IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MAKHANDA]

CASE NO. 1967/2020

In the matter between:

LEGAL PRACTICE COUNCIL **Applicant**

and

SAMANTHA ANNE CRADDOCK **Respondent**

JUDGMENT

JOLWANA J:

[1] The applicant herein seeks an order for the respondent's name to be struck off the roll of attorneys. The other orders sought are ancillary to and are entirely dependent upon the applicant succeeding in getting the main order for the striking off of the respondent's name.

[2] The respondent's entry into the attorneys' profession can be summarised as having all been achieved in a single year in 2005 when she passed all the admission examinations. That paved the way for her admission as an attorney as well as the work that entitled her to do all the other work that is exclusively reserved for attorneys which is an admission as a conveyancer and a notary public. Until just almost a decade later when the unusual events which led to this complainant

occurred in 2014, it does not appear that any complaints against her were ever received by the applicant either from members of the public or from within the legal profession. If any complaints might have been received there is no record of any adverse findings against her to date. Ironically, this complaint is itself entangled in a web of intriguing relations that are on their own not without significance. When the crime of forgery takes centre stage in the complaint, one is moved from being intrigued to being perplexed as all the other main players seem to be the complainant's very own family members.

[3] This application has its genesis in a complaint received by the applicant from Mr Labuschagne, a member of the public. In essence his complaint was that the respondent initialled and signed a deed of suretyship document as a witness who was present when Mr Labuschagne signed the said deed of suretyship and therefore witnessed Mr Labuschagne appending his signature on that document. It is common cause that Mr Labuschagne never signed the said deed of suretyship. Therefore, the respondent could not have witnessed him appending his signature thereto as he never did. In fact what appeared to be his signature on that document was a forgery.

[4] Exercising its statutory and regulatory powers, the applicant, whose objects are *inter alia*, to regulate all legal practitioners and candidate legal practitioners and to enhance and maintain the integrity and status of the legal profession, forwarded Mr Labuschagne's complaint to the respondent for a response. That complaint annexed to the applicant's founding affidavit as "JM1" is dated 26 April 2016. She responded thereto within a day on 11 May 2016 having received it under cover of the applicant's letter dated 10 May 2016.

[5] In responding to the said complaint the respondent forwarded to the applicant an affidavit she made to the police on 18 April 2016 in which she had said:

> "3. I have been asked to comment on a document signed in the form of a suretyship by Mr Neels Labuschagne and relates to a mortgage bond registered over Erf 2460 North End.
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> 4. The bond was registered as a consequence of an agreement of sale being concluded between ALC Property Trust and Lauren Nash Business Trust, which transaction registered in the Deeds Office in 2014.
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> 5. I practice as an attorney where my business relates, in the most part to conveyancing transactions. I deal with hundreds of transactions and sign documents either as a witness or otherwise in all of them. I am not able to confirm or deny whether Mr Labuschagne signed the surety in my presence as I have no independent recollection of this document being signed.
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> 6. What I do know is that the suretyship would have been required by the bondholder. I also know that Mr Labuschagne had a close relationship with both the seller and the purchaser particularly as he manages the rental portfolio for both parties. He was involved in their property related transactions.
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> 7. When initially I was asked about the signature of the document, I thought that it related to a different property transaction, namely one in du Preez Street where the Lauren Nash Trust purchased the property but here there was no mortgage bond registered. I now realize that the document relates to a property purchased in Middle Street, North End which was registered in 2014 as referred to above."

[6] That affidavit was forwarded together with her response in which she said the following:

> "I Samantha Anne Craddock, the sole director of Craddock Attorneys who was a party to a document whereby it is alleged that Mr Neels Labuschagne signed surety for the mortgage loan registered over ERF 2460 NORTH END, for a property transfer between TRANSFER ALC PROPERTY TRUST // LAUREN NASH BUSINESS TRUST which had registered in 2014.
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> I with regret cannot confer (sic) or deny whether Mr Neels Labuschagne had or had not signed in my presence, as I have no recollection of the said signature. I am

aware that the said form would have been required by the bond holder at the time and I have knowledge that Mr Neels Labuschagne was closely involved with both the seller and the buyer as he managed the rental portfolio for the said parties and had close dealings with their related property transactions.

I am very disappointed that Mr Labuschagne has involved me in his personal vendetta against Mrs Labuschegne as I am aware of the unresolved divorce proceedings he has underway with Mrs Labuschagne and unfortunately Mr Labuschagne is utilising an unrelated issue I had with Mrs Labuschagne to aggravate his claims against Mrs Labuschagne.

Mr Labuschagne had knowledge and direct dealings with the transaction in question as he personally benefitted from the rental referral/commission he earned from both the ALC Property Trust as well as the Lauren Nash Business Trust. As stated above I am unable to advise if the said signature alleged to be Mr Labuschagne's signature on the surety form is or is not his signature."

