

The Duty of Lawyers: Virtue Ethics and Pursuing a Hopeless Legal Case

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The purpose of this article is to present a philosophical argument about legal ethics and to describe why lawyers have an ethical duty not to take on a hopeless case that has no prospects of success. This is despite the principle that everyone should have the right to be heard in a court of law when that person's rights are at risk. In order to understand the underlying policy behind this ethical rule it is important to understand the meaning of the underlying principle that everyone should have access to justice. In this context the function and purpose of a nation's courts are relevant. Although the ethical rules for lawyers in South Africa do not directly prohibit the pursuance of a hopeless case, there is no escaping the fact that the foundational premise of these rules is to further the purpose of the courts. The South African Rules of Court, it will be demonstrated, also aim to further the basic functions of the court, namely access to justice. Lawyers should however, be guided by a moral compass, which is largely based on Aristotelian virtue theory. Popular culture dictates that virtuous lawyers should expose their evil clients to ensure that truth prevails. This stance in which there is a lack of adversarialism is however not popular with lawyers. Is it ever likely that a lawyer will know beyond any doubt that a client is in fact truthful in what they utter? The article contributes to the preponderance of literature on legal ethics by emphasising the virtues which are needed for sound ethical legal conduct, which are distinct from law and legal codes of conduct.

Keywords: Legal ethics; Law; Virtue; Morality

Introduction

When we speak of ethics we refer to lawyers knowing what they ought to do, and their ethical decision-making then consists of essentially doing what they know ought to be done in any particular situation. However, there is a distinction between ethical law and human law. The former is basically the essence of humanity which is imprinted on people who are rational beings, while the latter is a morally-based earthly law which is what guides the functioning of societies.

A number of ethical ideas we invariably espouse are notions such as moral realism, natural law ethics, divine command theory and relativism, and each of these fundamentally sit under the banner of virtue ethics which is itself based on philosophical themes dating back to Aristotle. Ethics is not a new concept. Indeed in ancient civilizations such as Classical Greece in about 350 BC, the notion of *arête* loosely translated to mean excellence, was taught by Aristotle (384 – 322 BC).

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In Aristotle's view, ethics was a highly practical rather than theoretical study. Virtues are considered to be the building blocks of truly moral individuals.¹

Virtue ethics originated in ancient Greece and was initially driven by both Socrates and then Plato, but advanced by Aristotle. Aristotle highlighted the importance of developing excellence or virtue of character (Greek *aretē*), as the means to achieve what is ultimately excellent conduct (Greek *energeia*).

Aristotle maintained that one should strive to become respectable and wrote various treatises on ethics, including the mega-work, *Nicomachean Ethics*² upon which he bases his teaching on human character. For example, Aristotle taught his students, including Alexander the Great, that virtue includes the proper function (*ergon*) of a thing. He also articulated the notion that humans have a purpose which is specific to them. This purpose must be an activity of the *psychē* (usually translated as soul) in accordance with reason (*logos*). Aristotle also identified this most advantageous activity of the soul to be the aspiration of all human conscious action, *eudaimonia*, generally translated as "happiness" or "wellbeing". If humans wish to be happy in their lives they require a good character (*ēthikē*) and must also possess virtue (*aretē*) in their dealings with others. *Aretē* is generally translated as being moral, ethical and virtuous.³ Blackburn maintains that a virtue is a character trait that is to be revered and is one which makes its possessor a better person, either morally, or intellectually, or in the conduct of specific affairs. Virtues will help a lawyer in deciding between what is right and wrong. Virtue ethics can thus support lawyers when facing moral dilemmas. Aristotle encouraged people to live in a state of well-being (*eudaimonia*) or prosperity which focussed on virtues and evils. Virtues are those aspects which relate to a person's character strengths which encourage flourishing and well-being.⁴ Contrariwise, vices are character defects that obstruct flourishing and limit one's well-being.

In Socrates *Republic*, the "Guardians" are leaders who interpret their high office in terms of their social responsibility. It is incumbent upon lawyers as legal justice leaders to serve society by endorsing ethical practices.⁵ Jean-Paul Sartre states that we are by definition morally bound for the reason that we share the planet with others whom we need to contemplate in the choices that we make.⁶ The primary paradigm of evaluation is always the self in relation to others. We should be basically always acting on the behalf of the interests of others.⁷ Sadly, many people do not do this.

Aristotle contends in Book II of his *Nicomachean Ethics*, that the person who possesses character excellence always does the right thing⁸, at the right time, and always behaves in what society considers being the right way⁹.

¹Boone (2017).

²Burger (2008).

³Aristotle (Bartlett and Collins) (2011).

⁴Hinman (2013).

⁵Gini (1997).

⁶Sartre (1960).

⁷Gini (1996).

⁸Aristotle (Irwin) (1999).

⁹May (2010).

