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THE REQUIREMENT OF BEING A "FIT AND PROPER" PERSON FOR THE LEGAL PROFESSION

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Ethics does not in this age, form an essential part of the sword or shield of the majority of legal practices. Ethics is more likely to be slashed by the slick lawyer and trodden upon to get to the loot.¹

1 Introduction

Since the beginning of time, the law was considered a noble profession and only certain people were allowed to practise.² Strict rules for admission to the legal profession developed over time, but this article will instead focus on the current legal requirements in South Africa to be admitted to or removed from the profession. A very important requirement for admission as an attorney or advocate is to be a "fit and proper" person. Lawyers can also be struck from the rolls of advocates or attorneys if they cease to be "fit and proper" persons. The requirement for being considered a "fit and proper" person is neither defined nor described in legislation, despite the fact that it is a stringent requirement. Given the lack of definition, it has to be interpreted in a subjective manner and applied by seniors in the profession and ultimately by the courts.

How the test was applied historically will be discussed, as will the developments over time. The question will be asked if the labelling of a person as being "fit and proper" is not a false warranty given to the public that such a person will act ethically. It will then be indicated that professionals who have been described as "fit and proper" do not always act in such manner. Arising from this observation it will be asked whether lawyers should still be seen as professionals or if they have become ordinary business people. Arguments will focus mainly on a generalisation of unethical behaviour amongst the "bad apples" in the basket, but mention should be made of

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¹ Govender, chairperson of the Ethics Committee of the Law Society of South Africa in a report of the Ethics Committee, in the Law Society of South Africa's Annual Report 2010/11 31.

² For a discussion of the origin of the professions of advocate and attorney as well as the early requirements for admission to those professions see Wildenboer L "The origins of the division of the legal profession in South Africa: A brief overview" 2010 *Fundamina* 16 (2) 199-225.

the fact that there are attorneys, young and old, with integrity, who serve their clients with dignity. In conclusion it will be argued that there is still a place for a type of initial character screening of lawyers, but that continuous moral development is also imperative.

2 Legal requirements for admission or removal as a lawyer

2.1 Admission

Admission to the profession of advocate is regulated by the Admission of Advocates Act 74 of 1964 (as amended). The Act prescribes in section 3 that an applicant should be older than 21, be a "fit and proper" person and have the right academic qualifications. In South Africa this means a Baccalaureus Legum (LLB) degree or an international qualification similar to an LLB. The applicant should also be a South African citizen or a permanent resident and his or her name may not be on the roll of attorneys. In the final instance it is up to the court to decide if a person is "fit and proper" to be allowed into the profession.

Section 15 of the Attorneys Act 53 of 1979 prescribes similar general requirements for an applicant who wants to become an attorney. The court may enrol an applicant to the attorneys' profession only if "such a person, in the discretion of the court, is a fit and proper person to be so admitted and enrolled".

2.2 Removal

Section 7(1)(d) of the Admission of Advocates Act authorises a court to remove an advocate from the roll of advocates, if the court "is satisfied that he is not a fit and proper person to continue to practise as an advocate".

Section 22(1)(d) of the Attorneys Act states that a practising attorney may be struck off the roll if that attorney "in the discretion of the court, is not a fit and proper person to continue to practise as an attorney". It was held in *Jasat v Natal Law Society*³ that

³ 2000 (2) All SA 310 (SCA) par 10.

section 22(1)(d) contemplates a three-stage inquiry: First, the court must decide if the alleged offending conduct has been established on a preponderance of probabilities. This is a factual inquiry. Secondly, it must consider if the person concerned is in the discretion of the court not a "fit and proper" person to continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney. This is a value judgement. Thirdly, the court must inquire whether in all of the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice. This is also a matter for the discretion of the court. In deciding on whichever course to follow, the court is not first and foremost imposing a penalty. Rather, the main consideration is the protection of the public.⁴

The Act also governs the establishment of Law Societies.⁵ The Law Societies lay down binding rules for the members of the legal profession on their registers. The different Law Societies are also responsible for various rules which are intended to protect and promote the legal profession, to protect the individual legal practitioner, and to protect the interests of the client in the context of the relationship between the lawyer and the client.

If either an advocate or an attorney who has been removed from the roll wants to be readmitted, he or she will once again have to prove that he or she is a "fit and proper" person.⁶ Although it is not a condition precedent to readmitting a person to

⁴ See *Malan and another v The Law Society, Northern Provinces* 2009 (1) All SA 133 (SCA) par [7].