[7] In her answering affidavit the respondent avers that at the time she gave the above explanation it had not yet been confirmed that the signature which purported to be Mr Labuschagne's was in fact not his. Mrs Labuschagne, who was Mr Labuschagne's wife was the principal applicant of the bond and her firm was attending to the simultaneous transfer. The applicant forwarded the above respondent's response to Mr Labuschagne who responded thereto indicating that the matter was being investigated by the SAPS and Standard Bank Fraud Division.

[8] Mr Labuschagne sent an email to the applicant on 25 July 2016 in which he advised that the SAPS, through their hand writing expert, had confirmed that his signature on the deed of suretyship was forged and that the matter was referred to a Public Prosecutor for a decision. It is however, not clear from the papers whether or not the respondent was criminally charged with forgery by the SAPS.

[9] In October 2016 the applicant addressed correspondence to the respondent asking her to advise whether or not it was her signature on the deed of suretyship.

The respondent gave the same response, that she could neither confirm nor deny that she did in fact append her signature on that document as she could not recall that far back.

[10] The applicant was not satisfied with this response. It was then decided to charge the respondent with unprofessional conduct for bringing the attorneys' profession into disrepute by signing a deed of suretyship as a witness to a forged signature. Thereby, so went the charge, she either signed knowingly or in the absence of the signatory. Her response to the charge was, once more, that she could not confirm or deny that the signature of the witness to the document was hers as she was unable to remember that far back.

[11] The applicant's disciplinary committee was again dissatisfied with her explanation. It found her guilty of the alleged unprofessional conduct. On 3 March 2017 she was invited to make submissions on an appropriate sanction to be imposed for the said infraction. On 12 April 2017 and in the absence of her submissions on sanction, the disciplinary committee of the applicant requested the respondent to advise why it should not ask its council for a resolution for a court imposed sanction.

[12] It later transpired that the respondent had in fact responded to the applicant's correspondence dated 3 March 2017 in respect of submissions on sanction on 7 March 2017. However, for some reason, her response did not come to the attention of the applicant's disciplinary committee. In her response the respondent advised the applicant that she had very limited knowledge, if any, regarding whether the signature on the deed of suretyship was hers or not. She added that bond documents were signed with the bond attorneys and that she was not at that stage,

on the bank's panel of attorneys. Furthermore, the complainant had on several occasions, brought documents to her office for commissioning as his wife worked for her in her practice at the time. She maintained that she was unable to recall the signature and/or whether Mr Labuschagne did or did not append his signature on the deed of suretyship in her presence. Some of her other responses do not take the matter any further.

[13] In the end the applicant decided to institute this application for the respondent's name to be struck off the roll of attorneys in January 2018. However, the papers were only issued in September 2020, more than four years after the complaint was received and more than two years after the resolution for a court imposed sanction was taken. This tardiness in coming to court in which the case being made is that the respondent is unfit to practice as an attorney is concerning. It is concerning because it means that for about four years from the time the complaint was received, the respondent practiced in circumstances in which, if the applicant's version is to be accepted, she was unfit to practice as an attorney. I am mindful of the transitional phase from the erstwhile Cape Law Society to the applicant's current composition. While that might have slowed down processes I do not think that it was not possible to take action sooner. It would be very surprising if the applicant's operations ground to a halt for that long.

[14] The applicant's case arises from what it calls the respondent's failure to give a satisfactory explanation based on respondent's constant refrain that she could neither confirm nor deny that it was her signature that appeared as a witness' signature on that deed of suretyship as she could not recall that far back.

[15] The respondent has given what she calls contextual facts in her answering affidavit. Therein she indicates that from May 2005 until about 2010 she worked at Greyvensteins Incorporated as a conveyancer. One of the directors of Greyvensteins Incorporated was Mr Chris Nortier who, in 2009 opened his own practice, Chris Nortier Incorporated specialising in conveyancing. The respondent was approached by Mr Nortier in 2010 asking her to join his practice as a conveyancer which she did later that year.

[16] However in 2011 Mr Nortier decided to return to Greyvensteins Incorporated. She then decided to buy Chris Nortier Incorporated and through it, practice for her own account. The purchase agreement in respect of that practice entailed her taking over the infrastructure and the staff. One of the staff members that she took over was a bookkeeper, Mrs Labuschagne whom she already knew from her time at Greyvensteins Incorporated. Mrs Labuschagne was the mother of Liesl Greyvenstein and Cor van Deventer. Liesl and Cor were siblings. When the respondent bought Chris Nortier Incorporated Liesl was one of the directors at Greyvensteins Incorporated. She had been a co-director even at the time of her employ there. Cor also worked at Greyvensteins Incorporated, either as an attorney or a director as well.