Aristotle advocates in his *Nicomachean Ethics* that morality is not simply learned by reading about it, but by witnessing the behaviour of a morally sensitive person who serves as a role-model. From a philosophical perspective, role-modelling is not enough to satisfy the basic needs of an ethical legal practice at either the normative or descriptive levels

However he also highlighted that virtue is applied, and that the purpose of ethics is to become moral, not just to have knowledge. He also asserts that the right course of action depends upon the fine particulars of a specific situation, rather than being generated purely by applying whatever law is deemed to be suitable.¹⁰ The type of wisdom which is then mandatory for this is called "practical wisdom" (*phronesis*), as against the wisdom of a theoretical philosopher's understanding or insight.¹¹

Thunder¹² ponders on the issue as to whether the practice of law is indeed compatible with the wholehearted pursuit of a good human life? The predominant purpose of one assuming a career in law is to further the aims of justice, and to vigorously promote public order and the common good, by arraigning those who act unlawfully or unjustly and by ensuring the accused a fair trial.¹³ Constitutionally everyone should be equal before the law and as such be fully entitled to equal protection under the law, even criminals.¹⁴ This value is only truly of material importance if everyone is treated on an equal footing to start with. Fairness must prevail in all transactions with clients. The notion of beneficence necessitates that all should be done for the benefit of a client with no underhanded intentions on the part of the lawyer. Ethical practice is not an optional possibility in legal practice but rather an indispensable and integral part of the justice system. Society through its organizations has obligations and responsibilities for all its citizens and non-citizens, and every individual's rights need to be respected.

The Complexity of Moral Decision-making in Legal Practice

For the purposes of legal issues, virtue ethics suggests that if one is a virtuous person, you will strive to do good things, and if you wish to be good, you must always do moral things¹⁵. Lawyers require executive virtues such as inter alia a strong resolve, courage and determination. Their moral virtues must be evident in their moral demonstration of seeking to uphold truth, empathy, kindness, honesty, and good nature. As professionals they should consider their options carefully before embarking on a legal venture with a client who is clearly of ill-repute and who has confessed in private that he or she is guilty of infringing the laws of the land, but nonetheless wants to be absolved from any and

¹⁰Kraut (1989).

¹¹*Sophia*, Bostock (2000).

¹²Thunder (2014).

¹³Thunder (2014).

¹⁴Groarke (2011)

¹⁵Pollock (2010).

all accountability or liability thereto. This is where the legal practitioner requires deep understanding and wisdom.

Lawyers require wisdom and an excellent knowledge of legal jurisprudence and other related theory. They need to use basic common sense when interacting with stakeholders and must be courageous, persevere, exercise temperance or moderation, be self-reliant and above all, truly seek justice.¹⁶

The attorney-client relationship may at times be adversely affected if the latter fails to understand the moral advice meted out by the former. It is then a lawyer's core function to provide legal advice and guide a client in terms of the law. The lawyer is still at liberty to comment and advise on how a client has acted in the ethical realm and to question whether or not a client has considered the ethical ramifications of actions they have taken. Such descriptive ethics concerns the motivation for one's actions and how a client may have reasoned through ethics at the point of the decision to perpetrate a crime, given the standards of society. Having said this, a lawyer's primary is to offer legal advice and support a client to make legal decisions.

While legal advice can be sought from existing laws and other resources, moral guidance for clients comes from within the lawyer's person. In cases where the prosecutors fail, the defence lawyer cannot be morally responsible even when he or she knows their client was prosecutable.

One's religious beliefs may serve as a foundation of morality and it is useful that virtually all religions embrace what is termed the 'Golden Rule' about one doing to others what you would have them do to you.¹⁷

Luban states that "A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."¹⁸ Nonetheless, attorneys often find it tricky to determine the moral choices for their clients. Moral analysis into lawyers' ethics has customarily focused on how legal professional rules and regulations relate to or conflict with basic moral principles that are commonly applied and considered to be universally binding on both individuals and their communities and also in essence important, and which necessarily address basic questions.¹⁹

The nature of humanity includes the fact that it is very often the case that bad things happen to good people and good things happen to bad people and so prescription becomes difficult. This is also the case when a client has been devoid of moral upbringing by virtue of their social position. The world is complex and often unfair.²⁰ Lawyer's need to be vigilant and not impose their religious morals on a client who possibly has different religious morals. It is advisable to then

¹⁶Van Zyl & Visser (2016).

¹⁷Duxbury (2009).

¹⁸Luban (1988).

¹⁹Wasserman (1990).

²⁰Boone (2017).

consider other sources which offer moral guidance to which a client may better relate.

