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Using Discipline as a Method of Retribution and Deterrence of Unethical Behaviour of Legal Practitioners in Namibia: How Does it Compare with Ghana?

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Abstract

The legal profession, just like the medical profession is regulated by the professional body. In the Namibian context, the Law Society of Namibia, a statutory body, is mandated to regulate the conduct of legal practitioners. The Legal Practitioners Act, 15 of 1995 is the principal statute that provides for the discipline of legal practitioners alleged to have committed misconduct or contravening rules relating to legal practice. The said Act must be read in conjunction with the Rules of the Law Society of Namibia. These Rules have been established under the law and further amplify what is contained in the Act. Every legal practitioner must comply with the principles of good legal practice namely ethics, honesty, competence, and professionalism. Hence, this article critically analyses the principles of good legal practice and whether discipline can be used to deter legal practitioners from further engaging in unethical conduct. To achieve this, the article examines the Namibian law on the subject and does a comparative study with Ghana, whose legal profession has been operating successfully for a long time.

Keywords: Legal practice; legal ethics; professionalism; disciplinary committee; Namibia; Ghana;

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competence; Legal Practitioners Act

1 INTRODUCTION

For decades, people have accepted that unethical behaviour, corruption, fraud, and dishonesty is the normal way of life. What is disheartening is the fact that this form of behaviour is not only exhibited in one's personal dealings but extends to one's profession. Fortunately, there are, however, established national and state norms putting forth guidelines for professional conduct in specific professions in an era of egregious and immoral activities carried out for personal gain.¹ Persons practising law are bound by the statute, rules of conduct, and common-law principles as far as these laws and rules relate to the practice of the legal profession. Different jurisdictions have different rules of discipline and sanctioning legal practitioners for misconduct. But, generally, the widely followed procedure is to first investigate the alleged misconduct and to array the implicated practitioner before a disciplinary committee. Once found guilty a legal practitioner can be suspended from legal practice for a specified period. In extreme circumstances, the practitioner may be removed from the roll, in which case they will no longer be able to practice law.² The last resort of removing a legal practitioner off the roll only happens in extreme circumstances, where the practitioner's misconduct is severe and the only reasonable sanction is removal from practice. This is the case when the practitioner is no longer deemed fit to practice law. Being fit and proper involves aspects of integrity, reliability, and honesty.³ Some of these factors of ethical behaviour are discussed in the following sections of this article. The article investigates whether discipline can be used to deter legal practitioners from engaging in unethical conduct. The below sections include discussions on the expected standard of behaviour by legal practitioners generally; a discussion of the Namibian position; a synopsis of the Ghanaian position; and concluding remarks.

2 STANDARDS OF ETHICAL BEHAVIOUR

2.1 Ethics and Honesty

It is far simpler to think favourably of the practice and reframe it as "standing up for a client's rights" whether in criminal, civil, or transactional cases when one's own attorney is actively "taking advantage of loopholes and technicalities."⁴ Some view attorneys to be dishonest as they are perceived as lying in court to get their way. On one hand, a attorney is expected to act in favour of their client whereas, on the other hand, they are required to uphold the law and ensure that they are honest in all of their dealings. Advocates and attorneys are required to make difficult decisions under challenging conditions daily. According to Rothenberg, tensions between a attorney's obligations to their clients, the legal system, and the integrity of justice cause exceedingly challenging ethical dilemmas in legal practice.⁵ Legal professionals frequently have to balance opposing belief systems during this process.⁶ One such example could be a legal practitioner's quest to make money versus upholding the law. The question here could be, must a legal practitioner act dishonestly simply to make money while trumping on law and justice? The legal profession has created a system of professional norms and rules of good behaviour that its members must adhere to in order to help attorneys avoid ethical problems and uncertainty in determining what is right and wrong.⁷

Legal ethics refers to:

⁷ *Ibid.*

The minimum standards of appropriate conduct within the legal profession, involving the duties that its members owe one another, their clients and the courts ... [t]he written regulations governing those duties.⁸

According to Kirchner, “[l]egal ethics in the broad sense have the same function for the practice of law that International Humanitarian Law (IHL) has for the soldier’s work: that is to civilize the way in which we fight.”⁹ Kelly proposes legal ethics to be comprised of four distinct meanings: (i) the professional rules of protocol, such as trust fund rules, etc.;¹⁰ (ii) the relevant principles and appropriate modes of conduct established through analysis of cases and opinions on ethical matters by, for example, bar association committees;¹¹ (iii) criticism of the law and society for failing to meet standards of justice;¹² and (iv) the practical scenario in which a attorney makes deliberations.¹³

Snyman opines that legal ethics should be looked at from both narrow and broad terms, in that it refers to professional and disciplinary norms and codes of behaviour, as well as morality, values, and philosophy.¹⁴ Van Zyl and Visser conclude that legal ethics is however more than the mere rules and regulations of behaviour, but connotes to moral principles of the legal profession. Thus, legal ethics does not simply relate to ethical behaviour in the general context, but rather behaviour expected from a legal professional.

Virtues of legal ethics and honesty can be formulated as follows:

- An honest attorney will not lie to the court; one with integrity will not overcharge clients;
- An honest legal practitioner takes responsibility for their actions.

The depressing truth is that too many attorneys — who formerly proudly stated that their word was their bond and claimed honesty and integrity as their trade — are rightfully viewed as being unreliable.¹⁵

Too many dishonest attorneys use the banner of “zealous advocacy” to try and justify unethical behaviour that is actually against the rules governing attorney conduct. For example, in the case of *Vassen v Law Society of the Cape*¹⁶ the accused (an attorney) stole money by getting an insurance company to pay the proceeds of a life insurance policy to himself rather than the beneficiary; and the court had to determine whether he was a fit and proper person to continue practising law. The court found he was not “fit and proper” to practice. The court went on to explain that an attorney is expected to be trustworthy, dependable, and honest. Some attorneys conveniently forget — or conveniently pretend to forget — that the golden rule of ethical practice is “zealousness within the bounds of law” and that adhering to the “law” entails abiding by the rules of professional conduct and other standards governing the practice of law, many of which already call for honesty and sincerity.¹⁷

According to the International Bar Association (IBA) International Principles on Conduct for

8 *Handler Ballentine’s Law Dictionary* 300.