[17] Mrs Labuschagne was not only her bookkeeper and her most trusted employee, but she also regarded her as a close friend. It was through this close relationship with Mrs Labuschagne that the respondent got to know Mr Labuschagne. In her practise she attended to several property transactions involving Mr Labuschagne who frequented her office coming almost daily. Her practice was about a kilometre or so away from Greyvensteins Incorporated and Cor would visit his mother, Mrs Labuschagne virtually on a daily basis.

[18] At the time that the property transaction relevant to the complaint lodged by Mr Labuschagne was being attended to she was not yet aware that Mrs Labuschagne had broken her trust as a friend and bookkeeper. She was not aware that she was defrauding or had been defrauding her practice over a long time costing the practice losses amounting to hundreds of thousands of rands. Her understanding was that she had a good relationship with Mr & Mrs Labuschagne and their son Cor.

[19] In January 2015 while Mrs Labuschagne was on leave, the respondent discovered certain anomalies in the financial records of her practice. Through investigations she discovered that Mrs Labuschagne had been defrauding her practice for some time. Ultimately she dismissed Mrs Labuschagne from her practice and laid criminal charges against her with the police. When Mr Labuschagne lodged his complaint against her with the applicant she had already laid a criminal complaint against Mrs Labuschagne for her alleged fraudulent conduct in her practice. She learned that the relationship between Mr & Mrs Labuschagne had seriously broken down so much that they were engaged in acrimonious divorce proceedings.

[20] I consider the above background to be useful to give context to the intricate personal and professional relations that were at play. This background includes family dynamics of some of the members of the Labuschagne family involving their adult children and their parents most of whom not only interacted as family but also interacted in the work environment with each other and with the respondent. It is in the professional work environment that the respondent would have been required to witness a document of some significance in the commercial world, the deed of suretyship.

[21] The applicant explains the reasons why this court has been approached for a court imposed sanction and in doing so, it has given a very concise summary of what in essence its case is, regard being had to its statutory role in regulating not only the entry into the attorneys' profession but also the conduct of all attorneys during their professional life.

[22] The applicant summarises its case against the respondent as follows:

> "26. The attorneys' profession places a high premium on the values of honesty, integrity, reliability and accountability. Attorneys can only be described as fit and proper persons to practice law when they do more than pay mere lip service to those values and bind and conduct themselves accordingly. Clients and potential clients should reasonably trust and believe that attorneys are trustworthy and of high moral character.
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> 27. It is clear from the aforesaid that the respondent failed to give a satisfactory response but maintained that she could not recall. One would have expected, as a servant of this Honourable Court that she would be able to, without hesitation, state that it was in fact her signature (or not) and that she would not have signed without the person being present. Her explanation for this is, with respect, insufficient in these circumstances. Furthermore, it is clear that where she has signed as witness her stamp has been affixed below her signature and she has failed to give any indication why, if it is not her signature, anyone would have access to her stamp.
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> 28. The respondent has abused her position as an attorney rendering her not to be a fit and proper person to practice as an attorney (or notary and conveyancer) of this Honuorable Court."

[23] It is not difficult to appreciate the applicant's submissions above in paragraphs 26-27 of its founding affidavit and it is so that the respondent could have done better to give a more insightful explanation. I deal with this issue later in this judgment. The difficulty is with paragraph 28 in which the applicant is rather unclear on how it alleges that the respondent abused her position. It is clear that the signature of the surety in that deed of suretyship is not that of Mr Labuschagne. Therefore, that

signature could only have been affixed there through forgery. In other words, another person other than Mr Labuschagne affixed a signature on that document pretending to be Mr Labuschagne or misrepresenting that it was Mr Labuschagne's signature. The presence of what appears to be the respondent's signature and her office stamp represent to the world that the signature of Mr Labuschagne was affixed there in her presence as an attorney of this Court. One way this could be possible is if the respondent was part of the forgery as Mr Labuschagne was already well known to her at the time.

[24] The other possibility is that the deed of suretyship, which was blank was brought to the respondent for her to sign as a witness and she did sign as a witness in a blank deed of suretyship. In so doing she would have misrepresented to the world that the document was signed by the surety in her presence.

[25] There is yet another possibility, a third one, which is that the document was brought to the respondent for her to sign as a witness in circumstances where the document was already signed by somebody who would have pretended to be Mr Labuschagne when in fact his signature was forged. The respondent would not have known that Mr Labuschagne's signature was forged precisely because she was not there when the signature was affixed. The applicant is rather unclear on what it alleges or suspects possibly happened. How the applicant submits that the respondent abused her position as an attorney is shrouded in vagueness. In any of the possibilities, and these may not be the only ones, it would have been a dishonourable conduct if the respondent acted in that manner. The abuse of the office suggests a deliberate act or a grossly negligent action on the part of the respondent. The applicant is rather unclear about the basis for the alleged abuse on the part of the respondent.