Slabbert asserts that in South Africa it is generally accepted that to be considered to be a fit and proper legal practitioner, one should exhibit integrity, reliability and honesty.²¹ In essence, a lawyer should do good things not based on his or her analysis of the end result or of a calculation to choose what to do in any given case but rather instinctively do the right thing, or the good thing, because of their good character. But once faced with intricate ethical dilemmas, they should demonstrate good character, by using sobriety of thought and their understanding. A lawyer should thus consider what type of person they should be, as opposed to what do I do in this tricky situation I am facing. Lawyers should use their discretion in an ethical manner²² and practise virtue as this will empower them to be routinely virtuous in the difficult situations that they face.

Where there is legal malpractice there is negligence, breach of fiduciary duty, breach of contract or all of these by an attorney during the delivery of legal services that ultimately results in injury to a client.²³ The test of public trust is that lawyers “walk the talk” or “practise what they preach,” and that they do not participate in behaviour that would be considered to be breaking the law.²⁴

The Dilemma

Lawyers are generally highly respected and are a fundamental necessity to the application of the law and the Rule of Law itself which is instituted on principles of justice, fairness and equity. Once lawyers fail to follow and endorse ethical principles, the law itself is seen to fall into disrepute and it is likely that The Rule of Law will fail.

While granting that rules of professional conduct are significant to legal practice, this importance should not be overestimated because legal practitioners make daily decisions about what ethical conduct is and whether or not they will conduct themselves in an ethical manner. Thus formal rules of conduct have very little to do with their decision-making.²⁵

It is incumbent on lawyers to act within the scope of ethical responsibility and duty and they should thus at all times enhance their reputations by doing what is right. It is often the case that a criminal defence lawyer knows that his or her client is factually guilty and may have even admitted as such to him in private conversation. The client nonetheless demands a response that will likely free him or her from imprisonment. Such a scenario is ethically troublesome and poses a moral predicament for the lawyer. A morally upright lawyer must seriously contend with such ethical dilemmas which arise from the representation of clients they recognize as being guilty.

²¹Van Zyl & Visser (2016).

²²McLaughlin (2009).

²³Byrne (2016).

²⁴Pollok (2010).

²⁵Van Zyl & Visser (2016).

Strauss Daly Attorneys²⁶ assert that

“...lawyers have a duty to contribute to the fairness of a trial. It must be emphasised that the mandate of any lawyer is to represent the client. In criminal trials, this fairness translates not into securing an acquittal of the client, but rather in fulfilling one’s mandate, namely to represent the client to the best of one’s ability and as honestly as one possibly can. In civil trials, this fairness translates into ensuring that the purpose of adjudication, judging, and proceedings are aimed at achieving a fair result... placing emphasis on ethics in the workplace and ethical behaviour ultimately enhances the reputation of lawyers as honest persons who act with both integrity and dignity. This reputation of the individual translates to the reputation of the firm and finally to the reputation of the fraternity as a whole.”

Invariably, lawyers are often torn between divided loyalties to the court and also to the client. It is often the case that such duties conflict with one another. Nonetheless, the lawyer is duty bound to fulfil his or her obligation to the court. Lawyers are thus required to be fit and proper as legal practitioners. This is a fundamental statutory requirement for admittance, and it is thus an indispensable aspect in evading disbarment from the legal profession.²⁷ Many clients do not necessarily understand this ‘conflict of interest’ facing their lawyer while some lawyers become involved in legal practices that are unprincipled and that often aim at defeating the interests of justice for their guilty clients.

Lawyers should have the option to select between taking either strong or weak positions, depending on the dictates of their consciences. However, both popular culture and academic legal literature offer thought-provoking viewpoints on the strong versus the weak confrontational and adversarial impasse. Lawyers should be guided by a moral compass,²⁸ which is largely based on Aristotelian virtue theory. Popular culture dictates that virtuous lawyers should expose their evil defendants so as to insure that truth prevails. This stance in which there is a lack of adversarialism is however not popular with lawyers. Is it ever likely that a lawyer will know beyond any doubt that a client is in fact truthful in what they utter?

If a client’s dilemma places moral weight on a lawyer there is a danger that the attorney’s own problem will affect the assistance given to the client. Most lawyers no doubt feel tainted by innocent persons being sentenced to prison and in such situations may encourage a guilty client to confess because the confession would make the lawyer feel better about the outcome of a case.²⁹

A strong approach distinguishes that in several circumstances a lawyer cannot always be entirely certain whether to take his client’s confession at face-value. Neither can a lawyer be confident whether the client’s direct evidence will be fabricated or even if the testimony of any witness is in fact truthful. Those in favour of a strong adversarialist approach argue that a sagacious approach requires

²⁶Strauss Daly Attorneys (2017).

²⁷Sections 3 and 7(1)(d) of the South African Admission of Advocates Act 74 of 1964 -as amended.

²⁸Souryal (2011).