9 Kirchner “Legal Ethics Education in Germany” 2015 *Indonesian Journal of International and Comparative Law* 98.

10 Kelly “Notes on the Teaching of Ethics in Law School” 1980 *Journal of the Legal Profession* 21.

11 *Ibid.*

12 Kelly 1980 *Journal of the Legal Profession* 22.

13 *Ibid.* 23.

14 Snyman-Deventer “Teaching the Theory and Skills of Legal Ethics to South African LLB Students” 2017 *Obiter* 128.

15 William 2002 *South Carolina Law Review* 529.

16 1998 4 SA 532 (SCA).

17 William 2002 *South Carolina Law Review* 529.

the Legal Profession, a attorney is required to uphold the greatest levels of honesty, integrity, and fairness at all times when dealing with their clients, the court, their colleagues, and anybody else they may interact with on the job.¹⁸ Thus, for the legal practitioner, acting in the best interests of the client is not the end of the enquiry. Legal practitioners need to carefully consider the impact that their actions may have on all parties that may be affected by such actions.

2.2 Competence and Professionalism

The legal profession is an honourable profession, it is not simply a trade or business but rather a profession.¹⁹ In other words, though the legal profession may be classified as a trade or business, it has a higher standard which its members must abide by as opposed to other trade or businesses. The fact that legal practitioners derive income as in the case of a business person is not in question. It is because of the common link of deriving income that may cause confusion resulting in a legal practitioner acting like a “normal” business person. The justification of professionalism is that customers gain from experts regulating their own markets in the spirit of public service, even if it is in their long-term interest and may not offer immediate benefits.²⁰ The regulation of legal professionalism ensures that legal professionals properly consider the public interest.²¹ The purpose of legal professionalism is clearly articulated in section 4 of the Legal Practitioners Act.²² Hence, legal professionalism helps to maintain and enhance the standards of conduct and integrity of all members of the legal profession;²³ it further encourages and promotes efficiency in and responsibility concerning the profession;²⁴ enforces correct and uniform practice and discipline among members;²⁵ and lastly, ensures the enhancement of the rule of law and promotes the protection of human rights.²⁶

Although the Legal Practitioners Act termed the above-mentioned principles together with a host of other principles not listed herein as the objects of the Law Society of Namibia, this article suggests that the principles listed herein can be termed as principles of legal professionalism in Namibia. Ultimately, adherence to legal professionalism ensures that legal professionals in their daily dealings maintain proper standards of work and act in the best interests of clients.²⁷ A legal practitioner does not only have a relationship (i.e. client-practitioner relationship) but also owes a duty to the court as an officer of the court to act carefully and considerably, ensuring that they do not hamper the court in delivering justice to the affected party or parties.

Apart from professionalism, a legal practitioner is required to deliver their work in a competent manner. Competence in this context may refer to the ability of a legal practitioner to discharge their work in a manner that could reasonably be expected from a person of their calibre, taking into account the knowledge, skills and expertise of a legal practitioner. Thus, the task of an attorney must be done competently and promptly. An attorney is not allowed to accept work that they do not reasonably believe can be completed in that way.²⁸ An attorney’s unprofessionalism

18 IBA International Principles on Conduct for the Legal Profession https://www.icj.org/wp-content/uploads/2014/10/IBA_International_Principles_on_Conduct_for_the_legal_prof.pdf

19 See *Ex Parte Siambango* [2020] NAHCMD 16.

20 Boon “Professionalism under the Legal Services Act 2007” 2011 *International Journal of the Legal Profession* 198.

21 *Ibid.*

22 Act 15 of 1995 as amended.

23 Legal Practitioners Act No 5 of 1995, s 41(a).

24 *Ibid.* s 41(d).

25 *Ibid.* s 41(g).

26 *Ibid.* s 41(m).

27 Boon 2011 *International Journal of the Legal Profession* 200.

28 IBA International Principles on Conduct for the Legal Profession

and incompetence do not only reflect negatively on a legal practitioner, but the legal profession as a whole.

Self-regulation of persons belonging to a particular professional body is not advisable for several reasons. First, self-regulation does not provide proper guidance with regard to conduct of persons of the professional body. Hence, it is difficult to ascertain which conduct is accepted or required from a legal practitioner. Second, the aspect of discipline is lacking in self-regulation. The question that one needs to ask is who will hold who accountable and liable for any wrongdoings if there is no professional body to regulate and enforce discipline? Thus, it is essential and correct, as in the case of Namibia, to have a body that prescribes professional conduct and outlines and enforces discipline in the event of non-compliance with the required professional conduct.

3 THE CONCEPT OF DISCIPLINE GENERALLY

Legal practitioners must uphold certain principles of the legal profession, and in failing a legal practitioner may face discipline. Slabbert, references the works of Du Plessis²⁹ who lists some of the qualities that a legal practitioner should possess. These qualities include integrity, objectivity, dignity, the possession of knowledge and technical skills, a capacity for hard work, respect for the legal order, and a sense of equity or fairness.³⁰ What needs to be added to this list is the ability of the legal practitioner to manage their trust funds. Trust funds are monies entrusted to a legal practitioner by their office as a legal practitioner and the agreement entered into by a legal practitioner with a client for the provision of legal services. Any legal practitioner who operates under a fidelity fund certificate must exhibit the ability to meticulously deal with trust funds. A legal practitioner who fails to properly exhibit the qualities of objectivity, integrity, dignity, possession of the necessary knowledge, respect for the legal order, and the ability to operate the trust funds will most likely fall into problems, necessitating some form of discipline to be taken against a legal practitioner.

The concept of discipline may be two-fold. First, discipline refers to the conduct that is prohibited in a work environment. Hence, it includes the offences for which the accused employee (in this context, a legal practitioner) may be charged with, and the sanctions that may be imposed. Second, discipline refers to the procedure to be followed in adjudicating the alleged misconduct that has been committed by the accused employee (legal practitioner). Sanctions can be imposed following the outcome of the disciplinary hearing.