[26] It surely could not be expected of the applicant to know with any degree of certainty which of the many possibilities is the likely scenario. The nature of the applicant whose role is regulatory and therefore not a witness to what happens in attorneys' practices simply does not allow it to know how specific matters evolve and what actually happens. I find it quite surprising however, that the applicant did not do the least it could have done as part of its investigations. The applicant could have sought to establish where that document, the deed of suretyship emanated from and how it got to be presented to the respondent for witnessing. The applicant surprisingly dismisses the source of the deed of suretyship as irrelevant in its replying affidavit.

[27] I do not agree. I fail to understand how it could be that the source of a document with a forged signature would be irrelevant. One would have thought that the source of any forged document is part of the factual matrix that would need to be disentangled in getting to the bottom of the forgery. To simply focus on the witness' signature in circumstances where forgery was clearly committed is an over simplification and an unfortunate lack of appetite to get to the bottom of how the fraud or forgery was committed. An investigation might possibly have helped to unmask the role played by the witness or witnesses thereto including the respondent if she had anything to do with it and their degree of participation. Most importantly, it would have helped to establish whether they were active participants in that crime through directly facilitating it or perhaps unwittingly facilitating it through for instance signing as witnesses when they did not witness the signing of that document.

[28] The respondent explains that the transactions which were relevant to the deed of suretyship were the transfer of erf 2460, North End which she handled. It also appears from the relevant power of attorney to pass transfer that the transfer was

from the ALC Property Trust and the trustee who signed for the trust is Cor van Deventer, Mrs Labuschagne's son. The conveyancer who was attending to the transfer was the respondent. The respondent has explained that the simultaneous bond registration process was attended to by a conveyancer at Greyvensteins Incorporated. That firm is where Cor and Liesl, his sister worked as attorneys or co-directors both of whom, according to the respondent are Mrs Labuschagne's children. It is not clear if Cor was the conveyancer for that bond but his firm attended to the simultaneous bond registration. As bond registration conveyancers that firm would have created and printed the bond documents which might have included the deed of suretyship on the instructions of Standard Bank.

[29] The applicant had and still does have jurisdiction over whoever was a conveyancer for that transaction and that person would have been a custodian of the bond documents including the deed of suretyship. That is the person who was entrusted by the bank to ensure that the bond registration documents were correctly signed by the correct person as they were very important documents in respect of those transactions. This is the person who could have easily explained how that document created and printed at his or her instance, would have needed to be witnessed outside their office by the respondent who had nothing to do with bond documents. How was it taken there and by whom? An affidavit in that regard would have been extremely useful in my view. Unfortunately, the applicant saw no value in investigating those aspects of the case and drawing a much clearer picture of the circumstances in which that deed of suretyship was signed and witnessed. To expect this of the applicant is not too much to ask as that conveyancer is equally accountable to the applicant which has regulatory powers over him or her.

[30] According to the respondent the person who has direct knowledge of the bond documents and how they were signed and witnessed including the deed of suretyship is Cor van Deventer, a conveyancer at Greyvensteins Incorporated. Had the applicant investigated the circumstances in which the bond documents and the deed of suretyship were signed and witnessed, it would have presented a much clearer picture to the court. The respondent raises some of the facts alluded to above in her answering affidavit. However, the applicant does not deal with these allegations beyond either dismissing them or proffering a bare denial. This can hardly be said to be sufficient response on the facts of this case even for the applicant which acts on information provided to it by other people such as Mr Labuschagne.

[31] There is no explanation in the replying affidavit why Cor van Deventer's explanation has not been made available to court. That information would have been useful to disprove the respondent's allegations about the linked transactions especially the deed of suretyship and its witnessing through Cor van Deventer or whoever else was responsible for the bond documents. It must be accepted, absent an explanation in that regard, that this information was readily available to the applicant as it has jurisdiction over the attorney or conveyancer who attended to the bond whether it was Cor van Deventer or not.

[32] While the respondent has neither confirmed nor denied that one of the witnesses' signature to the deed of suretyship is hers, the possibility that it is hers is not easy to exclude. Unfortunately, the report of the handwriting expect was inconclusive on her signature. Similarly, the possibility that it is not cannot be entirely excluded which would mean that, just like Mr Labuschagne's, hers might also be a forgery. Had the signatures been conclusively found to be hers, the picture

could be different. A positive affirmation that the signature is hers would have provided other independent evidence of her possible involvement, quite apart from her alleged inability to confirm or deny the authenticity of her signature. That would have been a much better basis for finding, on probabilities, that she did in fact sign as a witness to a forged signature. I have serious reservations about the acceptance of the hand writing expert's report that Mr Labuschgne's signature was forged and at the same time not give the respondent the benefit of doubt to the extent that the hand writing expert's report is inconclusive on her signature.