⁵ The different Law Societies are: the Law Society of the Northern Provinces, the Law Society of the Cape of Good Hope, the Law Society of KwaZulu-Natal, the Law Society of the Free State and the Law Society of South Africa.

⁶ See *Swartzberg v Law Society, Northern Provinces* 2008 All SA 438 (SCA) "the appellant had failed to discharge the onus of convincing the court that he was a "fit and proper" person to be readmitted as an attorney". At [17] Ackermann J is quoted when he said:

Section 15(3) deals specifically with readmissions. A discretion in deciding whether an applicant is a 'fit and proper' person to be so readmitted and re-enrolled is now expressly conferred on the Court. It is also significant that, whereas s 15(1) provides that a Court 'shall' admit and enrol a person as an attorney if the preconditions of subsec (a) and (b) are fulfilled, ss (3) provides that a Court 'may' re-admit and re-enrol any person who was previously admitted and enrolled as an attorney and had been removed from or struck off the roll, as an attorney if the preconditions of subsec (a) and (b) are fulfilled. The fact that the word 'may' is used in s 15(3) whereas 'shall' is used in subsec (1) is significant. It shows that the Legislature wanted to differentiate between the Court's functions under ss 15(1) and 15(3) and wished to confer a further discretion on the Court in regard to re-admissions under s 15(3). It seems that, even where the Court is satisfied that s 15(3)(b) has been complied with

practice that the Law Society (or Bar of advocates) should first be satisfied as to his or her fitness, considerable weight must be given to the attitude of the Law Society (or Bar Council).⁷

3 The requirement of being "fit and proper"

It seems that it is not sufficient to have a law degree or a thorough knowledge of the law to become a legal practitioner. Applicants will be admitted to the legal profession only once they have proven that they are indeed "fit and proper" persons for the legal profession. The burden of proof is on the applicant. Membership to the profession is thus subjected to character screening, yet what exactly a "fit and proper" person is is not defined or described in legislation or regulations. It is commonly accepted that in order to be "fit and proper" a person must show integrity, reliability and honesty, as these are the characteristics which could affect the relationship between a lawyer and a client or a lawyer and the public.

Although the burden of proof is on the applicant to prove that he or she is a "fit and proper" person to enter the legal profession, the decision remains essentially a discretionary value-judgement on the part of seniors or the court. As the President of the Supreme Court of Appeal, judge Harms said in *Malan and another v The Law Society, Northern Provinces*⁸:

[T]he exercise of this discretion is not bound by rules and precedents consequently have a limited value. All they do is to indicate how other courts have exercised their discretion in the circumstances of a particular case. Facts are never identical, and the exercise of a discretion need not be the same in similar cases. If a court were bound to follow a precedent in the exercise of its discretion it would mean that the court has no real discretion.⁹

Such value judgments have been politically influenced in South Africa in the past. When Mahatma Gandhi applied to be admitted as an advocate of the High Court of Natal, his application was opposed by the Law Society of Natal because he was a

and that the person applying is, in terms of s 15(3) (a) 'in the discretion of the Court' a 'fit and proper' person the Court still has a discretion to refuse re-admission.

⁷ *Law Society Transvaal v Behrman* 1981 All SA 470 (A) 557H.

⁸ 2009 (1) All SA 133 (SCA).

⁹ See also *Naylor and another v Jansen* 2007 (1) SA 16 (SCA) par 21.

person of Indian origin and as such not a "fit and proper" person to practise law.¹⁰ Madeline Wookey's articles of clerkship were refused because she was a woman and women were seen to be improper for legal practice.¹¹ During the years before South Africa became a democracy, various Law Societies brought applications to have lawyers involved in the struggle against *apartheid* removed from the roll of attorneys or advocates mainly on the basis that they were not "fit and proper" persons because they violated the legislation of the country.¹² Soon after the establishment of the new democracy the character screening of lawyers was tested constitutionally.

