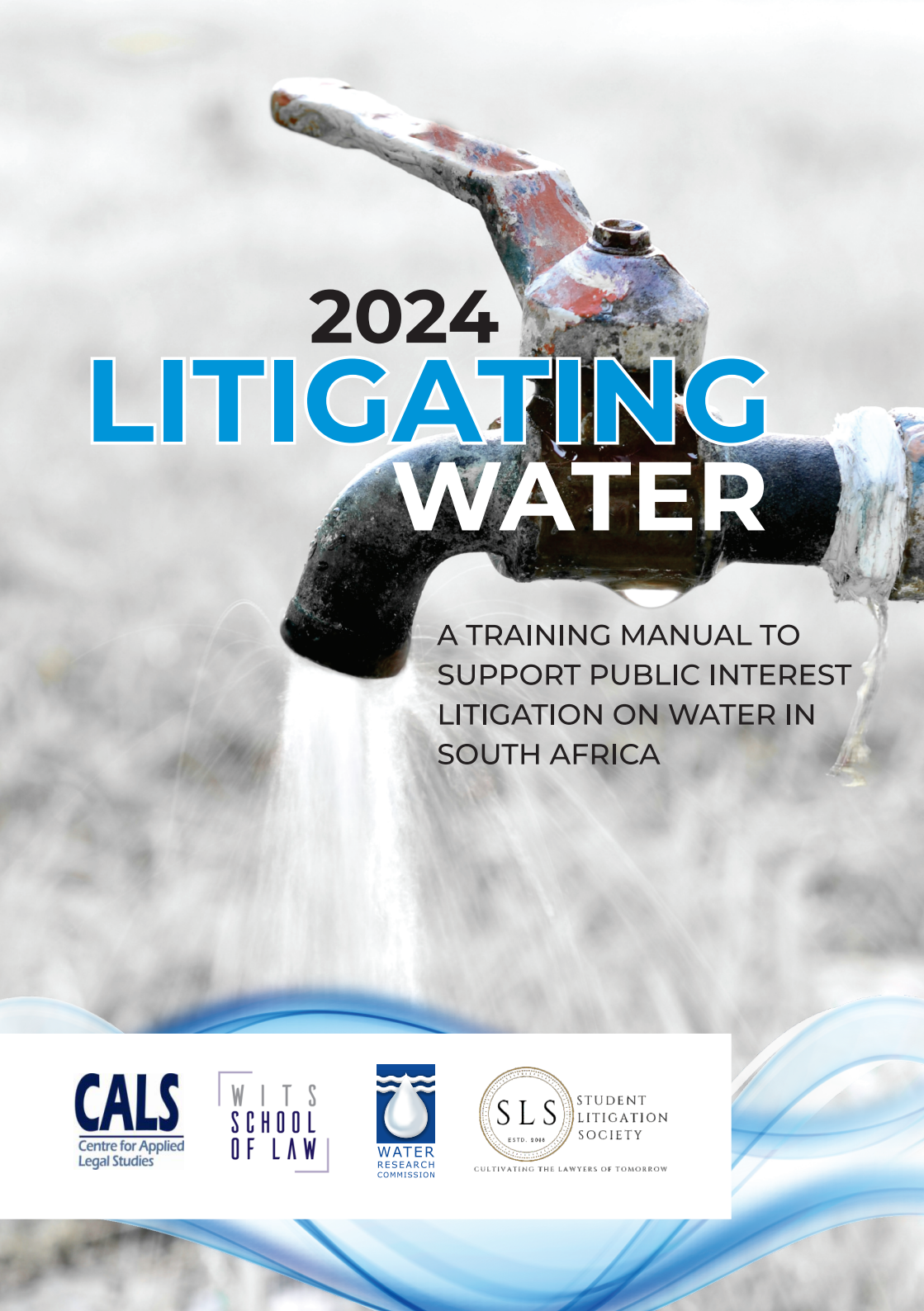

2024 LITIGATING WATER

A TRAINING MANUAL TO SUPPORT PUBLIC INTEREST LITIGATION ON WATER IN SOUTH AFRICA

CALS Centre for Applied Legal Studies

WITS SCHOOL OF LAW

WATER RESEARCH COMMISSION

SLS ESTD. 2016 STUDENT LITIGATION SOCIETY

CULTIVATING THE LAWYERS OF TOMORROW

Obtainable from:
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Gezina
0031

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Production editor: Lani van Vuuren
Design and layout: Anja van der Merwe
Printed in the Republic of South Africa
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This booklet is an outflow from the WRC project no. C2022/2023-00888

The main report is *Water law reform capacity building: Themes, gaps and opportunities* (**WRC report no. 3115/1/23**)

SP 170/23
ISBN 978-0-6392-0578-6

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INTRODUCTION

This training manual supports public interest in litigation on water in South Africa by elucidating some of the key legal principles and rules that arise at the intersection of law and science.

Water litigation, like environmental litigation more generally, cannot be divorced from science. Various subdisciplines of water and environmental science provide the substantive knowledge and methodological approaches that shape regulatory responses to the allocation of water as a scarce resource. At the same time, legal systems have evolved over centuries to regulate social relationships, power disparities and conflict resolution. Water scientists and water lawyers might have a common concern in protecting water and ensuring the fair allocation of this resource, but they do not necessarily speak the same language or come to the problem with the same set of assumptions.

The context of litigation brings these differences to the fore, where factual disputes and different standards of proof easily arise. At the same time. Litigating in the public interest, or the interest of a group or class of people adds another layer of complexity.

This training manual draws on the wisdom of experienced practitioners in the field to understand how law frames science, and science shapes law in the crucible of a public interest litigation matter on water.

BACKGROUND

This resource was developed as part of a set of deliverables for the Water Research Commission (WRC) funded project *Consolidating and Catalysing Water Law Expertise* (**WRC Report No. 2022/2023-ØØ888**), which included establishing a platform for strengthened law-science communities of practice and across tertiary public training institutions by hosting a national, inter-varsity, interdisciplinary National Water Law Moot Court Competition.

The National Water Law Moot Court competition was hosted in 2022/23 as a collaboration between the WRC, the Law School of the University of the Witwatersrand (Wits), the Centre for Applied Legal Studies (CALS), and the Student Litigation Society. The competition attracted more than 400 entrants from numerous public and private universities. The majority of entrants came from tertiary institutions characterised as historically disadvantaged.