[33] Ms Watt who appeared for the applicant was asked during the hearing of this matter why the original deed of suretyship was not obtained from the bank and made available to the handwriting expert so that possibly a more conclusive analysis could be done. She could not explain this beyond indicating that it may not be fair to expect the applicant to go to those lengths. I do not agree. The applicant must do what it needs to do to get to the bottom of any unprofessional conduct especially a serious crime like forgery which could bring the attorneys' profession into disrepute. The facilitation of forgery through false witnessing is not less reprehensible. The reason for this is that in appropriate cases such attorneys must be investigated to protect the integrity of the attorneys' profession from being tarnished by a few rotten apples. They must be weeded out and the image of this honourable profession protected from fraudulent behaviour involving some of the legal practitioners under its jurisdiction.

[34] Should the respondent be found not to be a fit and proper person to practice as an attorney for not being able to confirm or deny if that was her signature or not that appears as a witness' signature? In the midst of the rather intermingled relationships and relations from blood relationships to friendships and professional relations and

forgery being also part of the mosaic that forms the backdrop to this matter, that conclusion should not be made lightly. Objectively, there are just too many possibilities. I do not know if it can, with any degree of confidence, be expected of the respondent to say with certainty that a particular signature is hers on all the documents she has ever signed. This is particularly the case because she says she signs hundreds of documents mostly relating to conveyancing transactions in her line of work quite regularly as a witness or otherwise.

[35] In those circumstances one cannot easily conclude that it is farfetched for her to say that she cannot even remember the circumstances in which such a document could have been signed as even the complainant, Mr Labuschagne came to her office almost on a daily basis. It is even more difficult to conclude again with some certainty that she should have been able to look at those signatures and conclude that her alleged signatures were or were not a forgery. I do not know that it is always possible for everyone to be able to tell one's authentic signature from a forged one under all circumstances. Speculative hypotheses in this regard are simply insufficient to conclude on a balance of probabilities. Even aversion to unprofessional conduct by attorneys should not lead to unsubstantiated conclusions of errant behaviour or dishonesty by attorneys.

[36] This application is about whether or not the respondent is guilty of the alleged misconduct and thereafter, whether she is a fit and proper person to continue to practice as an attorney. Put differently, the question is whether or not on the facts of this case it can be said that the applicant has brought before this Court, facts on the basis of which, on a preponderance of probabilities, it must be concluded that the respondent has committed the alleged misconduct. I do not think that the applicant has discharged the evidentiary burden as can fairly be required of it. What becomes

apparent is that the basis on which this Court was urged to find the respondent guilty of the misconduct complained of stands on two postulations. The first is that Mr Labuschagne's signature was forged. The second one is that the respondent avers that she is unable to say whether or not one of the witnesses' signatures is hers.

[37] The applicable test on whether a person is fit and proper to continue to practice as an attorney was recently restated by Nicholls JA in *Hewetson*[1] as follows:

> "The test to determine whether a person is fit and proper is well established and needs no further elaboration. The first enquiry is to determine whether the offending conduct has been proven on a balance of probabilities. Once this is shown, the second enquiry is to determine whether the person is fit and proper taking into account the proven misconduct. The final enquiry is to determine whether the person concerned should be suspended from practice for a fixed period or should be struck off the roll. The last two enquiries are matters for the discretion of the court, which involve a value judgment."

[38] The first question that must be answered is, what is the offending conduct in this case? The best place to go to in order to answer this question is the applicant's founding affidavit. The answer is more clearly articulated therein where the applicant avers that:

> "16. On 10 October 2016 the CLS directed the respondent to advise whether it was her signature that appeared on the Deed of Surety and on 19 October 2016 the respondent advised that:
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> 16.1 she was unable to accurately deny or confirm that her signature was that of the witness as she was unable to recall so far back,
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> 16.2 she regretted that she was unable to offer much assistance.
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> 17. On 14 November 2016 the CLS directed that the respondent be required to respond to the charge that she was guilty of unprofessional conduct for contravening Rule 14.3.14 in that she brought the attorneys' profession into

[1] *Hewetson v Law Society of the Free State* 2020 (5) SA 86 (SCA) at para 4.

disrepute by signing a suretyship document as a witness to a forged signature and thereby either signed knowingly or in the absence of the signatory."