In the context of a legal practitioner, the Legal Practitioners Act³¹ and the Rules of the Law Society of Namibia set out the disciplinary process of a legal practitioner. The practical application of the rules informs us whether or not the set down disciplinary principles are properly formulated in the statute and the rules; and whether the same is properly implemented when the need arises, i.e., when misconduct is alleged to have been committed by a legal practitioner. This section discussed the principles of discipline briefly. The next section looks at the Namibian position in detail concerning the principal legislation and rules governing tethical standards and discipline.

4 THE NAMIBIAN POSITION

The preceding sections of the article provided conceptual underpinning of the ethical conduct and discipline of legal practitioners from a general perspective. This section discusses these issues from the Namibian position. Currently, the legal framework for legal practitioner's

29 Du Plessis "The Ideal Legal Practitioner (from an Academic Angle)" 1981 *De Rebus* 424–427.

30 Slabbert "The Requirement of Being A 'Fit and Proper' Person For The Legal Profession" 2011 *PELJ* 216.

31 Act No 5 of 1995.

discipline arbitration in Namibia is made up of, and is traceable from, an array of domestic legal instruments, namely the Legal Practitioners Act 15 of 1995, the Rules of the Law Society of Namibia, and judicial decisions. This section briefly examines such a legal framework for legal practitioner's discipline in Namibia.

4 1 Legal Practitioners Act 15 of 1995

As indicated in the preceding sections, The Legal Practitioners Act³² as a key statute sets out the regulatory and legislative framework that describes the conduct and discipline of legal practitioners in Namibia. It contains provisions that provide for the regulation of various aspects of the legal practitioner's conduct ranging from admission of legal practitioners;³³ makes provision for the establishment and constitution of the Board for Legal Education;³⁴ sets out privileges of legal practitioners;³⁵ provides for legal practitioners' books of accounts and power of Council to inspect;³⁶ outlines offences in relation to trust accounts;³⁷ provides for removal from the roll or suspension from the practice of law;³⁸ outlines what amounts to unprofessional or dishonourable or unworthy conduct;³⁹ establishes the disciplinary committee⁴⁰ and the like matters.

Legal practitioners' conduct in Namibia like most other jurisdictions is regulated by statute. The Legal Practitioner's Act sets out the procedure to be followed in the event of misconduct committed by a legal practitioner. Section 32 gives the court the power upon application to order that the name of a legal practitioner be struck off the roll or that a legal practitioner be suspended from practice. Before the court can make such an order the court must satisfy itself that the legal practitioner concerned no longer conforms to any of the requirements of section 4(1)(c);⁴¹ or if the legal practitioner is guilty of unprofessional, dishonourable or unworthy conduct or under circumstances which, in the opinion of the court, show that they are not fit and proper to continue to be a legal practitioner.⁴²

The application to have the legal practitioner's name struck off the roll or to suspend a legal practitioner on the ground that the legal practitioner fails to meet the requirements set out in section 4(1)(c) must be brought to court by the Law Society. Section 4 relates to the persons qualified to be admitted as legal practitioners and the application for admission. In terms of section 4(1)(c) to be admitted and authorised to practice law in Namibia one must be a Namibian citizen; (ii) be lawfully admitted to Namibia for permanent residence therein and is ordinarily resident in Namibia; or (iii) be a holder of an employment permit issued in terms of section 27 of the Immigration Control Act, 1993 (Act 7 of 1993) for employment in the service of the State. The second form of application involving the guilty verdict of unprofessional, dishonourable, or unworthy conduct may be brought by the disciplinary committee.

The Law Society of Namibia is a statutory body established as a body corporate with perpetual succession and a common seal. As a body corporate, the Law Society is capable of suing and

32 *Ibid.*

33 *Ibid.* s 3.

34 *Ibid.* s 8.

35 *Ibid.* s 13.

36 *Ibid.* s 25.

37 *Ibid.* s 31.

38 *Ibid.* s 32.

39 *Ibid.* s 33.

40 *Ibid.* s 34.

41 *Ibid.* s 32(1)(a).

42 *Ibid.* s 32(1)(b).

being sued and, subject to the provisions of the law, i.e. the Legal Practitioners Act. Furthermore, the Law Society is entitled to do and suffer all such acts and things as bodies corporate may lawfully do and suffer.⁴³

Amongst its other functions the Law Society of Namibia has the duty to maintain and enhance the standards of conduct and integrity of all members of the legal profession.⁴⁴ It is because of this duty that the Law Society cannot turn a blind eye to any wrongful conduct perpetrated by any legal practitioner in Namibia.

One of the main aspects regulated by the Legal Practitioners Act for which removal from practice is warranted is the unprofessional, dishonourable, or unworthy conduct of a legal practitioner. A legal practitioner may be found guilty of unprofessional, dishonourable or unworthy conduct if they engage in any of the following activities:

- In the event the legal practitioner practices on their own account or in partnership, without holding a fidelity fund certificate and without having been exempted from holding such a certificate under the provisions of section 67.⁴⁵
- Where the legal practitioner, in connection with their practice, without the written consent of the Council, employs or remunerates a person who is disqualified from practising because of the fact that their name has been struck off the roll or that they are suspended from practising.⁴⁶
- Where the legal practitioner fails to observe the provisions of Part III dealing with the keeping of accounts by the legal practitioner or provisions of section 67(3) wherein a legal practitioner who has been exempted from holding a fidelity fund certificate and who in the conduct of their practice accepts or receives or holds any money for or on account of another person, without first obtaining a fidelity fund certificate under the provisions of section 68.
- In the event, where subject to the provisions of any other law, a legal practitioner makes over to or shares or divides with any person, other than a legal practitioner in or outside Namibia, either by way of partnership, commission or allowance or in any other manner a portion of their professional fees.⁴⁷
- Where a legal practitioner allows, assists, or enables a person who is not a legal practitioner to charge, recover, or receive a fee or derive remuneration in respect of or in connection with the preparation or execution of a document or the performance of any professional work which only a legal practitioner is permitted by law to prepare, execute or perform...⁴⁸
- Where a legal practitioner allows their name together with their qualifications as a legal practitioner to appear by way of advertisement or notification or information upon business letterheads, accounts, or other documents whatsoever in conjunction with the name of a person who is not a legal practitioner to convey, or be capable of conveying, the impression that they are associated in their legal practice with that person.⁴⁹
- Where a legal practitioner enters into a contract or partnership with or of employment by a person who is not a legal practitioner, which agreement enables such a person to

43 *Ibid.* s 40.