²⁹Asimow & Weisberg (2008).

them to go all out to defend a client even when they are essentially certain that the client is guilty.³⁰

The normative argument for weak adversarialism, by contrast, tends to focus on values such as truth-seeking in trials, and upon a responsibility of truthfulness towards the court, and also includes the need to protect the repute of truthful witnesses and the interests of third parties who may be damaged by the lawsuit.³¹ A weak adversarialist is more concerned with the pursuit of utilitarian justice implying the reaching of a truthful result rather than just using the correct legal procedures and formalities (Farrow, 2008). A weak approach “honours the individual lawyer’s conscience by allowing the lawyer to do less than the lawyer’s adversarial best when the lawyer is certain that the client is factually guilty of the crime.”³²

If a lawyer opts to take a weak adversarial decision this must be communicated to the client as soon as the decision is made. A lawyer should display effective leadership and conduct a conversation with a client that cautions the client of the choice made and why.³³ For example, fabricated testimony will not be endured. On the other hand, defendants who have perpetrated criminal acts, often reflect on whether they should in fact inform their lawyers of their guilt and disclose all material facts, or if they should keep on being silent. They may be afraid that their lawyers will be certain of their guilt, and thus fail to represent them at all or perhaps represent them less efficiently. Either way, a defendant generally perceives the lawyer to be the way to justice and freedom. Once a lawyer loses a case, it is the lawyer and 'the system' that bear the brunt of blame. Ethics in their workplace and ethical behaviour enhances the reputation of lawyers as honest and virtuous individuals who act with integrity and possess self-esteem.³⁴ There are various ethical responsibilities as far as the practice of law is concerned in South Africa. There are ethical obligations and duties due to a client and duties due to a court. Breaches of either ethical obligation by a lawyer may lead to civil proceedings by the client, for example a breach of confidence or an action based on negligence. In such circumstances, a lawyer may be held accountable under disciplinary proceedings related to legal practitioners legislation. For a lawyer to act ethically, one inevitably needs to act honestly in all one’s transactions and such honesty is only ever qualified by the client’s privilege. It is important then to strike a balance between honesty to the court on the one hand, which necessarily involves fair trial reflections and privilege to the client on the other hand.

Thus, there is a difference between factual guilt or in other words what a defendant may have done and actual legal guilt based on what a prosecutor can effectively demonstrate through solid evidence. Therefore it is in the nature of the legal professional to ask whether a prosecutor can prove charges irrespective of what a lawyer knows his client may have done. The defendant’s legal guilt can

³⁰Asimow & Weisberg (2008).

³¹Asimow & Weisberg (2008).

³²Asimow & Weisberg (2008 citing Simon (1993)).

³³Frisch & Huppenbauer (2014).

³⁴Sections 15 and 22(1)(d) of the Attorneys Act 53 of 1979.

only be proved once a judge is convinced that the available evidence is sufficient to enforce a conviction.³⁵

Just as in the United States of America, a South African lawyer needs to seek to preserve and defend rules necessitating honesty, trustworthiness, allegiance, diligence, competence and impassivity in the service of his clients. This also needs to be above the notion of self-interest and definitely above commercial self-advancement. A lawyer needs to circumvent conduct that weakens the integrity of the adjudicative procedure at all times. The client's case must also be presented with believable force but with total candour towards the court of law.³⁶

Thus while a lawyer in an adversary proceeding is not obligated to present a neutral exposition of the law or to assure that the evidence submitted in a case is true, he or she must not permit a court to be misled by false statements of law or fact or even evidence that the lawyer knows to be false either partially or in entirety. Lawyers are generally respected but are required to demonstrate their moral character which reflects the ideals, principles and values upon which the legal profession was founded. A lawyer then does not need to seek to evaluate the consequences or the morality of an action they are contemplating but rather be good role models and undertake good acts in a virtuous way.

Unfortunately, the nature of the legal profession is such that a lawyer often tries to act for both parties and then places himself in an invidious position in which he must be liable to either one or the other party no matter what he does. He may wish to promote the law and ethical practice but simultaneously strive to defend wrongdoing for gain.

Lawyers cannot fail to exercise competence and care as this may give rise to an action against them for damages by their client. If a court is misled by a lawyer, the latter has then acted unvirtuously and failed in his or her duty to assist the court in legal proceedings. Equally without virtue and also lacking in professionalism, are lawyers who are obstructionist and delay proceedings of a court.

While the role of a defence lawyer in the legal system generally requires that he or she should not advise clients to confess to crimes, what should a lawyer do when they know that it is likely that an innocent person will be punished for their clients crime? Should they even take on a case they know they will surely lose? How will this dilemma ultimately impact all parties concerned? As in the case of police officers, lawyers should hold positive ethical and moral values, which are a reflection of society's expectations.³⁷

For many lawyers the task is simply to reconcile their moral or religious considerations with the legal profession's range of ethical norms. This is due to the fact that professional norms consistently accommodate moral and religious considerations. In any event, all people have a right to access of legal justice.

³⁵Souryal (2011).

³⁶ABA (2018).

³⁷Ellwanger (2012).

