Address by Justice Madlanga at the launch of *Legal Ethics* at Wits University

I have titled this address *Ethics and the constitutional mandate of legal practitioners*. Of course, I should not have limited this to legal practitioners. Earlier this week, before I could have a look at the book, I asked the researchers who assist me to find any learning, on ethics, in so far as they apply to people who are not in practice, like people who are employed by government departments, who are in the corporate world, and so on. And they told me that they could not find anything.

Then I got the book, and I said: "Look here, and it turns out the book does indeed deal with this aspect, which I think is quite an important aspect. So perhaps my title should not have said the 'Mandate of Legal Practitioners', it should more have been the 'Mandate of Lawyers' in general."

Legal ethics coexist with the very idea of legal practice. Absent strict adherence to legal ethics there cannot be a respectable legal practice. Needless to say, therefore, the publication of the book, *Legal Ethics in South Africa*, must be welcomed enthusiastically. I congratulate you, Professor Kruuse, together with all the contributors to this book for this great addition to learning in the legal landscape. In the preface, Professor Helen Kruuse writes and I quote: "Since first teaching legal ethics as a final year elective around 2008, I have been struck by how a subject so central to the identity and responsibilities of legal practitioners was relegated to the margins of the LLB curriculum, treated as optional at some institutions, and absent altogether at others. The implication seemed almost absurd that future legal practitioners could elect whether to be ethical."

It is not lost on me that some if not most of you can are thinking that I can only be quoting from the preface because I have not read the book. Quite the opposite, the book is so captivating that I just had to read every single page, including the preface. Based on what I have just quoted, it is unsurprising that following on the example of UNISA, at Rhodes University, legal ethics is no longer an elective, but compulsory. I'm certain that Professor Kruuse had everything to do with this. I can only hope that if there are still universities that offer this important cause as an elective, they will soon make it compulsory.

The legal profession has often been referred to as the honourable profession by those who have some affinity to it. And I emphasised this "by those who have some affinity to it". Unfortunately, it is largely lawyers themselves who have that affinity. As for many amongst ordinary people out there, the generally held view is that there is no honour at all in the profession. We laugh about many a nasty joke we hear about lawyers, but those jokes speak volumes. They actually stem from and underscore views held about the legal profession.

Take the commonly used isiXhosa word for a practising lawyer. It is “igqwetha”. This comes from the verb “uquqwetha”, the literal translation of which is to turn something inside out. So, the connotation is that legal practitioners turn the truth inside out or do with it as they please. Another isiXhosa word for legal practitioner is “umqondisi’mthetho” which is more aptly descriptive of what legal practitioners actually do. That, this has not gained much traction, is indicative of the fact that legal practitioners are, indeed, generally perceived, to engage in “uquqwetha”. It is said that an epitaph of a lawyer read: “Here lies a lawyer, and an honourable man”. People passing by and reading this used to say: “How could they bury the 2 together?”

It is us lawyers that have brought a bad name to the profession. It can only be us who can and must bring back the good name that I truly believe the legal profession deserves. As some have said, it lies with lawyers to bring the honour back to this honourable profession. Is that too big an ask? Has this gone beyond achievable? Why can't all lawyers live by the words of a lawyer of old who is reported to have said: “I would prefer even to fail without honour than win by cheating.”

I'm not suggesting that lawyers must not represent clients who lie, cheat, or are dishonourable. What lawyers must never do is to be the source of their client's lies. Nor must they help advance their lies. They must never be party to cheating. They themselves must never be tainted by dishonourable conduct. After all, they are officers of the court. As such, they have a duty to assist the court and not pull wool over the eyes of whoever sits in judgement. With all these constraints: “How then can legal practitioners represent their lying, cheating and dishonourable clients?” I cannot but explain why I have constraints in inverted comments. Conducting oneself in the manner I am advocating must come as second nature to a practitioner. It is not a constraint. But the right and honourable thing to do.

Reverting to how, in practical terms, you can represent your errant client if you yourself are not aware that your client is lying, cheating, or acting dishonourably, there is nothing wrong in advancing their cause. But of course, I am by no means encouraging what was eloquently described by Greenberg JA as fraudulent diligence in ignorance. That was in the case of *R versus Meyers*. He said: “A belief, though in fact, entertained by the representor, may have been itself the outcome of a fraudulent diligence in ignorance. That is, of a wilful abstention from all sources of information which might lead to suspicion and the sedulous are avoidance of all possible avenues to the truth, for the express purpose of not having any doubt thrown on what they desire, and are determined to, and afterwards do, in a sense, believe.”