To assist the moot court entrants with their written and oral submissions, the organisers convened a series of master classes on various topics at the intersection of law and science in October 2022. Prof Tumai Murombo (Full Professor of law at Wits, member of the Water Tribunal), Adv Jatheen Bhima (CALS), Adv Letlhogonolo Mokgaroane (CALS), Johan Lorenzen (Associate, Richard Spoor Inc Attorneys), Prof Tracy-Lynn Field (Full Professor of Law, Wits) and Nino Rodda (PhD Candidate, Wits) gave generously of their time to share their knowledge and practical experience and insights with the moot court entrants. The online presentations, including the question-and-answer sessions between these experts and the moot court entrants, were subsequently distilled and codified into this resource.

OVERVIEW OF SECTIONS

The training manual comprises six sections.

In the first, Tracy-Lynn Field and Nino Rodda set the scheme by sketching South Africa's context as a water-scarce and water-stressed country, outlining the relevant constitutional provisions relating to water and statutory water law, and commenting on public interest water litigation to date.

In section 2, Johan Lorenzen elaborates on the principled basis for approaching the courts for relief in a public interest water-related matter and outlines key considerations related to engaging experts and using and arguing expert evidence in court.

Tumai Murombo, in section 3, explains why expert evidence is so important in environmental and water-law-related matters and the challenges that arise from the 'inextricable intertwinement' of law and science. He also sets out some basic rules of procedure governing expert evidence.

In section 4, Jatheen Bhima takes a deep dive into factual disputes, highlighting the relevant principles and legal tests for dealing with factual disputes in action (trial) and application (motion) proceedings.

In section 5, Letlhogonolo Mokgaroane takes a practical turn and advises on how to draft persuasive heads of argument. Letlhogonolo's submissions on effective oral hearings in section 6, round out the training manual.

01 WATER AND WATER LAW IN SOUTH AFRICA – SETTING THE SCENE

Tracy-Lynn Field and Nino Rodda

SOUTH AFRICA IS WATER SCARCE.

The average rainfall across the country is relatively low at 450 mm per year, but this is unevenly distributed. The drier western regions receive as little as 100 mm of rainfall a year, and the wetter eastern parts up to 1500 mm. Already observed and projected climate change observations point to even drier conditions in the west, and to more variability and extreme events in the east. Some of these extreme events have already manifested, with the 'Day Zero' droughts in the Western Cape and Eastern Cape and the devastating floods that ravaged KwaZulu Natal all in recent memory.

To manage this uneven availability, more than two-thirds of South Africa's mean annual rainfall is stored in dams and the country has had to invest in large inter-basin transfers of water between catchments.

South Africa is also a water-stressed country. A standard measure of water stress is to compare how much freshwater is being withdrawn from all economic activities, compared to the amount of freshwater available. In 2019, South Africa withdrew almost 64% of available freshwater, putting it in the league of the most water-stressed countries in the world.

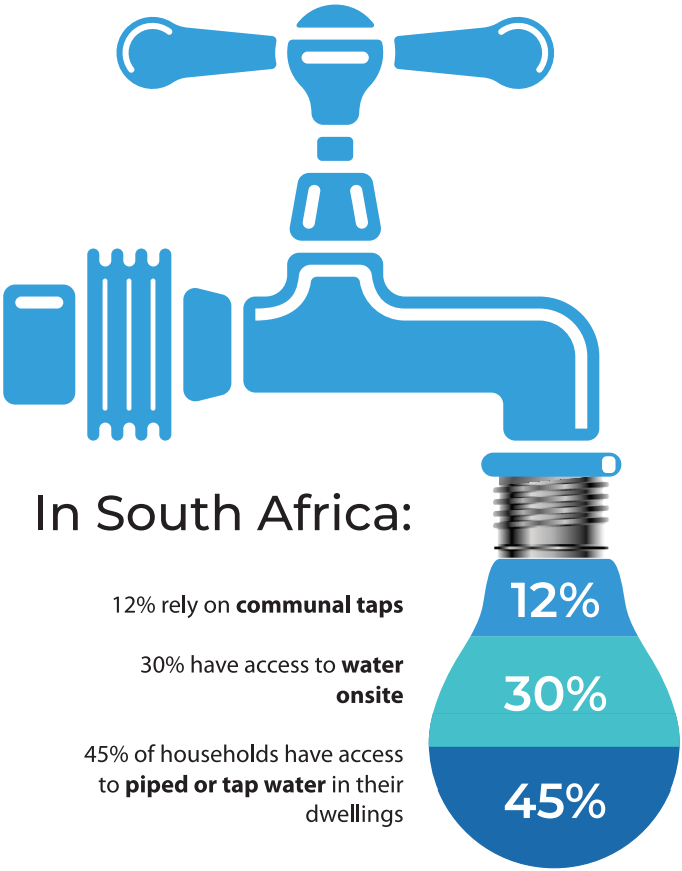
But as water law experts Richard Meissner and Anja du Plessis point out, South Africa's freshwater resources are stressed on all fronts, including 'unsustainable water consumption patterns, increasing water demands, failing water infrastructure, unreliable or non-existent water and sanitation services and continued pollution.' The wildcard of climate change will only exacerbate these existing stressors.

Overcoming colonial-apartheid legacies and securing water for development

Access to and availability of water is critical for development. Water is already unevenly distributed throughout South Africa, but the legacy of colonial apartheid resulted in unequal access to water and enjoyment of water security. At the start of the democratic era, some 12 million people did not have access to safe drinking water, and 21 million did not have adequate sanitation.

The 1996 Constitution entrenches a right of access to water services, and significant progress was made during the first two decades of the 2000s to roll out infrastructure for improved drinking water sources. According to Statistics SA, about 45% of South African households have access to piped or tap water in their dwellings, almost 30% have access

to water onsite, while about 12% rely on communal taps. However, a small percentage of households must still rely on neighbour's taps or unimproved water resources. Moreover, in recent years the functionality of water supply and sanitation infrastructure has arisen as an issue and communities and institutions such as schools and hospitals are struggling with frequent water supply interruptions. Non-revenue water is also a massive issue and a waste of resources.



As regard the management of raw water, the newly democratic South Africa was quick to enact legislation that entrenched the approach of integrated water resource management, which strongly foregrounded the need for transformation of South Africa's water management institutions. However, the vision of decentralised and participatory stakeholder institutions has been only partially realised, at best. The complex arrangements for protecting South Africa's scarce water resources and, in particular, the 'Reserve' meant to serve basic human and ecological needs, are also not functioning optimally.