The Right of Access to Justice

Rawls asserts that “Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.”³⁸ Lawyers should exhibit a sense of justice in which all entities are treated fairly in a spirit of justice which means that all people are treated equally and fairly irrespective of race, gender, cultural background, social position, intelligence, or power. Rawls highlights that social institutions must act with justice as the primary objective.

The right of access to justice is considered to be a fundamental right in many countries. It is a right that is protected in terms of international instruments, for example, article 10 of the UN Declaration of Human Rights declares the right of an individual to a hearing by an “independent and impartial tribunal”. The African Charter provides in art 7 for a right to an “impartial tribunal”. This guarantee also appears in the Covenant on Civil and Political Rights, the European Convention and the American Convention. Similarly section 34 of the South Africa Constitution provides:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

The right of access to justice is considered worthy of fierce protection. This sentiment was expressed by the Constitutional Court in *Chief Lesapo v North West Agricultural Bank and another*³⁹ as follows:

“The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation reasonable and justifiable.”

Recently Lord Hughes stated:

“In advancing notices of appeal, as in the conduct of trials, the professional duty of counsel lies both to his client and to the court. There ought to be no conflict between these duties, but it is axiomatic that the duty to the court is the overriding one. Part of the duty to the court is the duty not to advance grounds of appeal unless the point is properly arguable...The importance of this duty lies in enabling the court to deal efficiently with the very large number of applications made to it, and to concentrate on those which raise properly arguable points. If the court is pre-occupied with hopeless points,

³⁸Rauls (1999).

³⁹At par. 22.

*possibly meritorious cases where there are properly arguable issues will be delayed at best and may not receive the time which they deserve. An appellate court needs to rely on the professional duty of counsel to avoid this[...] Happily the confidence in counsel which courts are able to repose is a major factor in the delivery of justice at all levels.*⁴⁰

As seen from the court decisions quoted above, the meaning ascribed to ‘justice’ for purposes of this article is a narrow one. It does not refer to a universal kind of justice. It is simply the kind of man-made justice that one should expect from a civil justice system. It is the ‘justice’ that Constitutions refer to when they protect, as a fundamental right, the right of “access to justice”. It is noted that access to a court or access to a dispute resolution process does not necessarily mean justice. Many legal systems are plagued by high costs, delays, complexity and uncertainty. As stated by Lord Hughes the result of these factors, is at best, a retardation of access to justice and at worst a denial of the right of access to justice. In any event, law is a claim which people make upon one another which rests on duty, and it is a moral claim. In this sense, it is a conversation about rights and duties of lawyers and thus a moral argument.⁴¹

This brand of justice can be called ‘civil justice’. In order to ascertain how a civil justice system delivers this particular brand of justice, the starting point is that a civil justice system is a ‘public good’.⁴² As such, a civil justice system, in putting into practice the attainment of its ultimate goal, namely justice, produces certain bi-products, such as social order, certainty of the law and economic prosperity. In the words of Hazel Genn:

“My starting point is that the civil justice system is a public good that serves more than private interests. The civil courts contribute quietly and significantly to social and economic well-being. They play a part in the sense that we live in an orderly society where there are rights and protections, and that these rights and protections can be made good. In societies governed by the rule of law, the courts provide the community’s defence against arbitrary government action. They promote social order and facilitate the peaceful resolution of disputes. In publishing their decisions, the courts communicate and reinforce civic values and norms. Most important, the civil courts support economic activity. Law is pivotal to the functioning of markets. Contracts between strangers are possible because rights are fairly allocated within a known legal framework and are enforceable through the courts if they are breached. Thriving economies depend on a strong state that will secure property rights -and investments.”

⁴⁰ *Sumodhee v State of Mauritius* at pars. 22-23.

⁴¹ Shaffer (1979).

⁴² Genn (2012).

In providing civil justice, a civil justice system also settles disputes. Dispute resolution however, is not its primary objective or focus. It is merely a bi-product of the main objective, namely justice. As explained by Genn:⁴³

“The public courts and judiciary may not be a public service like health or transport systems, but the judicial system serves the public and the rule of law in a way that transcends private interests.”

This is why the duty on the part of counsel to the court should take precedence over counsel’s duty towards his client.

Processes are Designed Discourage Wasted Time and Costs

In terms of the common law the high courts have the power to stay vexatious, frivolous or oppressive proceedings.⁴⁴ This power is also provided for in terms of the Vexatious Proceedings Act.⁴⁵ Since everyone has the right of access to justice proceedings will be stayed sparingly. A claim that is not likely to succeed is not considered vexatious. The case must be hopeless in the sense that the elements of the case cannot be proved and therefore the case cannot conceivably succeed.⁴⁶ This must be proved with certainty and not merely on a balance of probability.⁴⁷ If a litigant is unable to prove with certainty that his opponent’s case cannot conceivably succeed, the courts can order the litigant to provide security for the costs of the other side.⁴⁸

Litigants are expected to deliver pleadings within the time set by the Rules of Court. Rule 26 of the High Court Rules provides:

“Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be ipso facto barred. If any party fails to deliver any other pleading within the time laid down in these rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleadings within 5 days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties shall be in default of filing such pleading, and ipso facto barred [...]”