44 *Ibid.* s 41(a).

45 *Ibid.* s 33(1)(a).

46 *Ibid.* s 33.

47 *Ibid.* s 33(1)(b).

48 *Ibid.* s 33(1)(c).

49 *Ibid.* s 33(1)(d).

enjoy, share, or participate in fees reserved solely to a legal practitioner; or secures for the legal practitioner the benefit of professional business solicited by such person or any other unqualified person.⁵⁰

- Where a legal practitioner accepts or agrees or offers to accept, for any professional work performed or to be performed by them for or on behalf of any client, any remuneration that is less than the minimum permitted to be charged in accordance with any rate or scale of charges prescribed by the law.⁵¹
- Where the legal practitioner acts or purports to act for any person in any matter without having been instructed by that person or a person authorised to instruct on behalf of the person they represent or is to represent.⁵²
- Where the legal practitioner wilfully misleads a court or tribunal, or allows it to be misled.⁵³
- Where a legal practitioner either directly or indirectly procures or attempts to procure the employment of themselves, or their partner or assistant, as a legal practitioner through or by the intervention of another person to whom remuneration for obtaining such employment has been given by them, or agreed or promised to be so given.⁵⁴
- Where a legal practitioner deceives or misleads a client or allows a client to be deceived or misled in any respect material to such client.⁵⁵

As can be seen from the above list, the statute has endeavoured to provide all possible types of misconduct for which a legal practitioner can be charged for any alleged wrongdoing. The approach followed by the legislature in providing a plethora of possible offences is commendable for two reasons. First, it aims to regulate and inform the legal practitioners regarding the conduct that is expected of them and which conduct the legal practitioners must refrain from. This assists a great deal in disciplining legal practitioners because they ought to be well aware of the do's and don'ts of the legal practice. Second, providing a long list of possible wrongdoings makes it easier for any party who is entitled to charge a legal practitioner to formulate charges correctly.

The Namibian legislature has been proactive and innovative in its approach. Apart from the list contained in section 33(1), the statute goes on to indicate that the list is not exhaustive, giving the court or Disciplinary Committee the power to determine that an act or omission not specified in the Legal Practitioners Act (i.e. section 33(1)) or any other law, which constitutes unprofessional, dishonourable or unworthy conduct on the part of a legal practitioner.⁵⁶

The provisions of the statute regarding unworthy or undesirable conduct have been formulated in such a way that a legal practitioner has little to no room in committing a misconduct and get away unpunished with such wrongful acts.

4 2 Rules of The Law Society of Namibia

Pursuant to section 52 of the Legal Practitioners Act empowering the council of the Law Society to make rules and with the approval of the Chief Justice, the Rules of the Law Society of Namibia were made and came into force upon being gazetted in terms of section 52(2) of the

50 *Ibid.* s 33(1)(e).

51 *Ibid.* s 33(1)(f).

52 *Ibid.* s 33(1)(g).

53 *Ibid.* s 33(1)(h).

54 *Ibid.* s 33(1)(i).

55 *Ibid.* s 33(1)(j).

56 Section 33(2).

Legal Practitioners Act.

Rule 17 and 18 are of utmost importance to the discussion at hand as it sets out accounting requirements generally and trust accounts respectively. Each legal practitioner is thus required to ensure compliance with the rules when dealing with its accounting records of the firm. For instance, a legal practitioner's practice is required to ensure that its accounting records distinguish in readily discernible form between business account transactions and trust account transactions.⁵⁷

The legal practitioner's firm is obligated to retain its accounting records for a at least five years from the date of the last entry recorded in each particular book or another document of record at its main office or a branch office, or any other place provided that prior authorisation for keeping it at "any other place" has been sought and granted by the council.⁵⁸

Furthermore, Rule 17(5) calls on legal practitioners to ensure that their firms regularly and promptly update their accounting records.

The significance of Rule 18 lies in the keeping of trust accounts. What is of paramount importance here is the fact that all monies received from a client for future services must be deposited into the trust banking account without any delay.⁵⁹ Furthermore, a legal practitioner may not help themselves with the funds in the trust bank account as such funds belong to the client and can only be withdrawn to or on behalf of a trust creditor; or for making transfers to its business banking account, but only in respect of money claimed to be due to the firm.⁶⁰

Rule 21 sets out the professional standards required from a legal practitioner and amongst others states that a legal practitioner will be deemed not to act professionally where they commit a breach of faith or trust in relation to their client or any estate of which they are the executor, administrator, trustee, liquidator, receiver, or curator.⁶¹

Any legal practitioner who withholds the payment of trust money without lawful excuse may also be found guilty of misconduct relating to unprofessional conduct.⁶² If a legal practitioner fails within a reasonable time to respond to an enquiry from a person to whom they owe a duty to reply, this equally will result in unprofessional conduct.⁶³ The law only permits those who have been duly admitted and so authorised to practice law to hold a practice and render services to the public. Thus, a legal practitioner who carries on practicing at an office that is not under the direct and personal supervision of a duly qualified legal practitioner may make themselves guilty of misconduct.⁶⁴ Any legal practitioner who fails to pay within a reasonable time the reasonable fees and disbursements of any legal practitioner, notary, or conveyancer in respect of work entrusted to such practitioner by them may equally be liable for misconduct as such act goes contrary to the professional standards that a legal practitioner is expected to display and uphold.⁶⁵ Such payment can be withheld lawfully under two conditions, i.e. where at the time of giving instructions it was clearly indicated that the said legal practitioner will not be liable for payment or where the council has been furnished with the reasons for withholding payment

57 Rule 17(3) of the Rules of the Law Society of Namibia.

58 *Ibid.* Rule 17(4).

59 *Ibid.* Rule 18(1).

60 *Ibid.* Rule 18(5).