The issue was first raised under the interim Constitution of 1993. In *Prokureursorde van Transvaal v Kleynhans*¹³ the court had to comment on the constitutionality of its statutory power to remove "unfit and improper" persons from the roll of attorneys. It was argued that this power violated section 26(1), the right to free economic activity, of the interim Constitution. The court rejected the argument and held that standards could be set for the legal profession as far as both "competence" and "unquestionable integrity" were concerned, either on the basis of the internal limitation of section 26 or in terms of the general limitations clause, section 33 (1).¹⁴

A few years later the constitutionality of the power of the court to strike an attorney off the roll of attorneys was once again constitutionally challenged, but this time under the final Constitution of 1996. In *Law Society of Transvaal v Machaka*¹⁵ it was argued that the "fit and proper" standard violated the right to dignity,¹⁶ equality,¹⁷ the

¹⁰ This fact is not reflected in the official law report *In re Gandhi* 1894 NLR 263, but is extensively dealt with in Gandhi's autobiography *An Autobiography; Or My Experiments with Truth* (1972) 121-123. See also Le Roux "Conscience against the Law: Mahatma Gandhi, Nelson Mandela and Bram Fischer as Practising Lawyers during the Struggle" 2001 *Codicillus* 20-35.

¹¹ In *Incorporated Law Society v Wookey* 1912 AD 623 a full bench of the then Appellate Division relied on Roman Dutch law and its exclusion from legal practice of persons who could be termed "unfit and improper" including, the deaf, the blind, pagans, Jews, persons who denounced the Christian Trinity, and women.

¹² See *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 (I) SA 133 (T), *Ex Parte Krause* 1905 TS 221, *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T), *Matthews v Cape Law Society* 1956 (1) SA 807 (C), *Incorporated Law Society, Natal v Hassim* 1976 (4) SA 332, *Ex Parte Moseneke* 1979 (4) SA 884 (T), *Natal Law Society v Maqubela* 1986 (3) SA 849 (N).

¹³ 1995 (1) SA 839 (T).

¹⁴ *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) 850 G-J.

¹⁵ 1998 (4) SA 413 (T).

¹⁶ Constitution of the Republic of South Africa, 1996 Section 10.

¹⁷ Section 9.

right not to be subjected to cruel, inhuman and degrading treatment,¹⁸ and the right to choose one's trade, occupation or profession freely.¹⁹ The court once again rejected the arguments, as well as the idea that membership of the legal profession should not be subjected to the character screening of the person involved. The court held that the character screening prevented the right to freely choose one's profession from being abused by criminally minded attorneys.²⁰

Having noted that it is constitutionally acceptable to use the "fit and proper" person test, it might be meaningful to look at a few cases as examples where the courts have ruled that a specific practitioner was not a "fit and proper" person to practise in order to establish what the test implies:

In *Ex parte Ngwenya*²¹: the applicant applied to be admitted as an advocate. He unfortunately pleaded on the one hand that he had been wrongly convicted of a crime and on the other hand that he had since reformed. The court argued that reformation can begin only when a person acknowledges that he has committed a wrongful act. His character references supporting the statement that he had reformed were irreconcilable with his allegation that he had been wrongfully convicted. The court concluded that if the references were true, his statement that he had been wrongfully convicted was untrue, which, in turn, meant that he was not a "fit and proper" person to be admitted as an advocate.

In *Vassen v Law Society of the Cape*²² the attorney had stolen money by convincing an insurance company to pay the proceeds due under a life insurance policy to himself instead of to the beneficiary. He then used the money for personal purposes and denied doing so despite clear evidence to the contrary. The court ruled that he was not a "fit and proper" person to practise. Honesty, reliability and integrity are expected of an attorney.

¹⁸ Section 12(1)(e).

¹⁹ Section 22.

²⁰ *Law Society of Transvaal v Machaka* 1998 (4) SA 413 (T) 416 A-J.

²¹ *In Re Ngwenya v Society of Advocates, Pretoria and Another* 2006 (2) SA 87 (W).

²² 1998 (4) SA 532 (SCA).

Where the books of a practice reflected a trust shortfall of R12 million and there was proof of touting, the Supreme Court of Appeal found that the court *a quo* had been correct in concluding that the appellants were not "fit and proper" persons to practise and that their names should be removed from the roll.²³ Touting is against the law, the law was broken, and therefore the appellants were not "fit and proper" people. The question can be asked if the breaking of the law necessarily reflect bad morals?

In the case of *The Law Society of the Cape of Good Hope v Berrange*²⁴ the court had to consider the issue of "marketing agreements" between attorneys and estate agents. Certain estate agencies referred conveyancing work to Berrange's firm and got payments in excess of R500 000 for the favour. The payments were purportedly made for the promotion and marketing of the respondent's firm. That according to the judge clearly constituted "soliciting" of professional work within the meaning of Rule 14.6.1.1.²⁵ Once again a rule was broken, which automatically led to declaring the person who broke the rule to be not "fit and proper". The respondent was therefore guilty of unprofessional conduct akin to touting. The attorney was suspended from practice for a period of two years.