Rule 27 provides for extension of time and condonation. It provides that a court can on “good cause shown” make an order extending or abridging the time prescribed by the rules.

⁴³Genn (2012)

⁴⁴*Western Assurance Co v Caldwell’s Trustee; Hudson v Hudson; Ecker v Dean; Absa Bank Ltd v Dlamini.*

⁴⁵3 of 1956.

⁴⁶*Western Assurance Co v Caldwell’s Trustee; Hudson v Hudson.*

⁴⁷*African Farms and Townships v Cape Town Municipality.*

⁴⁸*Ecker v Dean.*

In the case of *Collett*⁴⁹ Musi AJA stated:

“There are overwhelming precedents in this court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the rules court condonation may be refused without considering the prospects of success.”

The courts also have the right to mulct a practitioner that pursues a hopeless case in costs. In a recent decision of the Labour Court⁵⁰ Van Niekerk J stated:

“In my view, in respect of all those who enjoy right of appearance in the Labour Court, the same obligation (i.e. to refrain from pursuing hopeless case) applies. The same penalties in the form of punitive costs orders and orders that practitioners forfeit their fees) ought also to apply. The obligation owed by those who have the privilege of right of appearance in this court requires them in return to respect this institution and the statutory purposes of expeditious dispute resolution that is statutorily mandated to uphold. Section 162, which regulates orders for costs in this court, confers a discretion to make orders for costs, based on the requirements of the law and fairness. Those requirements, as I have stated above, compel practitioners and other representatives, to refrain from referring hopeless cases to this court, and to place the interests of justice and of the court before the parochial interests of their clients and what might be seen to be a principle of partisanship that requires representatives to advance their clients’ partisan interests with the maximum zeal permitted by law; and the principle of non-accountability, which insists that a representative is not morally responsible for either the ends pursued by the client or the means of pursuing those ends.”

Furthermore as pointed out by Rogers:⁵¹

“Before a person may litigate as a pauper an advocate must submit a certificate of probable cause. If a lawyer acting in such a matter concludes that the pauper’s case is hopeless, her duty is to seek judicial permission to withdraw. In order to obtain legal aid in civil cases or in criminal or civil appeals, there must be good or reasonable prospects of success. Why should the affluent litigant and his lawyer have a better right to exploit the judicial process?”

It is also noteworthy that it is a delict to pursue litigation that is unfounded be it laying a criminal charge or a civil claim. An aggrieved party can sue for

⁴⁹*Collett v Commission for Conciliation, Mediation and Arbitration.*

⁵⁰*Peter Marutwane Mashishi v Zodwa Mdladla & Others.*

⁵¹Rogers (2018).

damages.⁵² The aggrieved party can pursue an action in delict against the litigant and against his lawyer jointly.

While empathy towards clients is important in the overall service provided by a lawyer in a humanistic approach, it is equally important to afford people their human right in defence. The ancient Greek philosophers clearly understood too well what is required in humans. Socrates for one believed that virtue was a matter of understanding. When one grasps what is good and what is evil, they are cautious, self-controlled, are brave and possess a spirit of justice. Aristotle on the other hand argued that while virtue has an intellectual component, it also encapsulates a virtue of character that is progressively developed and is what one expects lawyers to have.

From an ethical perspective, lawyers should put virtue ahead of the demands of their profession. Whatever they undertake in legal practice should be interpreted considering the necessity of their role in conformity with its predominant determination to promote justice.⁵³ Lawyers need to be courageous and moderate enough to integrate their professional doings into a good or well-lived life while maintaining a continuity and “[...] interdependence between the virtues required for good lawyering on the one hand, and the virtues necessary for a good human life on the other.”⁵⁴ He continues “Ethical integrity[...] is a constant work in progress. But it is one worth persevering in, both for the sake of living a good life, and for the sake of professional excellence. Good lawyers should possess what Aristotle labelled ‘true virtue’ which is inherent in every individual”.

Today more than ever we require lawyers to be experts in one or other area of legal jurisprudence, but we should be seeking virtuous lawyers first and foremost. Credible lawyers are to an extent undermined by legal systems, processes and expectations, but it is time for ethical and competent lawyers to prevail in a spirit in which they become co-creators of a virtuous society and make efforts to drive the sustainability of morality and credibility in all practices and in all their dealings with all stakeholders. A lawyer’s moral receptivity is often difficult, as is that of police officers, given complex situations, and to attempt to reconcile professional and moral responsibilities remains an extremely challenging notion in practice.⁵⁵ Law and morality are invariably woven together so that moral issues become unavoidable in criminal cases. A lawyer’s moral compass has a viable and essential interface with the notion of legal ethics and the legal profession and its *modus operandi* in general. While there are innumerable rules of professional conduct in place in all legal systems, one needs to comprehend this interface and allow lawyers to consider moral issues when advising their clients, however attorneys must be careful when doing so since a moral context may differ from one person to another and also between diverse cultures.