61 *Ibid.* Rule 21(2)(a).

62 *Ibid.* Rule 21(2)(b).

63 *Ibid.* Rule 21(2)(c).

64 *Ibid.* Rule 21(2)(g).

65 *Ibid.* Rule 21(2)(j).

and the latter is satisfied with those reasons.⁶⁶

Once an application as envisaged in section 33 has been brought, the court may order for the temporary suspension of that legal practitioner from practice pending the determination of the complaint, if the court is satisfied, (a) that there are reasonable grounds to believe that the legal practitioner is guilty of unprofessional, dishonourable, or unworthy conduct; and (b) that the alleged conduct of the legal practitioner is of such a serious nature that it is in the public interest or the interest of the legal practitioner's clients that the legal practitioner be prevented from carrying on their practice until the disciplinary proceedings against them have been finalised or until further orders.

The Rules of the Law Society also make provision for investigating unsatisfactory conduct of a legal practitioner. The Standing Committee of the Council to be known as the Legal Ethics and Investigatory Committee, is responsible for advising the Council on all matters of ethics in the practise of law and has the powers to investigate the conduct of any member which in their opinion may require disciplinary action against such a member, and advises Council of their findings.⁶⁷ Once the Council has completed the investigation or, where applicable, after consideration of the report of the Legal Ethics and Investigatory Committee submitted in terms of sub-rule 22(7), the Council shall refer the matter to the Disciplinary Committee established by section 34 of the Act together with its report or the report of the Legal Ethics and Investigatory Committee under sub-rule 22(7) and with such recommendations as it may wish to make about the matter.⁶⁸

Similar to the provisions of the Legal Practitioners Act, the Rules of the Law Society provide numerous provisions that relate to conduct that is prohibited by law. A legal practitioner found guilty of such prohibited conduct may be held liable in terms of the law. The Rules of the Law Society, however, do not provide any disciplinary sanction to be imposed on a legal practitioner who has been found guilty of committing misconduct. One can speculate the Rules of the Law Society do not make provision for sanctions for misconduct. It could be argued that because the Rules of Law Society are established through the Legal Practitioners Act and must thus be read in conjunction with the Act, making provisions for sanctions could be a duplication.

What is commendable in terms of the Rules is the fact that it sets out a proper procedure to be followed to have a legal practitioner disciplined, when there is an alleged misconduct committed by a legal practitioner.

4 3 Judicial Decisions

Namibian courts had an opportunity on various occasions to apply the law regarding the practice of legal practitioners where the conduct of such legal practitioners has been in issue.

The case, *Witvlei Meat (Pty) Ltd and Others v The Disciplinary Committee for the Legal Practitioners and Other*,⁶⁹ involves an appeal against a High Court decision that denied an appeal under section 35 of the Legal Practitioners Act of 1995. The case addresses the significant issue of the obligations of confidentiality and loyalty owed by attorneys to their clients.

The six appellants submitted a complaint to the Law Society of Namibia that a certain law firm based in Windhoek that has been cited as the second respondent in the matter, namely, Koep and Partners, had acted in conflict with their duty to the six appellants when they took instructions from the fifth and sixth respondents, namely, Fatland Jaeren AS and Brodr. Michelsen AS,

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* Rule 22(1) and (2).

⁶⁸ *Ibid.* Rule 22(8).

⁶⁹ [2013] NASC 19.

to institute shareholder litigation against the first appellant, Witvlei Meat (Pty) Ltd. The fifth and sixth respondents are minority shareholders in the first appellant. The complaint was forwarded by the Law Society to its Disciplinary Committee for Legal Practitioners, which was constituted per section 34 of the Act. The Disciplinary Committee notified the appellants that their complaint did not reveal a *prima facie* case of misconduct. The six appellants launched proceedings in the High Court seeking a declaration that the complaint lodged with the Law Society does disclose a *prima facie* case of unprofessional, dishonourable, or unworthy conduct within the meaning of the Act. Furthermore, the appellants sought for an order instructing the Disciplinary Committee to hear the application and an interdict restraining the legal firm from accepting any instructions which would require them to provide advice or institute litigation against the six appellants' interests.

It became apparent to the court that it is necessary to quickly review the pertinent provisions of the Act in order to determine whether the Disciplinary Committee was correct in determining from the information at hand that the appellants had not disclosed a *prima facie* case of misconduct against the law firm. The court referred to Part IV of the Act stating that it provides for the discipline and removal of legal practitioners from the roll. The court further made mention of the function of section 32 stating that it provides that a legal practitioner may be struck off the roll by the High Court "if he or she is guilty of unprofessional or dishonourable or unworthy conduct of a nature or under circumstances which, in the opinion of the Court, show that he or she is not a fit and proper person to continue to be a legal practitioner." In addition, the court referred to section 35(2)(b) of the Act which allows for an application by the Disciplinary Committee to strike a legal practitioner off the roll. The court also highlighted the fact that in terms of the law, the Disciplinary Committee shall consist of four legal practitioners appointed by the Council of the Law Society and one person appointed by the Minister of Justice. Finally, the adjournment of the Disciplinary Committee under section 35 is to hear allegations of alleged unprofessional, dishonourable, or unworthy conduct on the application of the Council of the Law Society or a person affected by the alleged conduct. Rightly so, the court also indicated that a person aggrieved by the decision of the Disciplinary Committee can bring an appeal against such decision to court and the latter may confirm the decision or refer the decision to the Disciplinary Committee and order the Disciplinary Committee to hear and deal with the matter.

The Disciplinary Committee's determination that the complaint did not present a *prima facie* case of misconduct based on the record before it, was determined to be correct by the High Court. As a result, the High Court denied the application and assessed costs. The Supreme Court upon hearing the matter concluded that the legal firm's acceptance of instructions from the fifth and sixth respondents regarding a disagreement between those respondents and the first appellant was the basis for the complaint to the Law Society. The complaint, relating to the first appellant, does not show a *prima facie* case of "unprofessional or dishonourable or unworthy conduct," because the record before the Disciplinary Committee does not indicate that the first appellant has ever been a client of the law firm.