[39] In short, the question is whether on a balance of probabilities, it has been established that the signature of the witness in that deed of suretyship is that of the respondent. Or, whether there is any factual basis for the conclusion that on a balance of probabilities the second witness' signatures on that document are those of the respondent. The facts that the applicant should be expected to bring before court must be understood in the context of its regulatory function. The applicant, in its very nature, acts on the information provided to it by others. However, I do think that some criticism to the applicant is not unwarranted in so far as basic enquiries could have been done and were not done. First, the handwriting expert could have been assisted with being provided with the original deed of suretyship which must be with the relevant bank that had issued the bond instructions. This does not appear to have been done and no explanation was proffered on the papers why this was not done.

[40] Second, it would not have been very difficult to get information from the conveyancer who received the bond instructions and printed the bond documents including the impugned deed of suretyship. That document would ordinarily have been part of many documents that were required to be signed and witnessed by all the relevant people some of which would be sent to the deeds office for bond registration. The question is, who signed the other documents and who were the witnesses thereto? When and where were the other documents signed and witnessed in relation to the deed of suretyship?

[41] In *Berrange*[2] the court said:

[2] *Law Society*, *Cape of Good Hope v Berrange* 2005 (5) SA 160 (CPD) at 164 D-E

> "This Court must decide upon the papers filed by the parties whether the respondent has conducted himself unprofessionally and, if so, what sanction to impose. The Court is not bound by the views of the applicant. On the other hand, it is not an ordinary litigant. It brings this application in its capacity as the custodian of the status and dignity of the profession and seeks to protect the interests of the public in their dealings with attorneys. The applicant's views should accordingly be given proper weight (see *Law Society, Cape v Koch* 1985 (4) SA 379 (C) at 386G)."

[42] It seems to me that the conduct that must be established on a preponderance of probabilities, being whether or not the respondent did sign as a witness to a forged signature constitutes the first leg of the enquiry. If she did sign there can be no doubt that whatever the circumstances, the complainant, Mr Labuschagne was not there. Therefore, that conduct, the witnessing of the deed of suretyship in the absence of the surety or the person whose signing was being witnessed would have been a form of unprofessional conduct. But, has it been established that the deed of suretyship was witnessed by the respondent? The answer to this question cannot be in the affirmative on the papers that have been filed. It is not sufficient to try to answer this question with reference to the failure or inability of the respondent to confirm or deny that it was her signature that was appended to that document. This is more so that whatever was going on, the whole forgery seems to have been carefully planned and executed principally to defraud the bank. It could be that how the document got to be signed by her, if that is her signature, was part of a well-orchestrated uttering that may have started from the office that first received and/or printed and/or drew the deed of suretyship in preparation for its signature.

[43] Even Mr Labuschagne himself is very conspicuous by his absence in so far as him coming up with the little information that he might have, if any, about how the transaction evolved. Mrs Labuschagne, Cor and Liesl are all his close family members. His silence is worrisome. I do not think that it would have been difficult to

establish from the firm where Cor and Liesl worked and which was attending to the bond registration process, more information including the source of that document and how it was taken to the respondent for witnessing. That is, if what appears to be the respondent's signatures are in fact her genuine signatures and were not themselves forgeries. It is unclear who approached the bank for the loan and whether he even knew that the bank was to be approached for a loan. He has simply done no more than complete the standard complaint form of the applicant. Even he could have assisted the applicant a lot more than simply lodging a complaint against the respondent and then be cagey with what he knows or does not know about the transaction that led to the impugned deed of suretyship. It is not clear why he was not asked some probing questions about what he knew or did not know.

[44] I take the view that there are simply not enough facts presented to this Court on the papers filed on the basis of which the offending conduct can be said to have been established on a preponderance of probabilities. Establishing the existence of the offending conduct is a factual enquiry. This means that facts must be presented before court and regardless of the views of the applicant, the court itself must be satisfied as to the sufficiency of the facts that establish the offending conduct beyond sheer conjecture and suspicion. In this regard the applicant has unfortunately fallen short of the required minimum treshhold.

[45] There is nothing to suggest that the applicant did any real investigations beyond the pro forma standard procedure of asking an attorney to respond to the allegations and the exchange of correspondence in that regard. There is nothing to suggest that the complainant was asked any detailed questions about what his theory was about what might have taken place. There is not a single letter to Standard Bank and a

response thereto about who drew the deed of suretyship, where was it signed and whose responsibility was it to ensure that it was correctly signed and how or who sent it to them as an authentic document. It is not even clear if Standard Bank investigated what appears to be a compromised security environment in which the deed of suretyship was signed. Surely this must be a very significant exposure issue for them especially the integrity of the documents on which they rely for the security of their lending policy or loans they issue. One would assume that they would want to close any gaps in that environment that could potentially make their security documents not worth the paper they are written on. The silence of Standard Bank is too loud to ignore. There is no indication that any attempt was made to get any information from them and they refused to co-operate with the applicant.