Given that moral issues touch on legal issues in a big way and especially because a client may not have any other ethical support base, it is necessary in

⁵²*Specialised Edible Oils and Fats (Pty) Ltd v Eezi Food Imports and Exports (Pty) Ltd* at pars 19-21.

⁵³Banks (2013).

⁵⁴Thunder (2014).

⁵⁵Braswell, McCarthy & McCarthy (2012).

many cases, for a lawyer to be willing to discuss ethics with a client. Within this context, the moral choices and dilemmas of a client must of necessity remain theirs to ultimately make.

Conclusion

Law is a critical profession in which lawyers have numerous obligations to the court and especially to their clients, one of which is to be candid and ethical in utterances and actions. Lawyers, in efforts to be ethical, must not subordinate their service and professionalism to their profit motives, and ambitious personal aims and desires.

Quality service provision is the idyllic issue, and thus any remuneration must constantly be subservient to this determination. A lawyer who is virtuous adheres to ingrained and objective moral norms or character traits which impact and direct his or her capacity to judge between what action is right or wrong and to then act accordingly.

There are those who assume a strong adversarial position in dealing with clients cases in which they fervently defend their clients as if they did not know (which they do) that their clients were guilty. By means of contrast, others assume a weak adversarial position and they consider their acquaintance with the truth that they know when making strategic trial decisions. They are generally trustworthy and can be expected to state the truth, and when challenged in difficult situations, remain calm and endure pressure to react adversely.

People must have confidence in the legal profession and the administration of justice. Lawyers need to be totally honest with their clients about the likelihood and significance of their likely conviction when there is a preponderance of evidence against them. Lawyers also need to be careful not to coerce innocent defendants to plead to crimes that they played no part in. Where lawyers face conflicts of interest such as for example, when they represent a client but are in effect materially limited by their loyalty to another client, or some or other a personal relationship, they should be forthright with their clients and state the hopelessness of one or other sides case.

Lawyers in especially civil cases ought to have an ethical choice available to either agree or refuse to support a potential client after careful consideration presented facts and likely taking into account both the facts of the client's position, and the probable significance intended for a third party. Whether guilty or innocent, an accused person must have a fair trial which implies that lawyers are ethically bound to provide competent representation for clients and not abuse their position of trust. The reality is that the legal profession can only be as ethical, as its integral parts and ethical lawyers' important contributors to a desired ethical legal system that adequately protects individuals and entities.

References

- American Bar Association (ABA) (2018). Comment on Rule 1.3 -Client-Lawyer Relationship, Rule 1.3 Diligence, Center for Professional Responsibility: USA <https://www.americanbar.org/aba.html>
- Aristotle (R.C. Bartlett & S.D. Collins, trans.) (2011). *Nicomachean Ethics*. Chicago, Ill: University of Chicago Press.
- Aristotle (T. Irwin, trans.) (1999). *Nicomachean Ethics*. 2nd ed. Indianapolis, IN: Hackett Pub. Co. Introduction at xv.
- Asimow, M. & R. Weisberg (2008). 'When the Lawyer Knows the Client is Guilty: Client Confessions in Legal Ethics, Popular Culture, and Literature' in *Southern California Interdisciplinary Law Journal* 18:229-258.
- Banks, C. (2013). *Criminal Justice Ethics*. Thousand Oaks, CA: Sage Publishing.
- Blackburn, S. (2008). *Oxford Dictionary of Philosophy*, 2nd ed. Oxford, UK: Oxford University Press at 381.
- Boone, B. (2017). *Ethics 101: From Altruism and Utilitarianism to Bioethics and Political Ethics, an Exploration of the Concepts of Right and Wrong*. Avon, MA: Adams Media, Simon & Schuster, Inc.
- Bostock, D. (2000). *Aristotle's Ethics*. New York: Oxford University Press.
- Braswell, M., McCarthy, B. & B. McCarthy (2012). *Justice, Crime and Ethics*. 7th Ed. Burlington, Massachusetts: Elsevier.
- Burger, R. (2008). *Aristotle's Dialogue with Socrates - On the Nicomachean Ethics*. Chicago, Ill: University of Chicago Press.
- Byrne, J. J. (23 May 2016). Continuing Evolution of Legal Mal Breach of Contract Claims in *The Legal Intelligencer*. <https://www.law.com/thelegalintelligencer/almID/1202758271123/Continuing-Evolution-of-Legal-Mal-Breach-of-Contract-Claims/?sreturn=20180319141521>
- Duxbury, N. (2009). 'Golden Rule Reasoning, Moral Judgment, and Law' in *Notre Dame Law Review*, 84(4):1529-1605.
- Ellwanger, S. (2012). 'How police officers learn ethics' in M. Braswell (Ed.), M. C. Braswell, B. R. McCarthy & B. J. McCarthy (2012) *Justice, crime, and ethics*. 7th ed.. Newark, NJ: Anderson Publishing Company OH.
- Farrow, T.C.W. (2008). 'Sustainable Professionalism' in *Osgoode Hall Law Journal*, 46(1):51-103.
- Frisch, C. & M. Huppenbauer (2014). 'New Insights into Ethical Leadership: A Qualitative Investigation of the Experiences of Executive Ethical Leaders' in *Journal of Business Ethics* 123(1):23-43.
- Genn, H. (2012). 'What is civil justice for? Reform, ADR, and access to justice' in *Yale Journal of Law & the Humanities* 24(1):397.
- Gini, A (1996). 'Moral leadership and business ethics' in B. Adams & S. Webster (eds.) *Kellogg Leadership Studies Project: Ethics and Leadership working papers* (pp. 1-22). College Park: MD: Center for Political Leadership and Participation.
- Groarke, L. (2011). *Moral Reasoning: Rediscovering the Ethical Tradition*. Don Mills, Ontario: Oxford University Press.
- Hinman, H.L. (2013). *Ethics: A Pluralistic Approach to Moral Theory*, Cengage Learning: US.
- Kraut, R. (1989). *Aristotle on the Human Good*. Princeton, New Jersey: Princeton University Press.
- Luban, D. (1988). *Lawyers and Justice: An Ethical Study*. Princeton, New Jersey: Princeton University Press.

