to uphold the statutory sanctity, lest the coveted cause of justice is a casualty.*[14]

The Supreme Court of India recently set aside a judgment of the Himachal Pradesh High Court on the basis that it could not comprehend the legalese used in the judgment. Here is an extract from the High Court judgment:

> *However, the learned counsel appearing for the tenant/JD/petitioner herein cannot derive the fullest succour from the aforesaid acquiescence occurring in the testification of the GPA of the decree holder/landlord, given its sinew suffering partial dissipation from an imminent display occurring in the impugned pronouncement hereat wherewithin unravelments are held qua the rendition recorded by the learned Rent Controller in Rent Petition No.[..] standing assailed before the learned Appellate Authority by the tenant/JD by the latter preferring an appeal therebefore whereat he under an application constituted under Section 5 of the Limitation Act sought extension of time for depositing his statutory liability qua the arrears of rent determined by the learned Rent Controller in a pronouncement made by the latter on . . .*

---

12 *S v Madiba* 2015 (1) SACR 485 (SCA).

13 *Madiba* (note 12 above) para 11.

14 *State of Karnataka v Selvi J. Jayalalitha* 2017 INSC 143 at 544–545.

> *The summom bonum of the aforesaid discussion is that all the aforesaid material which existed before the learned Executing Court standing slighted besides their impact standing untenably undermined by him whereupon the ensuing sequel therefrom is of the learned Executing Court . . .*[15]

Do exercise logic, deal with each issue separately, and ask counsel to identify the issues.

Do maintain an impartial demeanour when dealing with litigants. The following exchange appears from the record of the proceedings of a local court:

> *COURT: Are any of these people in court today? --- I am not sure. I don't believe you, you are scared, aren't you? Am I right? You are scared to say anything. --- I . . .[intervention]. Yes, you don't have to answer me*
>
> *. . .*
>
> *COURT: Come here, please, accused 4. Come here, please. No, come here. Stay there. Turn your face that way. Turn your face this way. He has got one scar on his left cheek, but on the side of his cheek, one about two and a half centimetre scar. Go back there.*
>
> *COUNSEL: Your worship, if the Court can just note the scar on his nose as well.*
>
> *COURT: On where?*
>
> *COUNSEL: On his nose.*
>
> *COURT: Come back here. Oh, yes, I see now he has got a scar across his right nose, but this is three years later. Go back there. Across his right nostril.*
>
> *COURT: . . .after all [the witnesses'] tooth nonsense, not nonsense, sorry, tooth problem.*

This letter, written by a judge was part of the record in an application for leave to appeal to the Supreme Court of Appeal (where there was a complaint that the judge had delayed in delivering reasons for judgment):

> *This case was before me during the urgent court proceedings, at the end of July, 2007. I gave brief reasons indicating that I expected that I might be called upon to give more detailed reasons, in the future. A week or so – or even less – after 26 July, 2007, Mr Masilo was in my chambers, asking for full reasons. I did not chastise him for approaching me, a judge, for that purpose and in that fashion. You know, JP, that is unprofessional. I told him that full reasons are – as I had said in court – tantamount to a full judgment, that I did not have time to attend to it before the short recess, as I had other judgments that took precedence to it. It surprises me that Mr Masilo wrote this letter – which, by the way, reached me*

---

[15] *Sri Pawan Kumar Sharma v Sarla Sood and Others* 2011 HHC at 3 and 7.

> *shortly after 11 September, 2007. Incidentally, something I had forgotten when I spoke to Mr Masilo – I had no short recess, having been in the unopposed motion roll. So, regrettably I cannot touch that judgment before January, 2008. I attach a copy of a letter I wrote on 13 September 2007, in reply to Mr Masilo's letter. My registrar (Francois) and I are uncertain as to whether it was, indeed, forwarded to Mr Masilo, as Francois went for study leave in about that time.*[16]

Do be respectful and courteous to all parties, the legal representatives as well as colleagues. It may be necessary to express disagreement with another judgment or the views of a colleague. Do so courteously and with full recognition of the fact that to err is human: you yourself may be wrong.

Do not rely on points of law that have not been raised by, or canvassed with, the parties. For example, a Canadian judge found an accused guilty of second-degree murder on the basis of a provision of the Canadian Criminal Code that has been unconstitutional for 26 years.[17] The prosecution did not rely on the impugned section in its written argument. Even less surprisingly, nor did the defence.

Do not quote heads of argument at length. As stated in *Stuttafords Stores v Salt of the Earth Creations*:

> *The judgment [on appeal] consists of 1890 lines of typing of which, apart from a summary of the relief sought and the terms of the order, only approximately 32 lines are the judge's original writing.*
>
> *The rest consists of words taken exactly from [X]'s counsel's heads of argument, sometimes even without taking out phrases like 'it is submitted' and emotive comments on the parties' contentions and actions.*
>
> . . .
>
> *While some reliance on . . . counsel's heads . . . may not be improper, it would have been better if the judgment had been in the judge's own words.*[18]

Do not improperly draw from your own experience beyond the evidence. It is important that the judgment is decided on the relevant facts and law – not a judge's personal experience.

---

[16] *National Director of Public Prosecutions v Naidoo* 2011 (1) SACR 336 (SCA).

[17] *R v Vader*, 2016 ABQB 55 (CanLII).

[18] *Stuttafords Stores (Pty) Ltd v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 267 (CC) paras 9–11.

VII CONCLUSION

Courts are theatres in which many of the dynamics and dramas of society are played out.[19] Judgments analyse and record some of these performances. They also provide opportunities for skilful writing. Judgments should, however, be confined to the relevant issues and facts. It is essential that the reasoning underpinning a judgment is clear, lucid and understandable for the intended target audience. As stated by the former Chief Justice S Ngcobo '[b]revity, simplicity and clarity are the watchdogs for effective judicial writing.'[20]

[19] 'Judgment Writing' (note 1 above).

[20] 'Judgment Writing' (note 1 above).