HUMAN RIGHT TO WATER

The clearest soft law statement on the international right to water is now encapsulated in Resolution 63/292, in which the United Nations General Assembly explicitly recognised the human right to water and sanitation and acknowledged that clean drinking water and sanitation are essential to the realisation of all human rights. The Resolution was the culmination of a long process of norm development, rooted in Article 11 of the International Covenant on Economic and Social Rights – the right to an adequate standing of living – and subsequently elaborated as General Comment 15 on the right of access to water.

An international right to water is also found in treaty law. For instance, Article 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires states to protect the right of rural women to 'enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication'.

As is well known, the Bill of Rights in the South African Constitution, being the cornerstone of democracy, guarantees a right of access to water services in section 27(1)(b), as well as a right to have the environment protected for the benefit of present and future generations in section 24.

Both of these rights are inextricably linked to other human rights. The right to access to water services, for example, is closely related to the right of access to adequate housing. Communities' nutrition and thus right to food is affected when water supply services are interrupted, as is their right to health. The inability to access and use water resources also gravely impacts the rights to dignity and equality. Various procedural rights – chief among them being the right of access to the court and the right to administrative justice – help individuals and communities challenge the unequal power relations that drive unequal access to water.

WATER LAW STATUTORY FRAMEWORK

Within the overarching frame of the South African Constitution and Bill of Rights water is governed by two pieces of primary legislation, namely the National Water Act and the Water Services Act.

The National Water Act (Act no 36 of 1998) (NWA) is focused on the protection, use, development, conservation, management and control of water sources in South Africa. It gives effect to the notion of public trusteeship of the nation's water sources and entrenches rights to the 'Reserve', which is defined as the quantity and quality of water required to satisfy basic human needs and to protect aquatic ecosystems to secure ecologically sustainable development and use of the relevant water source.

The NWA sets out a system of water use authorisations, which range from minimum uses to General Authorisations, and water use licensing. It provides for a comprehensive system for protecting water sources through the setting of resource quality objectives, and includes provisions on water use pricing and South Africa's international water obligations.

The NWA's implementation rests on the development of a decentralised system of water management institutions, which range from catchment management agencies to water user associations and catchment management forums.

The Water Services Act (act no 108 of 1997) (WSA) recognises the rights of access to basic water supply and sanitation and provides a framework to set national standards in this regard. In line with the constitutional allocation of functions, the WSA establishes and defines the roles and responsibilities of water services institutions, which include water service authorities, water service providers, water boards and water service committees.

PUBLIC INTEREST LITIGATION ON WATER

The courts have had to consider the State's obligations in several public interest cases relating to, or affecting, the right of access to water. Chief among them is probably the early Constitutional Court decisions in Government of the Republic of South Africa v Grootboom, in which the court developed interpretive guidelines for what constitutes 'reasonable measures' to ensure the progressive realisation of socio-economic rights. Importantly, the court held that rights must be understood and interpreted through their historical and social context, considering barriers to access to services and the vulnerability of specific groups. The court held that an understanding of 'access' includes related services to enable the enjoyment of that right, removing barriers to access of that right, empowerment measures to enable access to that right, and the adoption of special measures to ensure access for vulnerable or disadvantaged groups.

In what could have been a landmark case for the human right to water, in Mazibuko and others v the City of Johannesburg and others, the Constitutional Court refused to affirm a 'minimum core' to the right of access to water and upheld the City of Johannesburg's Free Basic Water policy and the introduction of prepaid meters in Phiri as a reasonable measure, holding that this did not violate the community's access to water. In other public interest water litigation, the courts have been approached to declare water disconnection a fundamental breach of the right of access to water (residents of Bon Vista Mansions v Southern Metropolitan Local Council), to hold a municipality to account for improper management of waste disposal sites that led to groundwater contamination (Van Staden and another v Mookgopong Local Municipality and others), and to declare a municipality's failure to provide adequate housing unconstitutional (Thubakgale and others v Ekurhuleni Metropolitan Municipality and others).

KEY SUMMARY POINTS

1. South Africa is a water scarce and water stressed country in which water is unevenly distributed
2. While progress ha been made to address the unequal water access legacies of colonial apartheid, the functionality of water supply and water treatment infrastructure remains an issue
3. Climate change will likely exacerbate existing stressors
4. The establishment and functioning of decentralised, transformed and participatory water management institutions has only been partially achieved
5. South Africa's Constitution provides a rights-based framework for governing water, which includes a right to the environment and the right of access to water services
6. A range of other constitutional rights support a rights-based approach to water governance, including the right of access to housing, food and healthcare services, the right to dignity and equality and procedural rights
7. The courts have shied back from affirming a minimum core obligation relating to the right to access to water, but have provided guidelines on the reasonable measures that constitute 'access'.

02 APPROACHING THE COURTS: FUNDAMENTAL PRINCIPLES AND GUIDELINES ON ENGAGING EXPERTS

Johan Lorenzen

When you are dealing with litigation, it is always important to remember the bigger picture. Litigation should be the last resort. We expect Parliament to be passing laws, and the Executive to be implementing them. The ideal situation is that the dispute should be resolved without lawyers.

Bringing in lawyers often makes disputes worse and prevents them from actually being resolved. In the context of public interest litigation where there are limited resources and an array of injustices to address, it is even more important to be looking for solutions outside of courts. And those solutions should be driven by what the client wants. You need to look at what rights are available to the client and help them achieve what they want without going to court. This also makes litigation more fruitful and effective. If you approach courts as the first, rather than the last instance, the bench will approach your case with scepticism. For example, if you are dealing with a municipal issue, you would need to show an attempt to engage with the municipality.

Lawyers shape the creativity of their clients

It is important as a lawyer to be mindful that we are service providers to clients, it is never about us. If lawyers are not driven by their clients' needs they are less likely to reach effective outcomes. There is a fundamental humility that comes with appreciating that clients are in the driving seat. Community lawyers or public interest lawyers are often asked to be creative, but this is not fundamentally right. I**t is the lawyer's job to harness the creativity of his / her /their clients**. They assist in shaping communities' creativity and make it understandable and compelling to courts who may be sitting thousands of kilometres away from where the case has happened. Nevertheless, without this intervening work on the part of lawyers, courts would be in the dark about the dispute.

Author Zadie Smith writes:

"Writing is routinely described as creative. This never struck me as the correct word. Planting tulips is creative. To plant a flower is to participate in some way in the cyclic miracle of creation. Riding its control is taking this large, shapeless bewilderment and pouring it into a mould of our devising."