Lastly, in *Prince v President, Cape Law Society and Others*²⁶ Mr Prince, a Rastafarian, who had two previous convictions for the possession of *cannabis* (commonly known as dagga), declared that he would continue to break the law due to his religious beliefs. It was found that it would not be "fit and proper" to allow him to register for his articles as an attorney as he would constantly be breaking the law and his behaviour would bring the profession into disrepute. In this case though, there are indications in the Constitutional Court judgement that the position taken by the Cape High Court and the Supreme Court of Appeal on this issue does not find unqualified support among South Africa's senior judges. In all three of the judgements delivered in the Prince case,²⁷ the possibility is raised that Prince may still be a "fit and proper" person to practise law in spite of his criminal convictions and

²³ *Botha and Others v Law Society, Northern Province* 2009 (3) SA 329 (SCA).

²⁴ 2005 (5) SA 160 (C).

²⁵ Rule 14.6.1.1 of the Rules of the Cape Law Society, which addresses the sharing of fees.

²⁶ 2002 (2) SA 794 (CC).

²⁷ *Prince v President of the Law Society, Cape of Good Hope* 1998 (8) BCLR 976 (C), *Prince v President, Cape Law Society* 2000(3) SA 845 (SCA), *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC).

continued defiance of the law. Sachs J, for example, remarked that according to his understanding of the principles of an open democracy, Prince should not be forced to make a choice between his conscience and his career. According to him Prince has shown himself to be "a person of principle, willing to sacrifice his career and material interests in pursuance of his beliefs".²⁸ He should therefore be seen as a "fit and proper" person to practise. The impression is created that because the smoking of dagga is a crime, Prince was considered as not being "fit and proper" for the profession, but what if a person practised polygamy or adultery or were addicted to gambling, which is not criminalised? Would such a person be "fit and proper"? In other words the question arises if there is a difference between the morally wrong and the criminally wrong? The judges of the Constitutional Court missed an opportunity to address the notion of morality in a changing society. Their views were thus once again positivistic. They focused only on the fact that a law had been broken.

Du Plessis²⁹ says a successful practitioner, an attorney or an advocate, should possess and display certain qualities, most of which cannot be acquired through learning. Having these qualities could indicate that a person is indeed a "fit and proper" person for the profession. An appropriate academic training may, however, play a vital part in improving them – if they are "by nature at least" latent. He lists the following qualities as the least that a lawyer should possess:

- integrity - meaning impeccable honesty or an antipathy to doing anything dishonest or irregular for the sake of personal gain,
- objectivity – no irrelevant consideration whatsoever should bear upon one's judgment,
- dignity – practitioners should conduct themselves in a dignified manner, and should also maintain the dignity of the court,
- the possession of knowledge and technical skills,
- a capacity for hard work,
- a respect for the legal order and
- a sense of equity or fairness.

²⁸ *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC) at par 170 F 861.

²⁹ Du Plessis "The ideal legal practitioner (from an academic angle)" 1981 *De Rebus* 424-427.

But Du Plessis speaks from his own dogmatic framework inherited basically from Western (Christian) morality. What he misses is that morality is not the same always and for everyone. In a post-modern society questions can be asked about the universal applicability of the values outlined above.

McDowell³⁰ argues that he originally felt that a "good moral character" was a concept without real meaning and that the concept should have more or less the same core meaning today as it had for our grandparents. Yet that no longer seems to be the case for a large segment of our population, including lawyers.³¹ This, according to him, is a problem as for lawyers the nature of a "good moral character" is well defined in the codes of ethics. But how does one determine if such morality is present in an individual, and if so to what degree?³² He answers himself by saying that we live in a cynical age and do not expect to find good moral characters. If no one expects virtuous conduct; less of it will be perceived and displayed. The problem according to him, and I agree, is the fact that the test for being a "fit and proper" person is meant to take place **before** you are admitted as a lawyer. One cannot predict how a person will act in future in undefined situations unless one knows the person well.³³ Once a person is recognised as being "fit and proper" the Law Society offers further training, for example on how to run a trust account and how such an account should be audited. Lawyers are also constantly reminded of the Code of Conduct and ethical rules, but there is little focus on the development of their moral character.³⁴ Such an omission could be remedied by offering post-admission courses on ethics and ethical behaviour.³⁵

In South Africa prospective attorneys and advocates are interviewed by a senior person in the respective professions. This interview lasts no more than a maximum of fifteen minutes and the senior then testifies if he or she found the applicant to be a

³⁰ McDowell "The usefulness of 'good moral character'" 1993 *Washburn Law Journal* 323-336.