- May, H. (2010). *Aristotle's Ethics Moral Development and Human Nature*. London: Continuum
- McCartney, S. (2015). *Ethics in Law Enforcement*. Victoria, British Columbia: BC campus. <http://opentextbc.ca/ethicsinlawenforcement/>
- McLaughlin, E. (2009). 'Discretion' in E. McLaughlin & J. Muncie (eds.) *The Sage Dictionary of Criminology*. London: Sage at pp:134-135.
- Pollock, J. M. (2010). *Ethical Dilemmas and Decisions in Criminal Justice*. 9th ed. Boston, MA: Cengage Learning
- Rawls, J. (1999). *A Theory of Justice* (revised ed.). Cambridge: Massachusetts: The Belknap Press of Harvard University Press.
- Sartre, J.P. (1960). (No Edition number provided) *Existentialism and Human Emotions*, The Wisdom Library: New York.
- Shaffer, T.L. (1979). 'The Practice of Law as Moral Discourse' in *Notre Dame Law*, 55(2):231-253.
- Simon, W.H. (1993). 'Reply: Further Reflections on Libertarian Criminal Defense' in *Michigan Law Review* 91:1767-1772.
- Souryal, S. (2011). *Ethics in Criminal Justice: In Search of the Truth* (5th Edition), Burlington, Maine: Elsevier.
- Strauss Daly Attorneys (2017). 'Ethics in action in the Legal Profession', News, 03 April 2017. <http://www.strausdaly.co.za/2017/04/03/ethics-action-legal-profession>.
- Thunder, D. (2006). 'Can A Good Person Be a Lawyer' in *Notre Dame Journal of Law, Ethics & Public Policy* 20 (1):313.
- Van Zyl, C.H. IV & J. Visser (2016). 'Legal Ethics, Rules of Conduct and the Moral Compass - Considerations from a Law Student's Perspective' *Potchefstroom Electronic Law Journal* PER/PELJ (19). <http://dx.doi.org/10.17159/1727-3781/2016/v19ni0a795>
- Wasserman, D. (1990). 'Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation' in *Maryland Law Review* 49:392.

Court Cases

- Absa Bank Ltd v Dlamini* [2008] 2 All SA 405, 2008 2 SA 262 (T).
- African Farms and Townships v Cape Town Municipality* 1963 2 SA 555 (A).
- Chief Lesapo v North West Agricultural Bank and another*, [1999] ZACC16; 2000(1) SA 409 (CC); 1999 (12) BCLR 1420 (CC).
- Collett v Commission for Conciliation, Mediation and Arbitration* [2014]6 BLLR 523 (LAC).
- Ecker v Dean* 1937 AD 254.
- Hudson v Hudson* 1927 AD 259.
- Peter Marutwane Mashishi v Zodwa Mdladla & Others* (Case No: JR 2644/11 (2018) (LC).
- Specialised Edible Oils and Fats (Pty) Ltd v Eezi Food Imports and Exports (Pty) Ltd* [2015] ZAWCHC 187.
- Sumodhee v State of Mauritius* [2017] UKPC 17.
- Western Assurance Co v Caldwell's Trustee* 1918 AD 262.