Consultation and research are key to building trust in communities

To ensure that lawyers are really hearing their clients, consultation is key. The legal team needs to sit down with people in communities and hear diverse perspectives on the conflict. In this, curiosity is the superpower of litigation. If you are fundamentally curious about your clients, their needs and how they structure themselves, and if you're not curious about the nature of the disputes, you are not going to be able to be successful.

After consulting your client, researching widely on the issues they are facing is going to be fundamental to helping your client to get to an outcome. Lawyers need to read articles about the general area they are going to litigate in and beyond what clients are telling you. Reading widely about the issue will also enable lawyers to think critically about how the clients could be wrong or the risks they may face in going to court. Maintaining a critical distance from the beginning is important to build trust with a community over the long term.

It is not the lawyer's job to simply take down and run with a case. It is your job to advise on how to strengthen a case and to properly advise clients on their prospects of success.

Systematically break down the outcome you wish to achieve

Lawyers must take a systematic approach to the outcome they wish to achieve for communities. This will entail thinking carefully about the cause of action, and what the requirements are for the specific steps of each of the causes of action. For example, in the case of an interdict, think through each of the elements of the interdict you need to prove, and what evidence you and your clients will need to present to persuade the court. Think critically about where the disputes are likely to come from and anticipate what the opponents will say. Strengthen your case to address these weaknesses. It is only at this point that you will need to engage with experts to strengthen your case.

Engaging experts

You should only approach experts once you have a very clear idea of your case, and what gaps in your case you are wanting experts to clear up. When you approach an expert, you don't want to be asking general questions such as 'how can you help me with my case?' The expert works for the lawyer, not the other way around. It is the lawyer's job to set out very precisely what questions you want the expert to answer.

But recalling the principle of curiosity as your superpower, be open with your expert about what you know and what you don't know. It is important not to assume you are right so that you can also learn from your experts.

VIGNETTE:
EXAMPLE FROM THE SHELL CASE

What is the nature of the impact when a ship is firing explosions down into the seafloor? In that, we had to go in essentially acknowledging how little we knew and understood, and engage with our experts to better understand what the impact was.

Our client, the Xolobeni and Dwesa-Cwebe communities, were concerned about a few things – the impact that seismic blasting would have on marine life, on their ability to harvest fish, on their significant tourism economy, and they were also concerned about disruption to their ancestors. But for us to provide evidence, to explain to the courts why these concerns were valid, we needed to be setting out to the courts through experts what the actual impacts were. Through going in with curiosity and not assuming we were right, we were able to build a case explaining how life under the ocean – as I had the job of learning through our experts – is significantly shaped by sound.

You need to guide your experts. They are used to presenting to each other and are not used to presenting in court. They need to know what evidence they should give and to spell out what evidence they have in clear and simple language. It's always important to simplify. Experts will often have views about the law and outcome, but it's your job to present the legal arguments with the factual evidence your experts can provide. You must steer your experts to commenting only on the facts, not on the legal outcome.

You should have a conversation with your experts before they prepare their reports. However, it's also important that experts provide their critical perspectives. As a lawyer, you should not be putting words into your expert's mouth. It's also unethical to do that. Experts must be able to assist the courts with their reasoned insights. Even if you're doing a case on application, there's always a possibility that the case may be referred to a trial where your expert needs to give their evidence orally. If what is presented in your court papers is not the considered view of your court expert, then you have a grave risk that when they give their evidence in the trial they may be shaky.

One must also realise that the record of your engagements with experts may also be placed under discovery and that you may face accusations that you wrote the evidence rather than your expert.

Meshing legal argument with expert evidence

Let's use an example. Taking the question of whether the court's decision to grant a water use licence to the mine is principally a legal question. The lawyers need to make an argument about what is the standard to make a lawful decision; what is the legislative framework – under what law are water use licences granted, and in what context would a decision be unlawful or unconstitutional. What you will then be faced with is the need for certain facts about water: The importance of water, water in agriculture, in the community, and the impacts that come with diverting a river. Certain facts will need to be applied to the legal test that you set out in your arguments that you will need expert evidence on.

The starting point is to discern the questions you are going to put to your expert to help them produce their report, which will be quite short. You need to be asking very precise questions in terms of the legal framework. You need to think through each argument, what is the evidence that will help the court come to a decision – whether the award of the water use license was constitutional.

It is perfectly acceptable to have a 'back-and-forth' with your expert. Don't assume that you have to accept the first draft of your report. You are perfectly entitled to ask the expert to elaborate or expand. If you, from your research, believe that the evidence in the report is wrong you're able to put that to your expert and ask them to reconsider their view. If you have a difference that you cannot resolve, you can choose to do two things. Either submit the report as is or find a different expert.

Dealing with your opponent's expert report

In the ordinary course of legal proceedings, both sides will present expert reports. By the time you reach the stage of oral submission, you will have seen the opponent side's report. If the expert for the opposition says something harmful to your case, it is very important that you engage with that directly and explain to the court why either, the expert is wrong; or why even the expert is right, you still should win the case based on the legal test that sits before you.

It is therefore important to go through the opposition's expert report very carefully and to attack the report where it's appropriate. However, only attacking your opponent's expert report is not the most strategic thing to do. You'll gain more credibility for your expertise if you're also acknowledging where the opponent's expert is right, and where they are wrong. Engaging critically with the opposition expert report will earn you more credibility.

Establishing the qualifications of an expert

When you are in court, it is very important to establish the grounds for claiming that your expert is an expert. If you are dealing with water, they may have expertise in water and sanitation or have different expertise in the sub-disciplines of water.

In general, you should look at the following as factors to establish the qualifications of experts: Where someone went to school, where they are employed, publication record of articles and books, how frequently their work is cited by other scholars in their field, credibility with the industry or state, whether they've given evidence in any other court proceedings. inn your expert report, you must set out in broad brushstrokes why your expert is credible and attach their *curriculum vitae* to establish the foregoing grounds.

Experts, demonstration and visual representation

The legal team may wish to demonstrate a specific scientific technology for the courts. However, you should always prepare your expert report as a standalone, i.e. able to persuade without a practical demonstration before the court. In the context of the Constitutional Court, there will be no opportunity for your expert to make a demonstration before the court. As a lawyer, you will need to be able to crisply explain the expert evidence to the court when you do your oral arguments.