³¹ McDowell (n 30) 324.

³² McDowell (n 30) 326.

³³ McDowell (n 30) 327.

³⁴ McDowell (n 30) 328.

³⁵ Other professionals like doctors, engineers and auditors to mention some, have to earn CPD (Continuous Professional Development) points per year. It is suggested that lawyers should follow suit and that a point or points should be given for ethical training. See also the Research Report on Mandatory Continuing Professional Development, Law Society of South Africa 2010.

"fit and proper" person. The purpose of the interview is mainly to determine whether the applicant has previous criminal convictions or has ever been an accused in a disciplinary hearing. For attorneys it is also to check whether the candidate has knowledge of the profession's ethical rules and the application thereof. In the final instance the court confirms this value judgement although the judges are at liberty to ask extra questions to their satisfaction. The process is thus completely subjective and unsatisfying. How can anyone predict in such a short time what the candidate might or might not do in future? Would it not serve the public interest better if no such an interview were performed and the applicant were not declared a "fit and proper" person, instead of creating the impression that he or she is in fact a good person who will act ethically in future? Perhaps a consumer or client should enquire before he or she makes use of the services of a lawyer if the person is trustworthy and reliable instead of blindly believing a court finding.

Once admitted, a lawyer who then commits an unprofessional act is consequently judged and evaluated according to a legal process, an inquest, a disciplinary hearing or a court ruling. The previous subjective judgment is then partially annulled. Whatever the outcome of the legal or *quasi* legal process, it is based on objective criteria and actual acts of wrongdoing instead of subjective judgments and predictions.³⁶ "A good moral character" is therefore an aspirational concept which should be understood as being not just enough merely to meet the minimum standards of professional competence and to refrain from acting in ways that could lead to criminal prosecution or being struck off the roll; it also presupposes that more must be expected from lawyers.³⁷

After admission it is assumed that the person is "fit and proper" and has a moral character, but some "bad apples" prove this assumption to be wrong.³⁸ This will become clear in the next part.

4 Media reports and public perceptions of lawyers

³⁶ McDowell (n 30) 335.

³⁷ McDowell (n 30) 332-333.

³⁸ According to Thinus Grobler, Director of the Law Society of the Northern Provinces, in 2009 22 attorneys were struck from the roll and 19 were suspended, in 2010 this number more than doubled to 48 attorneys being struck from the roll and 37 were suspended, and up to 25 May 2011, 15 attorneys have already been struck off the roll and 11 suspended.

Perceptions are created in the media that the profession might have ethical problems. This becomes evident if one looks at some newspaper articles chosen randomly from the many which have appeared recently.³⁹ The chosen articles reflect only a few specific possible transgressions a lawyer may be guilty of, and due cognisance has to be taken of the fact that there may be other forms of misconduct as well.

There are many reports of unprofessional conduct concerning the Road Accident Fund, and it seems that it is a minefield of controversy for lawyers.⁴⁰ Thirteen advocates, including two senior counsel, have been charged by the Pretoria Bar Council for "double briefing" on Road Accident Fund (RAF) legal cases, allegedly involving millions of rands. Some advocates have been taking up to 15 matters a day.⁴¹

Some advocates also take instructions directly from the public.⁴² Many advocates were getting away with this illegal practice as no one was reporting them to the Bar Council. Some independent advocates (who are not members of the Bar) tout for their potential clients in courts, prisons and holding cells even though the Bar Council rules say an advocate, whether a member of the bar or practising independently, cannot appear in court without being instructed by an attorney.⁴³

Some unscrupulous lawyers use delaying tactics in order to delay a case to such an extent that the client's money dries up and then the case is struck from the court roll,

³⁹ More than 300 articles for the period 2000-2010 are available from INEG, UFS. The examples here were chosen randomly. See also *Society News*, the Law Society of the Northern Provinces magazine, which publishes at the back a list of names of attorneys who were either suspended or struck from the roll. Note that the list of names nearly doubled in size from April/May 2010 to December 2010.

⁴⁰ Oliver "Law society urged to pay victims" 2001 *Saturday Weekend Argus* 22 July 5, Vos "Lawyers are 'abusing' Road Accident Fund" 2009 *Citizen* 22 October 6, Botha "Lawyer 'borrowed' RAF payout" 2003 *Daily Dispatch* 27 September 1, Waldner "Lawyers pocket R7bn from RAF" 2009 *City Press* 29 November 2.