In another case, *Makando v Disciplinary Committee for Legal Practitioners and Others*,⁷⁰ the Supreme Court was called upon to deal with an appeal brought by a legal practitioner who was found guilty by the Disciplinary Committee of unprofessional, dishonourable, or unworthy conduct. The unprofessional conduct emanated from the allegations of misappropriation of trust funds and the violation of the Rules of the Law Society that regulate the management of trust accounts by legal practitioners. The appellant pleaded guilty to the charges involving the breach of the rules relating to the management of trust funds. He pleaded not guilty to charges relating to misappropriation of trust funds but was subsequently found guilty on all charges relating to this count. The Disciplinary Committee was of the opinion that his conduct justified his being

70 [2016] NASC 2.

struck from the roll. Since the High Court is empowered to strike legal practitioners from the roll in terms of section 32 of the Act, the Disciplinary Committee made an application to the High Court for the appellant to be struck from the roll for legal practitioners (striking off application), which the appellant opposed. The High Court concluded that the Committee was not properly constituted and referred the matter to the Committee for it to be properly constituted and hear the matter. The Supreme Court said that the High Court also has a function of supervising the legal profession in the public interest. The Court further ruled that the decision of the High Court to direct the matter to the Committee to hear the matter could be in the public interest. The Supreme Court thus dismissed the appeal, stating the appeal had no prospects of success.

In another case of *Disciplinary Committee for Legal Practitioners v Murorua*⁷¹ the full bench of the High Court found the legal practitioner, the first respondent, guilty of unprofessional, dishonourable, or unworthy conduct. There was, however, disagreement on whether to strike the legal practitioner off the roll. The majority decision ordered that the legal practitioner be suspended from practice for 12 months, but that such suspension be for a period of three years on condition that he not be found guilty of unprofessional, dishonourable, or unworthy conduct in terms of the Act within the three years. The minority judgment was of the view that the first respondent should be removed from the roll. The Disciplinary Committee is currently appealing the High Court ruling and decree. Unsatisfied with the decision of the High Court, the Disciplinary Committee appealed. The court stated that it is significant to remember that the Disciplinary Committee's mandate is to guarantee that legal practitioners act with integrity in carrying out their professional tasks and to discipline those that fail to meet this high standard of conduct in the course of their professional duties, and to sanction those who fall short of this standard. This crucial duty is essential to how justice is administered in Namibia.

From the above-discussed judgments, it is evident that the Namibian courts have dealt with cases of alleged misconduct. The courts did not only have the opportunity to deal with the allegations but went a step further and granted an order to strike legal practitioners found guilty of misconduct off the roll. An example of this can be seen in the *Makando* case as discussed above, where the court dismissed an appeal against the order to strike a legal practitioner off the roll of legal practitioners. It is rulings such as this that send a stronger message to the legal fraternity not to engage in dishonourable conduct, with the hope of upholding the good name and reputation of the legal profession.

71 [2015] NASC 30.

5 THE GHANAIAN POSITION

5.1 Legal Profession Act 32 of 1960

The Legal Profession Act 32 of 1960, is the main piece of legislation that regulates the conduct of legal professionals in Ghana. Part III of the Act in particular deals with the discipline of legal professionals.

In allegations involving misconduct by a legal practitioner, the Disciplinary Committee is required to hold an inquiry into the matter. The Disciplinary Committee, after an inquiry, must decide whether the allegations have been proved. If the Disciplinary Committee is satisfied that the allegations are proven, they may order the implementation of any disciplinary actions listed in section 16 of the Act and issue any cost orders they deem appropriate.⁷² The Disciplinary Committee may if they think fit postpone either indefinitely or for a specified period their decision whether to take any such disciplinary measures.⁷³ In other words, the Disciplinary Committee although empowered to decide on the disciplinary measures to be taken against the legal professional for alleged misconduct, is not obliged to decide. This approach appears to be problematic. It is not clear from reading the provision, the circumstances in which the Disciplinary Committee could refuse to exercise its powers and decide on the disciplinary measures to be taken against a legal professional. This can thus give room to the abuse of powers and corruption. The Disciplinary Committee may because of ill-intentions refuse to take disciplinary measures against the legal professional guilty of misconduct. Hence, though each case must be judged on its own merits, all practitioners who engage in improper conduct and for which disciplinary measures are warranted must be subjected to a disciplinary proceeding.

Section 16 of the Act regulates the erasure of a legal professional from the roll for misconduct. An attorney who has been found guilty of grave misconduct in professional respect shall be liable either to have their name struck off the roll of attorneys,⁷⁴ or be prohibited from practising as an attorney for a period specified in the order suspending them.⁷⁵ The Act does not specifically spell out what type of conduct amounts to grave misconduct. It however refers to the conduct set out in the rules made by the General Legal Council of Ghana as amounting to grave misconduct in professional respect. The general practice is to read the Legal Professions Act together with the rules made under the Act, and it is common to find the prohibited acts of behaviour in the rules. It could, however, be desirable to have some of the prohibited acts set out in the Act itself as is the case in the Namibian context.

The second part of section 16, i.e., section 16A makes provision for erasure of an attorney from the roll on conviction of certain offences. According to the section, the General Legal Council has the authority to direct the Judicial Secretary to strike off the roll of attorneys, without first conducting a disciplinary investigation, the name of any attorney who has been found guilty of an offense involving dishonesty or moral turpitude, and the Judicial Secretary is required to abide by any such direction.

The Judicial Secretary may however, not strike an attorney's name from the roll under this clause unless the applicable appeal period has passed without the attorney concerned filing an appeal, or if they have filed an appeal and it has not yet been dismissed, withdrawn, or abandoned.⁷⁶

Whenever a directive has been given regarding the striking off the roll, the Judicial Secretary may not blindly follow such a directive. Hence, the Judicial Secretary may not strike an attorney's name from the roll until the 21-day window allowed by section 21 of this Act has passed and they have confirmed that no appeals have been filed under that section or that any

⁷⁶ *Ibid.* s 16A.

such appeals have been adjudicated.⁷⁷ There is no similar provision in the Namibian context providing a window period. The Ghanaian position seems to be appealing as it could provide a legal practitioner who stands accused of having committed misconduct ample time to defend themselves. Though, the constitutional right to a fair trial and or hearing⁷⁸ could afford an accused legal practitioner a reasonable opportunity to defend themselves; setting out a window period could avoid any misuse of powers by those in charge of the disciplinary process.