South African lawyers can be quite conservative about only using text. Whereas internationally there is a growing movement to include figures, graphs and diagrams in expert reports. If there is something that could be well-illustrated visually, do include this in your expert's report.

Expert contradicting

This is usually a nightmare from a practitioner's perspective. You should therefore work diligently with your expert to ensure that they fully believe what they have in their report. When experts do contradict themselves, you can re-focus their evidence when you have a chance to re-examine them after cross-examination by the opponent.

Engaging with indigenous knowledge in the context of community litigation

To what extent can indigenous knowledge serve as expert knowledge, or how else does such knowledge enter the context of litigation?

As a first example, we can refer to the Xolobeni case where the community clients said that under customary law they own their portions of land, and the community owns grazing land communally. They set the rules of such customary property law out in detail, and what it means for an outsider to come in, and what consents would be required from individuals and the community. In that context we argued that the Australian mining company would have to follow a similar process – this was denied by both the company and the State who maintained that only the consent of the chief was required. We therefore brought in an expert to establish these rules of customary property law.

Farmer Neliswa Mdukisa tends her garden in Xolobeni. (Daniel Steyn/Groundup)

Arguing expert evidence in court

You should not be copying your expert's evidence verbatim into your heads of argument, nor should you simply be reading your heads verbatim in court. You want to be responding to the points raised by your opponents in their heads of argument.

If they have argued first, you want to be attacking what they said in their oral argument. And you want to be highlighting for the court the most important aspect of what your expert said, and why your expert's submissions mean that your client should win.

Always bear in mind what the legal test is. For example, there is a difference between arguing for a prima facie case of harm, versus establishing certainty. Most judges will not have time to read every single paper in a case. It is therefore important to highlight the most salient features of your expert report in your heads of argument.

KEY SUMMARY POINTS

Courts should be a last and not a first resort to resolving water-related disputes

Cases should be systematically broken down into each step of the cause of action

Lawyers must know what they want from experts, but also be open to what experts can teach them

Clients are central and the role of the lawyer is to secure them the outcome they need

Research widely on the area of litigation, beyond what clients are telling you

Experts should be guided to comment on facts, not on the legal outcomes

Consultation is key to ensuring that lawyers hear their clients

Curiosity is the superpower of litigation

It is perfectly acceptable to have a 'back-and-forth' with your expert, but you must never put words into their mouths

03 PROCEDURAL AND SUBSTANTIVE CONSIDERATIONS RELATING TO EXPERT EVIDENCE

Tumai Murombo

Many of the problems relating to the environment, 'nature', or 'natural resources' have a scientific foundation, in the sense that the problems themselves originate from scientific innovation or discovery. Many environmental challenges are self-imposed. We often latch on to discoveries that assist us but that, decades or even centuries down the line, carry significant environmental consequences.

An example would be the discovery of electricity, and the inventions around centralised coal-fired power stations and transmission systems, which are today having hugely detrimental effects on South Africa's scarce water resources. Fossil fuel usage for electricity has also caused climate change and air pollution. All environmental problems have a scientific solution which was developed to support our current consumptive, easy and secure lifestyle.

Science, as such, also becomes the solution to these self-imposed problems. Taking climate change as an example, we are currently in a transition away from fossil fuels to renewable sources of energy, which is currently a burgeoning source of scientific research and technological innovation.

Because of the inextricable intertwinement of science and environmental problems and solutions, it becomes inevitable that when we are making environmental laws, regulations and standards, science plays a critical role in legitimising or giving credence to the substance of those instruments. Science-based regulation is given pre-eminence and preferred over regulation that does not appear to have a rigorous scientific foundation.

Science is also important because when we wish to mitigate risk, reference points informed by scientific research, development and innovation are needed. How we define risk and find measures to mitigate it is inevitably tied to science, because it provides the tools and methods for conceptualising such risks. It follows then, that science is integral to any form of licensing process involving natural resources.

Science is therefore pervasive when it comes to any environmental or natural resource issue.

Challenges that arise from the inextricable intertwinement of law and science in environmental matters

Western science may overshadow epistemologies

Shadowed other ontologies and epistemologies for understanding the world. The science-

based approach to regulation-making, standard-setting compliance and enforcement is becoming a problem particularly where the science is derived from particular epistemologies that are not universally accepted. For example, indigenous knowledge systems may be completely overshadowed by the science- based approach because their practices and customs are not amenable to the processes of testing and validation used in Western science.

At times, therefore, we can place too much reliance on Western ways of understanding the world and nature. As the decisions above show, it is not always necessary to have scientific certainty or proof in the Western sense to make decisions about the environment. Much depends on the issue before the court or tribunal. For example, in the Sustaining the Wild Coast matter the issue centred on consultation, and whether Shell and the government were duly diligent in ascertaining the practices and customs of the community.

Scientific expertise is not always readily available

A second challenge is that scientific expertise is not always readily available. More often than not, the decision-makers in government must rely on reams and reams of scientific reports to make decisions. Ultimately, the decision-maker is an administrator who is guided by the science.

The uncertainty of science and the precautionary principle

A related challenge is uncertainty. While we have made great strides over the past century and a half, there is still a vast realm of science that is poorly or partially understood. In the area of environmental law, whether looking at biodiversity, climate change, or bio-engineering, we are dealing with many unknowns because of the limitations of scientific knowledge. We expect our administrators to make decisions in this area of uncertainty.

Legal standards have evolved to deal with the uncertainty of science, the chief of which is the so-called precautionary principle. This principle is enshrined in the National Environmental Management Act. While these principles can be helpful, in practice a decision must always be made (incidentally, this is also a problem that lies at the core of the 'just transition' away from fossil fuels).

Making decisions in this space of uncertainty, and where there is significant contestation, is a complex task.

Science is at times removed from the socio-economic context in which it must be applied

Sustainability requires balancing scientific insight into, for example, the functioning of an economic system or a natural ecosystem, with social equity and social justice (which include economic imperatives). Science may point one way, while socio-economic priorities might point the other way. It can become quite challenging to make environmental decisions based on the best science that runs counter to socio-economic needs.

Conscious and unconscious bias

The question of funding of research and development is important. Some lobby organisations direct funding to research that will support their interests. There is a bias towards thinking that research is necessarily objective and independent, but this has been proven to not always be the case. Scientists claim to be unbiased, but the fact that they have been hired by a party, who has paid them and been very specific about the purpose of the research they are undertaking, may affect their objectivity – even in an unconscious way. This is a well-known problem in the context of environmental impact assessment.