⁴¹ Rawoot "Road fund: advocates face charges" 2010 *Mail and Guardian* 15 February 5.

⁴² Coetzee "Advokaat dalk van rol af geskors" 2005 *Volksblad* 17 May 4, Schroeder "Clampdown on illegal practice by advocates" 2007 *Cape Times* 28 December 5.

⁴³ See *Society of Advocates of Natal v De Freitas* 1998 (4) SA 1134. Jika "Law fraternity move to tackle touting advocates" 2006 *Daily Dispatch* 26 January 9. If an advocate is not a member of a specific Bar Council he/she still falls under the rules of a Bar, see *General Council of the Bar v Van der Spuy* 1991 (1) SA 718.

whereas lawyers should actually be honest and tell their clients if they think they do not have a case.⁴⁴

The Law Society of the Northern Provinces applied for the removal of Tiego Moseneke from the roll of attorneys. The Law Society received complaints about Moseneke's unprofessional conduct, which included that he had "lost" files, did not execute the mandates of clients, and accepted funds for performing work but failed to repay the funds when the work was not done. There were also shortfalls in his trust funds.⁴⁵

"It is amazing and shocking that an attorney and counsel (would) get their client to sign a document to the effect that their client wishes to close his case even before the case against the accused is not completely presented" Waglay J said, to describe the conduct of a defence attorney and advocate in getting a teenage hit-man, hired to murder six-month-old Jordan Leigh Norton, to give them an affidavit granting them permission to close his case without presenting evidence.⁴⁶

Bertelsmann J said unequivocally: "A practitioner who knowingly tells a lie to the court... is unfit to practise and there can be only one way of dealing with him – he must be struck off".⁴⁷

The public's perceptions about lawyers are also sometimes captured in anti-lawyer humour. Quips such as - How do you know it is really cold outside? When the lawyers have their hands in their own pockets! - are well known. Or "A lawyer is a learned gentleman who rescues your estate from your enemies and keeps it for himself", or "How do you know when a lawyer is lying? His lips are moving".⁴⁸

On their part lawyers may feel that the public is prejudiced against them because they are misinformed by bad press. They may be right that newspaper coverage is

⁴⁴ Du Plessis "Regters raas oor 'uitsteltaktiek'" 2005 *Burger* 31 October 6.

⁴⁵ De Lange "'Defective' attorney faces axe" 2006 *Citizen* 2 February 4.

⁴⁶ Schroeder "Lawyers' conduct 'amazing, shocking'" 2007 *Cape Times* 9 May 1.

⁴⁷ Venter "'Unfit' attorney is struck from the roll" 2002 *Pretoria News* 28 November 4.

⁴⁸ See also Rhode "Expanding the role of ethics in legal education and the legal profession" <http://www.scu.edu/ethics/publications/submitted/rhode/lega1ed.html> [date of use 11 Aug 2010]. For a list of publications by Deborah Rhode see <http://www.law.stanford.edu/faculty/rhode/>

skewed, as it should be kept in mind that the contexts in which people encounter the profession are often unpleasant. Most people need a lawyer for a divorce case, bankruptcies, personal injuries or contractual disputes.⁴⁹ These unpleasant scenarios inevitably give rise to the perception that lawyers profit from others' miseries.⁵⁰ Rhode, a leading author on legal professional conduct, argues further that attorneys are more often than not the messengers of bad news, so they readily become scapegoats when the justice system fails to deliver justice as participants perceive it. She refers to a newspaper columnist who noted: "Everyone would hate doctors, too, if every time you went in the hospital, your doctor was trying to take your appendix out, and the other guy's doctor was standing right there trying to put it back in".⁵¹

According to her one of the most positive traits the public associates with lawyers is their loyalty towards their client, yet this can also be a contributing factor to unethical behaviour in that they will manipulate the system on behalf of their clients to such an extent that there is no regard for justice.⁵² It is therefore necessary to scrutinise the possible reasons why some lawyers are not acting as "fit and proper" professionals.

5 Possible reasons why lawyers do not act as "fit and proper" persons

5.1 Adversarial system

In an adversarial system two parties face each other (e.g. the state and the accused in a criminal case, or two private/juristic persons in a civil case). The roles of the legal representatives and judges are carefully separated. On the one hand, the judge acts as an impartial "referee" who listens to both sides of the case. The lawyers on the other hand focus on their clients' interests and do not really strive for justice or the promotion of the general good. The lawyer is required to present the client's case in the best possible light with an indifference to the moral merits of the case.⁵³ "The

⁴⁹ Rhode (n 48) 2.