[46] There is no evidence whatsoever from the applicant about who was instructed by the bank to draw up its bond registration documents. Nothing is said about who was instructed to register the bond and whether or not the deed of suretyship was to be signed and witnessed as part of the responsibility of the conveyancer who registered the bond. It is not clear whether or not it was to be signed together with the other bond documents as is normally the case in conveyancing practice or whether it was signed and witnessed at the bank. There is nothing preventing this document from being signed at the instance of the bank before its officials or anywhere else as it is not one of those that are required to be prepared, signed before and witnessed by a conveyancer. It would not have been difficult for the applicant to get this information. The applicant had all the time to enquire about such details which I consider to be relevant considering the time they took before launching these proceedings. For this Court to be now called upon to make a finding of fact that the respondent did initial and sign as a witness on nothing more than her

insistence that she can neither confirm nor deny that those were her initials and signatures is quite a stretch. This, without any basis relied upon in the founding affidavit for contending that she should be able to say that those were or were not her signatures. One might ask even if rhetorically so to speak, what would the applicant have done if the respondent had said that those were not her signatures which it is unable to do to prove its case when she says she cannot say either way?

[47] All that having been said, I must express my disquiet at the lack of candour on the part of the respondent. On reading the answering affidavit it is not difficult to see that the respondent is almost holding her chest about how, as a matter of practice, she attends to the witnessing of documents generally. It is not clear if she keeps her office stamp at the reception in her office so that once she is done witnessing, her staff whom she would have trained, affixes the stamp. Who, at the time, would have ushered in a person who brought documents for witnessing? Would it have been Mrs Labuschagne or somebody else? Did she allow her staff to assist the person whose signature is to be witnessed by her, to observe the person appending her or his signature on a document after which a document is brought to her for her signatures as a witness? If that is the case, how could she be certain that the document she would be witnessing was signed by the correct person? Would it ordinarily have been necessary that a document such as a deed of suretyship should be witnessed by her or her employees could have done so? All these questions and scenarios and they may not be the only ones, are matters that would have assisted the court in understanding the administrative processes and policies at the respondent's offices.

[48] While in this case there is no basis for making a finding of fact that the respondent did sign as a witness to the deed of suretyship, attorneys must be

mindful of the importance attached to their title as attorneys. The weight of an attorney's signature as a witness to a document is obvious and is inseparable from the fact that she or he is an officer of the court. It is not sufficient for an attorney to simply proffer a bare denial or say that they are unable to tell one way or the other as the respondent has done here. There is a professional and ethical responsibility for attorneys to play open cards with the regulator, the LPC. Candour with the Court and a demonstration of a clear appreciation of one's responsibilities as an attorney and an officer of the court are indispensable attributes of the attorneys' profession. All of that must appear from the explanations given to the LPC and if the matter makes its way to the court, the affidavits must reflect that deep appreciation of those responsibilities. Unfortunately, in her answering affidavit, the respondent in this case has behaved more like an ordinary litigant who is not an officer of the court. This is unacceptable and may itself result in negative inferences being drawn or even the relevant attorney being mulcted with costs as a mark of displeasure by the court in an appropriate case.

[49] That attorneys must refrain from the old adage of "he who alleges must prove" was made clear in *Hewetson*[3] in which the Supreme Court of Appeal which, after considering a number of authorities all the way back to *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401, stated the legal position as follows:

> "It must throughout be remembered that an application for the striking off of an attorney is not an ordinary proceeding but one *sui generis* of a disciplinary nature, in which the court has the inherent jurisdiction to penalise errant attorneys found unfit to practice by either striking them from the roll or suspending them from practice for a period. There is no room for an attorney to adopt an adversarial position in regard to the enquiry. Instead, as was stressed, *inter alia,* in *Kleynhans* an attorney is

[3] Note 2 supra at para 44.

expected to co-operate and to provide all necessary information so that the full facts are placed before the court to enable it to make a correct and just decision."

[50] This is the same approach that attorneys must adopt even at the investigative stage of the complaint to enable the LPC to make an informed decision on whether, in light of the explanation given by the attorney concerned, it should exercise its own penal jurisdiction or whether it should refer the matter to court for a court imposed sanction.

[51] After this matter was heard and the judgment was reserved, it became necessary for the Judge President to reconstitute the court in terms of section 14(3) of the Superior Courts Act 10 of 2013[4] by the addition of a third Judge. Before the hearing of this matter before the full court, a directive was issued calling upon the parties to file supplementary heads of argument on "whether or not it is appropriate to refer this matter for the hearing of oral evidence."

[52] While section 14(3) of the Superior Courts Act refers to appeals, there is nothing in logic or principle why the handling of an appeal referred to in that subsection should not obtain even in respect of a court of first instance constituted of two Judges. As far as I understand the practice in all Divisions in this country, a third Judge is added to the two Judges who previously heard the matter where the two judges are unable to agree on the reasoning for the judgment or the order. The matter is then heard de novo as the two initial Judges are not *functus officio* as they did not conclude the matter by making an order or delivering a judgment.