There are nevertheless rules of law that attempt to counter the possibility of bias or unconscious bias. For example, the rules of environmental impact assessment allow the responsible authority to seek independent scientific expertise if they suspect that any particular environmental report is biased.

Basic rules of procedure governing expert evidence notice of expert evidence

Expert evidence is complex, this is one of the reasons it is labelled as 'expert'. Because of this complexity, and the need to ensure that everyone has an equal opportunity to present their case before the court, it is important as a first rule that notice must be given.

Notice of expert evidence ensures equality of arms among the parties. Therefore, parties who intend to call expert scientific evidence must give notice to the other side of this intention. That notice must include a summary of the evidence that will be led by the expert to be called. This enables all parties to prepare sufficiently and to be able to respond appropriately.

Appropriate contexts for expert evidence

A need for expert evidence must have been identified. Irrelevant expert evidence does not assist the court. It might even lead to confusion. In an ideal world, the experts must be led so that their testimony can be sufficiently tested by the other parties and the experts they lead (i.e. in action proceedings). Expert evidence on affidavits is limited in the sense that it leaves the court and the other side with limited capacity to engage with the submissions being made.

Expert evidence does not substitute the need for the court

Echoing the point made previously regarding the difference between scientific and legal standards of proof, the evidence of scientific experts does not substitute for the role that the court plays. There is therefore no expectation that scientists should answer the legal questions that are before the court. Drawing inferences from the expert evidence is the task of the court, not of the experts themselves.

Expert witnesses are there to assist the courts

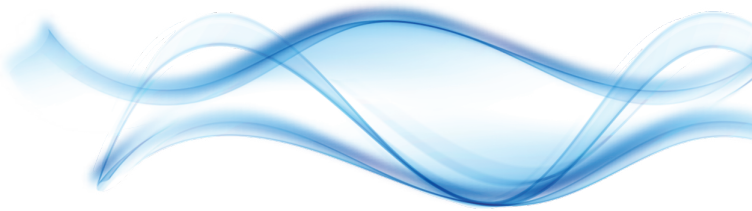
You should not be calling expert evidence to bolster your case. The idea behind expert witnesses is for them to be of assistance to the court. Expert evidence should be independent, and provide the court and all the parties with specialised information on complex matters on which the court or tribunal and the legal practitioners are not able to engage with or fully ventilate. Remove the idea that you are calling experts to bolster your case.

Expert witnesses must be suitably qualified

This does not imply that every expert witness must have a Ph.D. or twenty master's degrees. A minimum academic qualification is required. But courts have tended to place more weight on the experience and the skills that have been accumulated by the expert witness, based on their track record. Academic qualifications on their own are not sufficient proof that the person is an expert.

Expert evidence should be premised on facts that are within the knowledge of the expert

One cannot base expert evidence on hearsay, or on facts that are contested or disputed. Because courts and tribunals tend to rely heavily on expert evidence, the standards of integrity and objectivity are high. The facts must be accurate and there must be a high degree of objectivity.



KEY SUMMARY POINTS

1. Scientific evidence has limitations, particularly where there are other ways of knowing and understanding the world that are not necessarily defensible based on the scientific method
2. Scientific expertise is not always readily available
3. There is a vast realm of science that is poorly or partially understood. Making decisions in this complex environment is difficulty notwithstanding legal tools such as the precautionary principle
4. Making environmental decisions based on the best science that runs counter to socio-economic needs can be challenging
5. Scientific research is not always independent and objectives and conscious and unconscious biases can be evident
6. Parties must give notice of expert evidence to ensure 'equality of arms'
7. Irrelevant expert evidence does not assist the court

04 FACTUAL DISPUTES IN ACTION AND MOTION PROCEEDINGS

Jatheen Bhima

To determine the correct form of proceeding, determining whether there is a factual dispute is the starting point because the nature of the evidence and the nature of the disputes are what determines the form. A factual dispute is a fact that needs to be proven in due course ('he said vs. she said, the sky is blue/the sky is red). If you foresee that a factual dispute will arise, you need to choose an action proceeding, which will commence with the use of summons. If you do not foresee a factual dispute arising, or the law says we have to go on application (e.g. liquidation proceedings), then you need to choose an application proceedings (decided on the papers).

The court assesses the evidence differently in action vs. application proceedings. In action proceedings, they have the benefit of witnessing the person giving evidence. The judge can observe the demeanour and candour of the witnesses and how they carry themselves when answering questions. In motion proceedings the evidence is presented on paper – affidavits or even photographs, but no oral evidence. If there is an expert opinion, it forms part of the affidavit, whereas in a trial the expert will be sitting in the box. The presiding judge will have an opportunity to witness how the expert answers the question and conveys his or her expertise.

Relationship between a cause of action, facts and dispute of fact

A cause of action is the legal basis on which you approach a court. For example, if somebody crashes into your car, then you will approach the court with an action in delict. Delict is the cause of action. A cause of action is what entitles you to your relief.

In public interest water litigation, the cause of action is likely to lie in administrative law (review of a government decision in terms of the Promotion of Administrative Justice Act 3 of 2000), constitutional law (violation of a human right relying directly on the constitution, or alleging that water law itself is unconstitutional), or statutory water law (non-compliance with the provisions of the Water Act or Water Services Act).

The relief that these causes of action can provide ranges from setting aside a government decision or requiring a government decision-maker to reconsider his or her decision, a declaration that an act or conduct is unconstitutional, an interdict or mandamus relating to water directly (e.g. ordering a farmer to demolish an illegally constructed dam), or ordering the payment of compensation.

To persuade the court, you will need to present facts on all the elements of a delict:

The act, causation, wrongfulness, intention, and damage. Some of the facts that you will present to the court to convince them to award you compensation for the harm, include the car you were driving, the car the other person was driving, and evidence about why the cars crashed, for example, that the other person skipped a red traffic light.

A factual dispute arises when there are conflicting claims about the facts. For example, Party A says that Party B skipped a red traffic light, whereas Party B alleges that the traffic light was green.

Deciding disputes of fact in action (trial) proceedings

In trial proceedings, after all the evidence has been led, the judge will apply the test set out in Stellenbosch Farmers' Winery v Martell (427/01) [2002] ZASCA 98 (6 September 2002) to conclude a factual dispute. The test requires the judge to focus on three key themes: (a) the credibility of the various factual witnesses; (b) how reliable they are; and (c) the probabilities.