⁵⁰ See Van Zyl "Hoe om te maak as jy voel jou prokureur lewer nie goeie diens nie" 2010 *Tshwane-Beeld* 13 October 7.

⁵¹ Rhode (n 48) 2.

⁵² Rhode (n 48) 3.

⁵³ Eshete "Does a lawyer's character matter?" in Luban D (ed) *The Good Lawyers' Roles and Lawyers' Ethics* (1984) 270-285 at 272.

lawyer is required... to place the client's interest ahead of the interest of the adversary... as well as of public values such as justice".⁵⁴ This happens especially in criminal cases, where the burden of proof is on the state. The defence lawyer represents his or her client fiercely, as there is an element of performance in which the lawyer can display his or her combative and persuasive skills openly,⁵⁵ but what about justice? The lawyer may have to deliberately convey the impression that the client is completely innocent of wrongdoing.⁵⁶ Markovits⁵⁷ argues that the adversarial system puts lawyers in a moral dilemma by requiring them:

Not only to display ordinarily impermissible partiality in favour of their clients, but also to subordinate their ordinary first-personal ethical ideals of honesty, fair play and kindness to a professional role in which they must, in some measure or other, i.e. cheat and abuse [and] to pursue courses of action and adopt forms of life that separate them from their personal ambitions and ideals.⁵⁸

5.2 Competition

Increases in the number of lawyers have increased the level of professional competition.⁵⁹ There is also intense competition amongst law firms with the result that the younger attorneys have to work many hours. "All work and no play is fast becoming the norm rather than the exception".⁶⁰ In the process morality is being sacrificed in order to take and win more cases.

5.3 Money driven

It has been said that "no profession offers a surer path to affluence and influence" than the legal one.⁶¹ A large number of lawyers believe that the life they have chosen

⁵⁴ Eshete (n 53) 272.

⁵⁵ Eshete (n 53) 276.

⁵⁶ Eshete (n 53) 274.

⁵⁷ Markovits "Legal ethics from a lawyer's point of view" 2003 *Yale Journal of Law & the Humanities* 209-293.

⁵⁸ Markovits (n57) 285-286.

⁵⁹ Rhode (n 48) 3. Also see Rossouw "Why professional ethics in the legal profession?" 1998 (1) *TSAR* 53-62 at 56.

⁶⁰ Rhode (n 48) 4. Also see Rossouw (n 57) 55.

⁶¹ Rhode (n 48) 23.

is the best one because it offers opportunities for wealth and prestige.⁶² Some lawyers will do what it takes despite their own moral character.

There is also an intense pressure to serve clients with short-term solutions in order to make more money and earn better salaries at the expense of other values.⁶³

5.4 Education

Formal education in the law does not prepare lawyers for the moral challenges of the profession. The ultimate aim of legal training is to enable the student to become a successful attorney or advocate.⁶⁴ Knowledge is important in order for the lawyer to be able to make a convincing case for either side in a dispute. "What this sort of learned cleverness does not require is either a developed capacity to judge what is right or a disposition to seek it".⁶⁵ Many universities' syllabi do not have Professional Ethics as a compulsory module. The issue of ethical values, what ethics is and how to act morally is thus never addressed before the student enters either the training for attorneys at the different Law Societies or pupillage at the different bars. At both of these institutions ethics is a compulsory module that is examined before an applicant is admitted to practise. If a graduate does not apply to be a member of a bar of advocates but practises independently as an advocate, he or she might never have done a formal course in ethics.

5.5 Lawlessness in general

The climate of lawlessness in South Africa has been attributed to the blunting of moral sensitivities during the *apartheid* years and to the transition from a culture of authority to one with more relaxed political and moral bonds. It contributes to the moral crisis experienced by lawyers. Justice is no longer seen to be done. It is sometimes alleged that some lawyers do not think twice before delaying a case unnecessarily, calling irrelevant witnesses, or litigating despite knowing that the litigation is without merit.

⁶² Kronman "Living in the law" 1987 *University of Chicago Law Review* 835-876 at 838.

⁶³ Rhode (n 48) 3.

⁶⁴ Eshete (n 53) 271.

⁶⁵ Eshete (n 53) 272.

