AFFIDAVITS, ARGUMENT AND PRIVILEGE AFTER *VENMOP*

by **GAVIN ROME SC**

For about a decade, I have had an uneasy relationship with a familiar paragraph in draft affidavits I am asked to settle. The introductory section of a draft often contains some version of this formula: "To the extent that this affidavit contains legal allegations and submissions, these are based on the advice of my legal representatives", or "the Applicant's/Respondent's legal representatives", "which advice I believe to be correct". My concern first arose from a quick reading of *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another*[1] and its admonitions that legal submissions in affidavits "have neither evidential content nor probative value" and, as argumentative matter, "have no place in affidavits", and that the invocation of the familiar formula may well result in the inadvertent waiver of legal professional privilege.

Prompted by those admonitions, I have at times simply deleted the formula. That was, however, not always satisfactory. There are instances where an affidavit cannot sensibly avoid setting out key legal provisions, as in applications for leave to appeal, constitutional matters and similar proceedings. At other times, I retained the familiar formula, but in reduced form. After one too many undecided encounters with these drafts, I have settled on a formulation which may, in an appropriate case, address those instances where an affidavit cannot avoid dealing with issues of law. This article is the result.

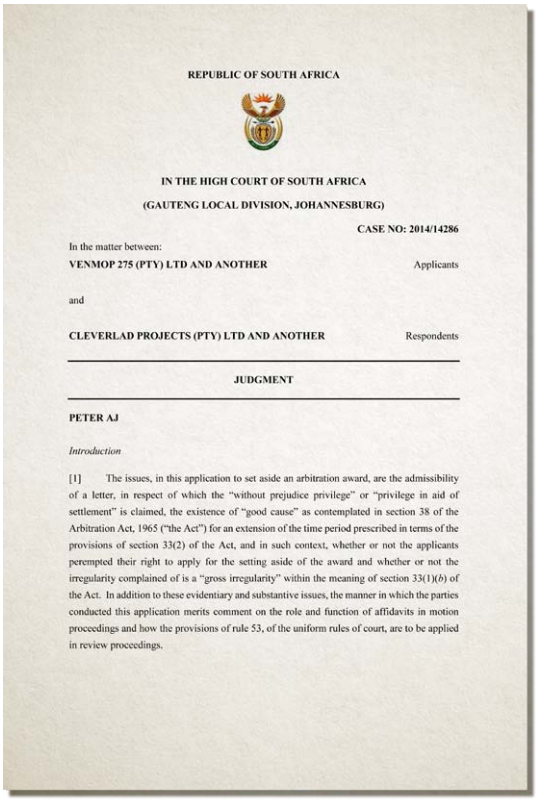
This is not an esoteric concern. It will be familiar to most practitioners who spend any time in motion court. Most motion court practitioners have, at some stage, encountered an affidavit which reads less like evidence and more like an over-extended set of heads of argument. The deponent says a little about the facts, the lawyers say a great deal about the law, and the affidavit becomes the vehicle for both.

That practice received pointed judicial criticism in *Venmop*.[2] The judgment identifies a real problem in motion proceedings: the migration of legal argument into affidavits, and the invocation of legal advice to justify its presence there. At the same time, some of its language may be read as going further than necessary. The challenge is to preserve the judgment's warning about forensic discipline while recognising the awkward realities of application procedure.

THE OFFENDING FORMULA

The drafting formula, criticised in *Venmop*, is familiar. An affidavit begins with a paragraph to the effect that, where the deponent makes legal submissions, he or she does so on the strength of legal advice obtained from the party's legal representatives, which advice is believed to be correct.

That may appear harmless. It is often intended to achieve no more than candour: the deponent is not a lawyer; the legal propositions are not personally generated by the deponent; and the litigant's legal representatives have advised on the legal consequences of the facts. The difficulty arises when the formula is used to license pages of argument in an affidavit, while preserving the forensic advantage of legal advice without accepting the consequences of disclosure.



REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2014/14286

In the matter between:

VENMOP 275 (PTY) LTD AND ANOTHER — Applicants

and

CLEVERLAD PROJECTS (PTY) LTD AND ANOTHER — Respondents

JUDGMENT

PETER AJ

Introduction

[1] The issues, in this application to set aside an arbitration award, are the admissibility of a letter, in respect of which the "without prejudice privilege" or "privilege in aid of settlement" is claimed, the existence of "good cause" as contemplated in section 38 of the Arbitration Act, 1965 ("the Act") for an extension of the time period prescribed in terms of the provisions of section 33(2) of the Act, and in such context, whether or not the applicants perempted their right to apply for the setting aside of the award and whether or not the irregularity complained of is a "gross irregularity" within the meaning of section 33(1)(*b*) of the Act. In addition to these evidentiary and substantive issues, the manner in which the parties conducted this application merits comment on the role and function of affidavits in motion proceedings and how the provisions of rule 53, of the uniform rules of court, are to be applied in review proceedings.