In Stellenbosch Farmers' Winery, the court explained what courts should look for when assessing these three key themes:

Credibility: Assessing the credibility comes down to the court's impression of whether the witness is being truthful or evasive, which entails focusing on six things: (i) The witnesses' candour and demeanour (how they carry themselves); (ii) any possibility of bias (a friend, spouse or business partner), (iii) any internal contradictions in the evidence; (iv) external contradictions with what was pleaded on their behalf, or with fact, or with their extra curial statements or actions); (v) the probability or improbability of their version of the facts,), and (v) the calibre and cogency of their performance compared to other witnesses.

Reliability: The court will consider the opportunities the witness had to experience or observe the event in question; and the quality integrity and independence of his recall thereof. Was the witness there? Is this expert qualified? Is the view that they are about to express reliable?

Probabilities: We need to analyse the probability or improbability of each party's version on each of the disputed issues. Probability requires us to think about how the facts fit together – like a knitted sweater. And if they don't fit, what are the parts that are 'jutting out', and what do we do with that?

Deciding disputes of facts in motion proceedings

Once we understand how disputes of fact are dealt with in action proceedings, it is easier to understand what we need to deal with in motion proceedings. If there is no witness before the judge, all of the considerations in Stellenbosch Farmers' Winery go out the window.

The courts have therefore developed a methodology to resolve the disputes that centres on the common cause facts.

The first step is to ask whether the relief being sought is interim or final. If the parties have to come back at a later stage, the relief will be interim. If the relief will be resolved at the proceeding, then the relief sought will be final. If the relief sought is interim, you must apply the formula in Webster v Mitchell 1948 (1) SA 1186 (W) at 1187 – 9. Take the common cause facts, and then look at the facts alleged by the applicant, and then decide whether those facts justify the interim relief; i.e. you give the applicant the benefit of the doubt. Common cause facts are agreed by both parties and are not in dispute.

Formula: Common cause facts + facts alleged by the applicant: If these facts justify the interim relief, then a court will grant an order.

However, if the relief sought is final, then the fairly straightforward test in Plascon Evans applies. Because it is a final relief, the benefit of the doubt shifts more to the respondent. According to Plascon Evans, a court will grant relief if:
Common cause facts + Respondent's undeniable facts = grounds for an order

UNLESS: the respondent's version is so far-fetched as to be untenable (thus the quality of the respondent's version is important).

When you are preparing for court it is a good idea to prepare a table in which you systematically note the arguments alleged by the applicant and the respondent. This will enable you to pinpoint the common cause facts in the case.

In the case of NDPP v Zuma 2009 (4) BCLR 393 (SCA) at para 26 the Supreme Court of Appeal provided further clarity on the Plascon Evans rule. In this case, the court held:
It is well-established under the Plascon Evans rule, that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the [respondent], justify such order.

It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.

The second paragraph explains exactly what we are looking for when we are assessing the respondent's version. If any of these words describe what the respondent is putting forward, then their version is likely to be rejected by the court.

When is there a dispute of fact in motion proceedings?

An applicant will set out their case in the pleadings. In response, the respondent can do one of four things:

- Admit a fact
- Confess and avoid a fact (adding further information)
- Deny a fact
- A non-admission (neither admit nor deny but no knowledge to do either)

Denials help to identify the disputes of fact

This is not a free ticket to just deny everything. In the case of Wightman t/a JA Construction v Headfour (Pty) Ltd & another 2008 (3) SA 371 (SCA), the Supreme Court of Appeal laid down the following guidelines for what constitutes a good denial.

- A bald denial (no further information) will usually not suffice
- Is there a bald denial where the respondent ought to have the information to respond? (This is a key consideration when litigating against the State) If they ought to know, then their denial will be a bad one.

To ensure that the dispute does not go back and forth on disputes of fact, the motion proceeding procedure (usually) only allows for three filings of affidavits (the founding affidavit, answering affidavit, and replying affidavit).

What do we do with disputes of fact?

Once you have determined what is disputed and what is not disputed, you need to deal with the facts where there has been a non-admission, or which have simply gone unaddressed. You can address disputes of fact by following these steps:

- Step 1: Apply High Court Rule 22, which states that anything not explicitly denied is deemed to be an admission (deemed admission).
- Step 2: Determine if the dispute is properly raised (Wightman)
- Step 3: Determine if the respondent's version is bald or uncreditworthy; raises fictitious disputes of fact; is palpably implausible, far-fetched or so clearly untenable that the court

is justified in rejecting them merely on the papers

- Step 4: Then you demonstrate, explain, refer to facts pleaded and conclude. The conclusion in this context would be that the factual dispute raised by the respondent fails to be rejected.

How to assess disputes in expert opinions

When doing any assessment of expert evidence, whether in action or motion proceedings, we need to see whether the opinion expressed by the expert is based on sound, logical reasoning. In other words, are the conclusions reached by the expert defensible?

The Supreme Court of Appeal had laid down guidelines for the assessment of expert evidence in the case of Michael & another v Linksfield Park Clinic (Pty) Ltd & another 2001 (3) SA 1188 (SCA), which dealt with evidence about sound medical practice. The essence of the court's holding is that it will not accept an expert opinion uncritically. Although a court will very seldom conclude that views genuinely held by a competent expert are unreasonable, the court will still enquire into whether the opinion expressed by the expert has a logical basis.

The court held as follows:

The court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice.

The court must be satisfied that such opinion has a logical basis, in other words, that the expert has considered comparative risks and benefits and has reached "a defensible conclusion.

The assessment of medical risks and benefits is a matter of clinical judgment that the court would not normally be able to make without expert evidence and it would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support. Only where expert opinion cannot be logically supported at all will it fail to provide "the benchmark by reference to which the defendant's conduct falls to be assessed".

The 'logical basis' test provides a basis to attack the respondent's expert evidence. The tactic would be to challenge the assumptions underlying the expert evidence.

Difference between scientific and judicial measures of proof

It is important to realise that scientific and legal knowledge are based on different assumptions and 'measures of proof'. In the Linksfield Park Clinic case highlighted above, the court highlighted the important distinction between scientific and judicial measures of proof.