The General Legal Council may establish standards of professional etiquette and professional conduct for attorneys, and may by rules made for this purpose direct that any specified breach of the rules shall for t this part constitute grave misconduct in a professional respect.⁷⁹

Section 48 of the Act empowers the General Legal Council to make rules as to certain matters that affect legal practice. These matters concern the opening and keeping of separate bank accounts for clients' funds and;⁸⁰ keeping of accounts that contain information as to the money received.⁸¹ The General Legal Council may make rules that will assist with and enable it to determine whether the rules comply with⁸² section 49 of the Act. It provides for the consequences of failure to comply with the rules by stating that any individual may file a complaint with the Disciplinary Committee regarding a person's violation of any of the rules imposed under section 48 of this Act. The same rules that apply to applications to the Committee under Part III of this Act also apply to complaints brought under this section.⁸³ The process of making Rules made under the Legal Profession Act is similar to the process followed in terms of the Legal Practitioners Act of Namibia.

5 2 The Legal Profession (Professional Conduct and Etiquette) Rules, 1969 (LI 613)

The Legal Profession (Professional Conduct and Etiquette) Rules, have been created under section 23 and 53 of the Legal Profession Act.⁸⁴ According to the rules, an attorney in practice is defined as an attorney who is admitted to practice and represents himself as prepared to do so, or an attorney who regularly works as an editor or reporter of any series of law reports that are wholly written and edited by attorneys for use by the legal profession.⁸⁵ This is substantially similar to the Namibian position, where the statute under definitions defines a legal practitioner as a person who, in terms of this Act, has been admitted and authorised to practise as a legal practitioner or is deemed to have been so admitted and authorised.

The rules clearly set out various conduct that a practising attorney is directed to refrain from. In terms of Rule 2, a practicing attorney is not permitted to serve as the managing director, executive chairman, or an active partner in any company.⁸⁶ Furthermore, a practicing attorney is prohibited from engaging in any other occupation or business that would seriously jeopardize their ability to perform their professional obligations.⁸⁷ Any act or thing that could be considered to be touting, advertising, or calculated to bring in business unfairly is prohibited for attorneys

77 *Ibid.* s 22.

78 Constitution of Namibia, Art 18.

79 Section 23 of the Legal Profession Act 32 of 1960.

80 *Ibid.* s 48(1)(a).

81 *Ibid.* s 48(1)(b).

82 *Ibid.* s 48(2).

83 *Ibid.*

84 *Ibid.*

85 The Legal Professional (Professional Conduct and Etiquette) Rules, Rule 1.

86 *Ibid.* Rule 1(2)(a).

87 *Ibid.* Rule 1(2)(b).

to directly or indirectly engage in when applying for or seeking professional business.⁸⁸ No attorney may in their daily dealings act in a manner that fails to uphold the dignity and high standing of their profession and their own dignity and high standing as a member of it.⁸⁹ Similar to the Namibian position, the Ghanaian legislative framework prohibits an attorney from allowing the name of any person to appear on such attorney's professional stationery.⁹⁰ In other words, it is only the name of persons who holds a valid license or other authorisation for the time being prescribed by law or who has duly complied with any law requiring registration by an attorney before carrying on any such practice to appear on their name plate or to be printed on their professional stationery.⁹¹

The rules in terms of Ghanaian legal practice provide that an attorney is prohibited from agreeing to represent any individual, authority, or corporation in all of their court cases for a set annual salary; instead, they should be instructed and paid separately for each task. However, an attorney may take a retainer in exchange for counsel.⁹²

Another equally important provision found in the rules relates to the legal practitioner's evidence to the court. The rule states that a attorney is not allowed to provide evidence that the court shouldn't accept. They should refrain from expressing their personal convictions about their client's guilt, the fairness of their cause, or any of the relevant facts in their argument before the court or in their address to the jury.⁹³ The Namibian statute does not contain any similar provision. The approach followed by Ghana in this regard is commendable as it guards against dishonesty from any legal practitioner at the behest of the court. The rule ensures that legal practitioners are honest in all their dealings with the court.

Rule 6 deals with the keeping of attorneys' accounts, calling on attorneys to keep at all times books and accounts that show all dealings of the attorney, trust monies held on behalf of the client and any monies dealt with by them as far as the client account is concerned.⁹⁴ In terms of the Namibian context, legal practitioners operating with the fidelity fund certificate are equally required to keep books of record clearly distinguishing between business and trust funds.⁹⁵ The purpose of this rule, both in the Namibian and Ghanaian contexts aims to promote transparency and accountability in the legal practitioners' practice and limit the risks of fraud and embezzlement of funds.

Lastly, Rule 9 provides for aspects of professional conduct, stating that any attorney that has been convicted for a criminal offence that involves dishonesty is not fit for practice and can therefore not continue to practice as an attorney.⁹⁶ Additionally, whenever an attorney commits an act of deliberately deceiving the court it amounts to misconduct, and may invite legal consequences.⁹⁷

Understanding that honesty is an important aspect of professional conduct, the Ghanaian counterpart prohibits dishonesty, by calling upon attorneys to behave with the utmost honesty and frankness; and any breach of this rule constitutes professional misconduct.⁹⁸

88 *Ibid.* Rule 2 (1).

89 *Ibid.* Rule 2(2).

90 *Ibid.* Rule 3.

91 *Ibid.*

92 *Ibid.* Rule 5(2).

93 *Ibid.* Rule 5(9).

94 *Ibid.* Rule 6(2)(a).

95 Rules of the Law Society of Namibia.

96 The Legal Professional (Professional Conduct and Etiquette) Rules, Rule 9(1).

97 *Ibid.* Rule 9 (2).

98 *Ibid.* Rule 9 (7).