In *Venmop* Peter AJ put the criticism in firm terms:

> "A statement appeared in the introductory paragraphs of the answering affidavit made by Cleverlad's director, that where he made legal submissions, he did so on the strength of legal advice having been obtained by him on behalf of Cleverlad from its legal representatives in the application. A statement of such nature in motion proceedings has become increasingly popular in practice in the last few years. Its apparent purpose is to disclaim responsibility of the deponent for later argumentative matter which serves to inflate the papers and of which the deponent has no comprehension. However impressive this might be to a lay client in justifying a legal representative's fee for voluminous affidavits, I find this practice disturbing in at least four respects. First, by their very nature these submissions have neither evidential content nor probative value; as argumentative matter they have no place in affidavits. It is not for nothing that Rule 6(1) of the Uniform Rules of Court provides for an application to be supported by an affidavit 'as to the facts'. Secondly, the argumentative submissions that follow are expressly admitted hearsay and, as such, inadmissible. Thirdly, the submissions amount to legal opinions on matters upon which the court is required to decide. Lastly, there is the aspect of professional legal privilege. … Where parties in motion proceedings disclose the substance of otherwise privileged legal advice from their legal representatives, in the form of submissions to advance their case, it is difficult to comprehend that fairness and consistency would not permit them to 'cherry pick' those parts of the advice that they received without being required to disclose the whole of the advice."

THE POINT IS SOUND, BUT CONTEXT MATTERS

The practical point in *Venmop* is sound. Affidavits are not heads of argument. Nor should they be used to smuggle legal submissions into evidence. Rule 6(1) requires an application to be supported by an affidavit "as to the facts". That is not an empty phrase.

But the point should be applied with some sensitivity to practice. The suggestion in *Venmop* that the formula may impress a lay client or justify a fee for voluminous affidavits captures a real frustration with inflated papers. However it may not describe the usual reason why the formula appears. More often the cause is defensive drafting: practitioners fear waiver, anticipate strike-out points, try to plead and prove simultaneously, and know that, in motion proceedings, the affidavit is the case.

That is the practical reality which the *Venmop* judgment perhaps does not fully accommodate. Application papers must plead the cause of action or defence, place admissible evidence before the court, anticipate disputes of fact, and preserve points for argument. It is unsurprising that the boundary between fact, legal characterisation and argument is sometimes crossed. The remedy is discipline and restraint, not a rigid rule treating any reference to advice as suspect.

The admonitory dicta in *Venmop* should therefore be read with care. They should not be elevated into a broad proposition that any affidavit reference to legal advice is improper, or that any such reference automatically waives privilege. The mischief is more specific: the use of legal advice as a drafting device by which a deponent purportedly adopts argumentative legal material in the affidavit, while the party remains able to say that the advice itself is privileged and need not be disclosed.

There are legitimate reasons why an affidavit may refer to legal advice. A litigant may need to explain why a procedural step was taken, why an application was launched when it was, why condonation is sought, why a point was not taken earlier, or why a particular understanding of the legal position informed conduct. None of that necessarily requires disclosure of the advice. Nor does the mere statement that advice was obtained necessarily waive privilege.

> "AFFIDAVITS ARE NOT HEADS OF ARGUMENT. NOR SHOULD THEY BE USED TO SMUGGLE LEGAL SUBMISSIONS INTO EVIDENCE. RULE 6(1) REQUIRES AN APPLICATION TO BE SUPPORTED BY AN AFFIDAVIT 'AS TO THE FACTS'."

AFFIDAVITS ARE EVIDENCE, NOT ARGUMENT

The principle that affidavits in motion proceedings perform a dual function is well established. They serve both as pleadings and as evidence. In *Choice Holdings Ltd v Yabeng Investment Holding Co Ltd*, (quoted in *Venmop)*, the point was put in the familiar language of *facta probanda* and *facta probantia*: the affidavits must delineate the essential averments and supply the evidence to support them.[3]

The courts have repeatedly warned against prolix and argumentative affidavits. In *Reynolds NO v Mecklenberg (Pty) Ltd,*[4] Stegmann J deprecated the practice of burying factual disputes beneath argumentative verbiage. That criticism was endorsed in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*.[5] The Supreme Court of Appeal has since repeated the warning. In *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others,*[6] the court emphasised that affidavits in application proceedings must contain (and be confined to) the evidence upon which the applicant relies.

The same theme appears in the appellate courts' impatience with inflated papers. In *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd*, Schutz JA observed that endless repetition irritates rather than persuades.[7] In *Van Zyl and Others v Government of Republic of South Africa and Others*, the SCA warned that egregiously prolix affidavits may justify being struck out **as a whole** or attract adverse costs consequence.[8]

These cases do not require affidavits to be sterile. They require discipline. The facts must be stated. The argument should, ordinarily, be left to counsel's written and oral submissions.