6 Are lawyers still professionals or just ordinary business people?

In early days the concept of "a profession" was intended to include only the learned occupations of divinity, law and medicine, and before the industrial revolution, social class and status determined entry into these professions.⁶⁶ A profession is born out of a social need for services which require specialised knowledge and skills.⁶⁷ Larson identifies the characteristics of professions as including the knowledge and techniques which professionals apply in their world, training to master the knowledge, service orientation, a certain distinction of personality which justifies the self-regulation granted by society, and autonomy and prestige.⁶⁸ The Law Society of South Africa in their Practice Manual for professional conduct states that a profession is a career which complies with the following six requirements: an intellectual basis, a private practice, an advisory function, a tradition of service, a representative body, and a code of conduct.⁶⁹ The legal practitioner fulfils a dual function by assisting the client on the one hand and by promoting justice in society on the other hand. The first Chief Justice of the Constitutional Court, Judge Mahomed, remarked: "...[t]he ethical objectives of the law contain the life blood of a nation...".⁷⁰

It can therefore be concluded, taking Larson's characteristics and the Law Society's explanation into consideration, that the legal profession is indeed a profession and not an ordinary job. Yet, if it wants to be recognised as such the professional lawyers themselves should act accordingly.

⁶⁶ Larson *The rise of professionalism: a sociological analysis* (1997) 5.

⁶⁷ Carter "Increased professionalism: An experience from the United States" 1998 *Journal of Leisurability* (25)(21) 20-25.

⁶⁸ Larson (n 66) 5.

⁶⁹ 2010 Practice Notes 9.

⁷⁰ Chief Justice I Mahomed at a dinner hosted by the Johannesburg Bar on the 27th June 1997 to celebrate his appointment as Chief Justice of South Africa.

7 Conclusion

The "fit and proper" person test does not succeed in keeping unwanted elements out of the legal profession. It is also no guarantee of moral goodness. Referring to Bizo's biography, Pityana remarked that

effective lawyering takes a great deal of patience, diligence, hard work, systematic drilling and strategy, and always a measured temperament. There are no shortcuts, no instant gratification and no guaranteed wealth – only diligence and sheer hard work. Almost always there will be satisfaction for a job well done, and one will earn the respect of one's clients and colleagues by reason of adherence to professional standards and integrity.⁷¹

He went on to say that the problem in our country is perhaps that too many [lawyers] behave like the rest of us instead of being better than us – men and women of impeccable character and sound judgement. We are mistaken in assuming that because we have a wonderful Constitution, justice and the Rule of Law will prevail automatically.⁷² A lawyer should do more than just occupy a profession; a lawyer should serve the public. To do so effectively lawyers need to be trustworthy men and women of untarnished reputation⁷³ - thus, "fit and proper" persons.

In an address on law, ethics and morality in public life in South Africa, Professor Kader Asmal⁷⁴ refers to John Quincy Adams, the sixth President of the United States of America, who once said: "Always vote for principle, though you may vote alone, and you may cherish the sweetest reflection that your vote is never lost". Asmal rephrased the quote and said: "Always adhere to the highest standards of ethics and moral conduct in public life, though you may stand alone, and you may cherish the sweetest reflection that your principles are never lost".⁷⁵

The test to determine whether or not an applicant is indeed "fit and proper" to be admitted to the legal profession is not perfect, nor is it any guarantee that a lawyer

⁷¹ Pityana, Principal and Vice Chancellor, University of South Africa, in an address to mark the 30th Anniversary of the Black Lawyers Association, delivered at Emperor's Palace, Kempton Park, Gauteng, on Friday 9 November 2007.

⁷² Pityana (n 71) 4.

⁷³ Pityana (n 71) 5.

⁷⁴ Asmal, in his paper delivered at the Helen Joseph Memorial Lecture: Law, ethics, morality in public life in South Africa, University of Johannesburg, Tuesday 28 October 2008 5. (n 1) 2.

⁷⁵ Asmal (n 74) 2.

would act morally and ethically in future, yet it is a means of screening prospective lawyers, and it must be enhanced by further training through seminars or workshops on ethical behaviour or morality within the legal profession. The "fit and proper" test could be seen in the same light as the "I do" that marriage partners exchange during a wedding ceremony. By saying "I do" the partners accept the responsibility to try to make a success of the marriage. They know that circumstances and personalities might change in future, yet a commitment is made. If the "fit and proper" person test is to remain the moral scrutiny of prospective lawyers, its consequences and meaning should be communicated to each and every candidate so that all of them know exactly what moral conduct is expected of them not only shortly after admission but also well into the future. This knowledge should be followed up by extra training in ethics. To remind them of their respective Codes of Conduct or Ethical Rules is not enough to guarantee acceptable behaviour. To allow only real "fit and proper" lawyers into the profession remains aspirational.

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