Therefore, you can represent a liar, cheat or person guilty of dishonourable conduct, in relation to the cause at issue, if you yourself cannot be faulted. That is, if your own conduct is by no means dishonourable, is this possible? Of course it is. Were it not so, NSCJ could not have enunciated the following imperatives of legal practice. He said:

“Now practitioners, in the conduct of court cases, play a very important part in the administration of justice. They represent the case of their client by urging everything, both in fact and in law, which can honourably and properly be said on their behalf. And this method of examining and discussing disputed causes seems to me a very effective way of arriving at the truth. In as effective a way, probably, as any fallible human tribunal is ever likely to devise. But it implies this that the other practitioner shall say or do nothing, shall conceal nothing, posting, nothing, with the object of deceiving the court, shall quote no statute which they know has been repealed and shall put forward no fact which they know to be untrue, shall refer to no case which they know has been overruled. If they were allowed to do any of these things, the whole system would be discredited. Therefore, any practitioner who deliberately places before the court or relies upon a contentional statement which they know to be false are in my opinion, not fit to remain members of the profession.”

To be practical, let me be anecdotal but I have a little bit of trepidation in doing so in that, I am going to be the subject of what I'm going to say, and it may sound like the type of parent, who forever, nauseatingly talks about their child to other parents, so please forgive me.

When I was a few years in practice as council at the Umtata Bar, I received a brief to represent an accused who was charged with murder. During consultations he gave a narrative that amounted to a confession that he had indeed murdered the deceased. I asked if he was going to plead guilty. He said not. And with all the confidence that he had in his advocate, he looked me in the eye and asked what story we were going to tell the court.

Let me digress and explain that although the Transkei Criminal Procedure Act was modelled on the South African Procedure Act of 1977, the section on pleas of not guilty, in the Transkei act, made it obligatory for an accused who pleaded not guilty to explain the basis of her or his defence. No right to silence there. This was unlike section 115 of the South African Act, which is permissive on whether an accused pleading not guilty, will make a plea explanation.

Now, let me revert to my client. I told him that we would have to tell the court upfront what the basis of his defence was. I added that in doing so, I could not defend him on a narrative that was different from what he had told me. Based on that narrative, there was no way I could tender a plea of not guilty on his behalf. His eyes told a story of utter disbelief and disappointment. I guess what must have been going on in his mind was, “what kind of uquqwetha is this? That expects me to tell the truth and admit guilt. What is he here for then?” To cut a long story short, I told him that if he was persisting in pleading not guilty, I could not represent him. Days, or even months, later, I saw him being represented by my then colleague at the bar, who later became my colleague at the Constitutional Court Justice Jafta. Knowing Justice Jafta as well as I do, he would not

have represented him based on a lie. If, when the accused went to Justice Jafta after, he still wanted to plead not guilty, he must have gone to him having created a new narrative that fitted his avowed intention of pleading not guilty.

What is the relevance of all this to the subject under discussion? It is, in fact, central to the mandate of legal practitioners in a constitutional democracy, that oppose the rule of law. In a speech, Chief Justice Mogoeng said that a truly independent body of justice, judges and magistrates, loyal to the oath of office or solemn affirmation, is central to the rule of law and democracy. Codes being the traditional field of play of legal practitioners, it stands to reason that legal practitioners are an indispensable call when the rule of law plays itself out before the courts. Speaking extracurially , Chief Justice Chaskalson said that the judiciary depends on an independent legal profession to enable it to perform its constitutional beauty. This is an incident of the rule of law, which is entrenched in our Constitution. Later, he says, without the assistance of lawyers, judges would not be able to discharge their constitutional duty to uphold the law without fear or favour. Obviously, legal practitioners can only properly and meaningfully play their role in the advancement of the rule of law if they conduct themselves honourably and in strict adherence to their rules of ethics. It is only then that they can be said to be true to the rule of law, a founding value of the Constitution.

The book we are launching today recognises the role of the Constitution in today's ethics. The following is said: “Law students and practitioners must know the rules, but also identify the influences that shape their decisions and become equipped to resolve ethical dilemmas with clarity, integrity, and constitutional purpose. Lawyers are not only service providers, they are officers of the court, constitutional agents, and ideally champions of justice.”

Legal ethics is not merely about compliance. It is about understanding, judgement, and moral courage. I opened by referring to the pitiful views of the public, about lawyers. Coming close to the end, let me refer to the lament of Judge Jeremy Pickering in his recently published memoir *Raising the bar, the making of a judge*. He says: “The old saying that a witch will sail to the sea in a sieve, but the devil will not venture aboard a lawyer's conscience has an element of truth.” This is something said by judge who was on the bench for many, many years, which was preceded by, I think, more than two decades at the bar. That is the context in which his lament must be seen. He had a long period over which to observe unethical conduct by lawyers.

In conclusion, even though this situation is sorrowful, we cannot and should not throw our hands up in the air. Let us do everything we can to self-correct. May I sound an exhortation that each lawyer must play their role to bring honour back to the legal profession.

Let us not hide behind a sense of impunity with which comes a misguided belief that you will never be caught. Being caught or not being caught is not the issue. The issue is to act ethically and honourably. That is not too onerous an ask. I should not be heard to be pronouncing a vote of no confidence in the legal profession. I believe that the vast majority of lawyers out there are honourable and ethical.

Thank you