Vlada Karpovich

THE PRIVILEGE PROBLEM

The most interesting aspects of *Venmop* concern privilege. Legal professional privilege protects confidential communications between lawyer and client made for the purpose of obtaining or giving legal advice. The Constitutional Court recognised the importance of that protection in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others*.[9]

Privilege belongs to the client and may be waived. Waiver may be express, but it may also be imputed. The question is not always whether the client subjectively intended to abandon privilege. The authorities recognise that fairness and consistency may require disclosure where a party has disclosed part of a privileged communication, or its substance, to obtain a forensic advantage. That principle is reflected in *Kommissaris van Binnelandse Inkomste v Van der Heever*[10] and in the SCA's discussion of litigation privilege in *Competition Commission v Arcelormittal South Africa Ltd and Others*.[11]

That is the real danger in the standard formula. If the affidavit merely says that advice was obtained, privilege will not ordinarily be lost. But if it goes further and deploys the substance, gist, reasoning, or conclusion of the advice to persuade the court, a claim to privilege may become difficult to maintain. A party cannot fairly use selected privileged advice as a sword while insisting that the remainder remains behind the shield.

DOMESTIC LAW IS FOR THE COURT

There is a further reason for caution. Evidence of domestic law is ordinarily unnecessary and inadmissible. Courts decide South African law; witnesses do not prove it. In *Venmop*,[12] Peter AJ referred to *South Atlantic Islands Development Corporation Ltd v Buchan*[13] and to *Prophet v National Director of Public Prosecutions*,[14] where the Constitutional Court dealt with the limited role of opinion evidence on legal questions.

This does not mean that an affidavit may never contain legal characterisation. It often must. A founding affidavit may need to say that the applicant seeks review relief, that the decision was procedurally unfair, that a contractual term was breached, or that a statutory precondition was absent. Those are not, without more, expert legal opinions. They are part of the case pleaded in motion proceedings.

The difficulty arises when the affidavit ceases to identify the legal issue and argues it at length. The deponent then becomes a mouthpiece for legal submissions. That is poor practice, and *Venmop* was right to criticise it, even if some of the judgment's language may be thought stronger than the point required.

A SAFER FORMULATION

A safer introductory clause should avoid saying that the legal *submissions* in the affidavit are the legal representatives' advice. It should also avoid suggesting that the party relies on that advice as evidence. A formulation along the following lines is preferable:

> "To the extent that this affidavit makes reference to matters of law, this is based on my understanding of the legal position, which understanding I have obtained from the advice of my legal representatives. I believe such advice to be correct. I do not rely on that advice as evidence of any fact or legal proposition, and I hereby expressly maintain legal professional privilege over all privileged communications with my legal representatives."

Where the deponent acts for a juristic person or litigating party, the clause can be adapted:

> "To the extent that this affidavit makes reference to matters of law, this is based on my understanding of the legal position, which understanding I have obtained from the advice of the Applicant's/Respondent's legal representatives. I believe such advice to be correct. I do not rely on that advice as evidence of any fact or legal proposition, and the Applicant/Respondent hereby expressly maintains legal professional privilege over all privileged communications with its legal representatives."

No form of words is a magic spell. If the affidavit discloses the substance of privileged advice and uses it to obtain an advantage, a reservation of privilege will not necessarily save it. But careful drafting reduces the risk and, more importantly, encourages the drafter to keep the affidavit within its proper evidential function.

CONCLUSION

Venmop should not be read as creating a rigid prohibition against any mention of legal advice in affidavits. It is better understood as a warning against a particular forensic habit: padding affidavits with argument and then attributing that argument to privileged legal advice.

The discipline required is simple. Put the facts in the affidavit. Identify the legal issues only so far as necessary to define the case. Keep the argument for heads. If advice must be mentioned, refer to the fact of advice, not its content. And if privilege is to be preserved, do not deploy the advice as part of the evidence.

It may also be that the full implications of Peter AJ's observations in *Venmop* have not yet been worked out in subsequent case law. The warning has been sounded clearly enough. But the precise limits of permissible legal averment in affidavits, and the point at which such averment risks implied waiver of privilege, still remain likely to be developed incrementally in future cases. A

Notes

1 *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another* 2016 (1) SA 78 (GJ). The paragraph 16.
2 Ibid at paras 7-16.
3 *Choice Holdings Ltd v Yabeng Investment Holding Co Ltd* 2001 (3) SA 1350 (W) para 34.
4 *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78G–80F.
5 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 17.
6 *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) para 43.
7 *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) para 80.
8 *Van Zyl and Others v Government of Republic of South Africa and Others* 2008 (3) SA 294 (SCA) paras 44–46.
9 *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* 2009 (1) SA 1 (CC) paras 183–185.
10 *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at 1061B–C.
11 *Competition Commission v Arcelormittal South Africa Ltd and Others* 2013 (5) SA 538 (SCA) paras 33–34 and 37.
12 *Venmop* supra, at para 16.
13 *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C) at 237C-F.
14 *Competition Commission v Arcelormittal South Africa Ltd and Others* supra 33–34 and 37.