The court pointed out that expert scientific witnesses tend to assess likelihood in terms of scientific certainty. For example, the judgments contained in the Intergovernmental Panel on Climate Change's periodic assessments of the state of climate change, are subject to stringent and often highly controversial debates on what counts as a 'degree of certainty' or a 'level of confidence' in a finding about climate change. Take, for example, this paragraph from the summary for policymakers of the IPCC's fifth assessment report:

The degree of certainty in key findings in this assessment is based on the author teams' evaluations of underlying scientific understanding and is expressed as a qualitative level of confidence (from very low to very high) and, when possible, probabilistically with a quantified likelihood (from exceptionally unlikely to virtually certain). Confidence in the validity of a finding is based on the type, amount, quality, and consistency of evidence (e.g., data, mechanistic understanding, theory, models, expert judgment) and the degree of agreement. Probabilistic estimates of quantified measures of uncertainty in a finding are based on statistical analysis of observations or model results, or both, and expert judgment. Where appropriate, findings are also formulated as statements of fact without using uncertainty qualifiers.

In contrast with this very rigorous scientific measure of proof, the judicial measure of proof is both more practical and holistic and is based on the key standards of a 'balance of probabilities' in civil cases, and proof 'beyond a reasonable doubt' in criminal cases. In the Linksfield Park Clinic case, the Supreme Court of Appeal cited a decision of the House of Lords in the Scottish case of Dingley v The Chief Constable, Strathclyde Police, 200 SC (HL) 77, where the court issued the following warning (at 89D – E):

[O]ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved – instead of assessing, as a judge must do, where the balance of probabilities lies on a review of the whole of the evidence.

A practical example of dealing with expert evidence in motion proceedings: Sustaining the Wild Coast NPC & others v Minister of Mineral Resources & Energy & others (3491/2021) [2022] ZAECMKHC 55 (1 September 2022)

In the Sustaining the Wild Coast case, the full bench did an exceptional job of providing an analysis of competing expert opinions in motion proceedings. It is advisable to study this judgment to see how the Judge President expressed his opinion.

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KEY SUMMARY POINTS

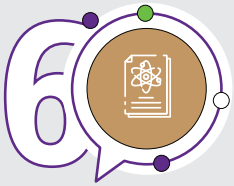
Scientific evidence is important and necessary to make informed decisions, especially around the environment

Scientific evidence also has limitations, particularly where there are other ways of knowing and understanding the world that are not necessarily defensible based on the scientific method

Scientific expertise is now always readily available

There is still a vast realm of science that is poorly or partially understood, and making decisions in this complex environment is difficult notwithstanding legal tols such as the precautionary principle

Making environmental decisions based on the best science that runs counter to socioeconomic needs can be challenging



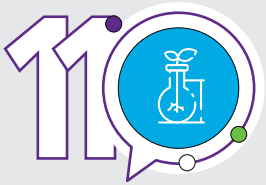
Scientific research is not always independent and objective and conscious and unconscious biases can be evident

Parties must given notice of expert evidence to ensure 'equality of arms'

Irrelevant expert evidence does not assist the court

Expert evidence cannot substitute for the court's role, which must still critically engage with the evidence in line with legal standards

Academic qualifications are not sufficient to prove the status of an expert



Expert evidence must be premised on facts within the knowledge of the expert

05 DRAFTING PERSUASIVE HEADS OF ARGUMENT

Jatheen Bhima

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Heads of arguments are a synthesized version of what you wish to argue in court. They are not meant to be a dissertation or a repetition of what has been submitted on the papers. Essentially, they are an outline for the court to follow your argument in court.

The purpose of heads of argument is to identify the key points that shape your reasoning.

Heads of argument need to be clear, succinct and without unnecessary elaboration. The case has already been put to the court on the papers.

Heeding the rules of court and practice directives

When drafting heads of argument, it is important to follow the Rules of Court and the Practice Directive of the particular court in which you are appearing. Hence, if you are appearing before the Constitutional Court, you need to look at the Constitutional Court Rules.

Take careful note of any formatting requirements stipulated by the court. For example, some courts will indicate they want the heads of argument to be presented in Times New Roman, font 12, with a double line spacing.

Also be very consistent and careful in how you name the parties, for example, referring to 'appellant' and 'respondent' consistently. It is not necessary to repeat the names of the parties every time (unless this is essential to the 'story' you want to tell).

Shorter heads of argument are better than longer heads, although much will depend on the complexity of your matter.

Structuring your heads of argument – Crafting your arguments for the judgement you want to have

Your job is to make the case easier for the court to understand. For example, being clear about what the case is principally about.

Although there is no prescribed structure for heads of argument, like any argument, heads must have a beginning, middle and end. These different parts should be set out in consecutively-numbered paragraphs. Each paragraph should contain only a single idea, but paragraphs should also not be too short or too long.

Headings are useful, as they provide signposts to or pinpoint what the section is dealing with.

The beginning of the heads of argument must deal with a definition of the issue, for example. 'This matter concerns … and the crisp issue is.' You can specifically list the issues the court needs to deal with.

The next paragraph must deal with the court's jurisdiction, e.g. s 17(1) of the Supreme Court's Act. If requesting direct access, you will point out the relevant provisions of the Constitution that empower the Court to deal with the matter directly. This is also the place in the heads to highlight any challenge to the court's jurisdiction. If there is no dispute about the court's jurisdiction, you can simply note that the court having jurisdiction is a 'common cause'.

If there is an issue relating to locus standi, then it will also be important to address it upfront.

After outlining the court's jurisdiction, you will move to the facts. You should deal with the material facts in chronological order. The emphasis is on material. It is not necessary to list dates, for example, if they are of no relevance or consequence. Cut unnecessary detail. You may list the material facts in a section headed 'Background'.

After setting out the material facts, you will then need to deal with each legal question in sequence, with their headings. In these sections, you will highlight authorities that support your position, and how the material facts of the case relate to the legal question. Each sub-section dealing with a legal question must end with the conclusion you would like the court to draw.

Thereafter, you should have a heading for 'just and equitable relief' under which you will argue for what relief you think is appropriate in the circumstances.

After setting out just and equitable relief, you will then conclude which summarises the key decisions you would like the court to make.

Dealing with the court a quo

In appeal matters, counsel will often try to reargue the judgment given in the court of first instance or the court a quo. This is not advisable. It is much better to point out the key bases about which you are alleging that the court a quo erred. You need to highlight the findings of the court quo and why you agree or disagree with it.

KEY SUMMARY POINTS

1. Heads of argument outline your reasoning before the courts and need to be clear, succinct and without unnecessary elaboration
2. It is important to heed all relevant rules of court and practice directives
3. There is no prescribed structure or template for heads of argument, but like any argument, heads must have a beginning, middle and end
4. Avoid rearguing the matter decided in a court a quo in an appeal court, rather highlight the findings of the court a quo and why you agree or disagree

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