5.3 Approach to Discipline in Ghana

Over the years, the General Legal Council of Ghana has taken an active role in upholding professional standards and ethics by closely observing attorneys' behaviour.⁹⁹ Due to this, there have been disciplinary hearings, suspensions for attorneys found guilty of professional misconduct, and disbarment for others.¹⁰⁰ In fact, there is a backlog of cases for the members of the GLC disciplinary committee as a result of an increase in the number of complaints made against attorneys for ethical violations.¹⁰¹ The increase in the number of complaints against attorneys conduct and the backlog could mean one of the two things. First, the General Legal Council is doing something right by taking decisive action against the unethical conduct of attorneys. Hence, the members of the public have confidence in reporting unethical conduct. On the flipside, the backlog could also suggest that complaints of unethical conduct are not properly and adequately dealt with and thus escalating. Interestingly, the General Legal Council has been tasked with looking into some of these cases after receiving complaints from judges regarding the calibre of some attorneys' court filings.¹⁰² As officers of the court, attorneys are tasked with the responsibility to act ethically and professionally not only towards their clients but also towards the court. Flawed submissions made in court could suggest unprofessional conduct, even if directly so. There has been no record of investigations in Namibia in relation to a legal practitioner's conduct as a result of flawed or poor-quality submissions made in court. The Ghanaian approach should be uploaded as it holds attorneys to their call of duty as officers of the court, requiring them to be flawless in their conduct towards their clients and the court.

Ghana's approach to keeping a close eye on attorneys' behaviour and conduct, is indicative of the importance placed on the ethical conduct of attorneys. The urgency with which the discipline of attorneys is approach, suggests that the General Legal Council of Ghana emphasises the need for attorneys to uphold their legislative and regulatory duties as far as their conduct and professionalism are concerned.

6 CONCLUDING REMARKS

The legal practice framework in Namibia is fairly comparable to that of Ghana. The legal practice in both countries is governed by a legal framework established through Acts of Parliament. Furthermore, both jurisdictions have established rules to regulate and govern the conduct of legal practitioners in their respective jurisdictions. The existence of the legislative and institutional framework does however not necessarily mean that things are done the way they should be done, that is per the law. This equally holds true for the legal practice.

One can argue that generally, the rules against attorneys' dishonesty and unprofessional and unethical conduct are not as clear-cut and unequivocal as one could expect, proper enforcement, and sanctions have not always been as stern so as to use them to achieve deterrence.¹⁰³ Legal professionals are being regulated and reregulated by jurisdictions worldwide, or similar reforms are being considered.¹⁰⁴

The Namibian legislative framework sets out standard procedures as far as the legal practice discipline is concerned, but some areas need improvement. These improvements can come

99 Dawuni "The Legal Profession in Ghana: from Indigenization to Globalization" 2022 *International Journal of the Legal Profession* 90.

100 *Ibid.*

101 *Ibid.*

102 *Ibid.*

103 William 2002 *South Carolina Law Review* 540.

104 Boon 2011 *International Journal of the Legal Profession*.

from lessons that we learn from comparative analysis with other jurisdictions as was done in this article. The Ghanaian legal practice discipline provides for a compulsory 21-day window period before a legal practitioner can be struck off the roll. This is a good approach as it gives legal practitioners ample time and opportunity to raise any issues that may need to be addressed before a life-changing decision of removing a practitioner from practice is taken. Another equally important provision contained in the Ghanaian legislation (i.e., Legal Practice Act) is the express prohibition of legal practitioners from adducing inadmissible evidence. This is important as it shows that legal practitioners as officers of the court are placed under a heavier burden to avoid bringing information to court that should not have been placed before the court, in the first place. The rationale in this context could be to avoid wasting the court's time and also to guard against possibly misleading the court with unnecessary and sometimes untruthful information.

Again, in both jurisdictions, the courts have had the opportunity to deal with cases of misconduct and apply the law. Whether the law has properly been applied by the courts remains a matter of argument but the fact that the courts adjudicated on issues of conduct of legal practitioners gives a clear impression that the legal profession is a noble profession and unethical conduct cannot be left unattended.

The Disciplinary Committee and courts should not shy away from dealing with allegations of misconduct and contraventions of the law, thereby imposing stronger sanctions under the law. Discipline can be used as a mechanism of deterrence. If a legal practitioner is alleged to have committed misconduct or contravened a provision of the statute governing the legal practitioner's conduct, proper investigations must be conducted, and if need be the legal practitioner must be formally charged. Once charges have been properly formulated, a hearing must be initiated to find the innocence or guilt of a legal practitioner concerned. All these activities must be done within a reasonable period. Any delays in taking disciplinary action against a legal practitioner or a complete failure to take disciplinary action may perpetuate the culture of wrongdoing amongst legal practitioners. The fact that the legal profession is a noble profession cannot be overstated and thus there is a need for members of the profession to act in a manner that upholds the principles of ethics, honesty, competence and professionalism.

However, before disciplining legal practitioners, the professional body to which the legal practitioners belong must take active steps to ensure that the legal practitioners are well-informed of the conduct and behaviour expected from them. It is assumed that because legal practitioners take an oath in court at the time of becoming admitted, they ought to know what sort of conduct is expected from them. Although this assumption might be correct, there is a need for constant reminders of the principles of legal professionalism, ethics, honesty, and competence. The Law Society of Namibia as the body charged with ensuring that there is law and order in the legal profession and that the legal practitioners are adhering to professional conduct, should continuously arrange workshops and seminars to educate, inform, and remind legal practitioners of the ethical and professional conduct required of them. Though upon admission, legal practitioners deem to be fit and proper,¹⁰⁵ refresher courses, seminars, and workers will aid in maintaining the ethical acumen and professionalism required from legal practitioners.

Given the fact that the law is not static, there is a need to revisit the law and either repeal or amend provisions or the entire law to ensure that the new provisions or law speak to the socio-legal and contemporary context within which we find ourselves. The article concludes that Namibia is not at the stage where we need to repeal our current laws regulating the legal profession. There is, however, a need to continuously educate and inform legal practitioners

105 Section 4 of the Legal Practitioners Act 15 of 1995 as amended.

of the ethical and professional conduct required of them; and also, to discipline those that find themselves guilty of misconduct and contravention of the law.