[4] Section 14 (3) reads:
Except where it is in terms of any law required or permitted to be otherwise constituted, a court of a Division must be constituted before two judges for the hearing of any civil or criminal appeal: Provided that the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may in the event of the judges hearing such appeal not being in agreement, at any time before a judgment is handed down in such appeal, direct that a third judge be added to hear that appeal.

[53] Parties did file their supplementary heads of argument and both are in agreement that this is not an appropriate case for referral for the hearing of oral evidence. While it is so that their agreement in that regard is not binding to the court, I am in agreement with the views expressed by counsel for both parties in that regard for the reasons stated hereunder.

[54] I am emboldened in the view that I hold on this issue by how the Supreme Court of Appeal dealt with the issue of referral for the hearing of oral evidence in *Hewetson*[5]. The Supreme Court of Appeal dealt with the referral for the hearing of oral evidence in that matter as follows:

> "Nonetheless, as set out above there are gaps in the appellant's evidence that are cause for concern. If one has regard to the apparent contradictions between her own affidavits and the affidavit of Mr Knoetze there is a discrepancy which requires an explanation from the appellant. Likewise, the SMS and WhatsApp exchanges between Mr Hewetson and the appellant require an explanation insofar as they are indicative of prior knowledge of her husband's misuse of trust funds. Ms Petze's allegations, although not wholly convincing also require a response. There may well be satisfactory explanations for all the apparent contradiction but, given the nature of the application, it is in the public interest that a hearing be conducted on these narrow issues. In addition, the appellant is required to explain her delay, if any, in reporting the matter to the Law Society.
>
> A court is loath to impute dishonesty on the basis of untested allegations in motion court proceedings in the absence of clear proof and where these allegations were denied on grounds that cannot be described as far-fetched. But because of the sui generis nature of these proceedings it is in the interest of the public and the appellant herself that these issues be referred to oral evidence in the high court. Only then can a court properly exercise its inherent jurisdiction to penalise the appellant by either striking her from the roll of practising attorneys or suspending her from practising for a period."

[5] Note 1 supra at paras 37 and 38

[55] From these facts it seems that there were narrow and delineated issues that needed the hearing of oral evidence to enable the court to exercise its penal jurisdiction. This is over and above the fact that the question relating to the first leg of the enquiry, the establishment of the offending conduct was not in issue, it being common cause. In this case the offending conduct is not only not common cause but also the applicant has simply failed to canvass sufficient facts to establish it. The question of an unconvincing explanation or even contradictions in the respondent's explanation do not arise. There cannot be an unconvincing explanation in a case such as this in which, after the respondent did not own up to the signatures, there was no investigation to establish if in fact her denial was well founded. There is therefore nothing to refer for the hearing of oral evidence. The fact that these proceedings are of a sui generis nature is no basis for the referral for the hearing of oral evidence, absent an issue to be resolved thereat. The applicant must first establish, on probabilities, the offending conduct on the basis of which it is or can be concluded that there has been an infraction of the disciplinary code of ethics. Alternatively, it must be that the respondent's explanation, assessed objectively, is less than satisfactory or contains contradictions that, in the interests of justice, necessitate a referral for the hearing of oral evidence on issues that are material. I emphasize that the issues referred for the hearing of oral evidence must be material to the resolution of the lis between the parties and must not be peripheral. The referral for oral evidence, should not be for an impermissible purpose of looking for "self-incriminatory" evidence from the respondent even unwittingly. It would offend our civil procedure jurisprudence in what are essentially adversarial proceedings to put the respondent in a situation where she might crumble under the pressure of cross-examination for no legitimate reason. Even in proceedings of a sui generis

nature, doing so is impermissible, absent an issue or issues that need the agency and efficacy of oral evidence hearing.

[56] It was argued quite strenuously on behalf of the respondent that in the event of the applicant not succeeding in this application, the applicant should be ordered to pay the costs of this application on an attorney and client scale. I do not think that a case has been made for the award of any costs, let alone a punitive costs order against the applicant. This is because whatever criticism one may level against the applicant in the paucity of the information brought before this Court, the situation is not so egregious as to require the court to make such a ruling. This is over and above the applicant's role of not being an ordinary litigant in these kinds of applications. It comes to court bringing such "application[s] in its capacity as the custodian of the status and dignity of the profession and seeks to protect the interests of the public in their dealings with attorneys."[6] The shortcomings in its failure to thoroughly investigate the complaint and place itself in a better position to bring sufficient evidence of the alleged misconduct is not such as to warrant it being mulcted in costs. The respondent has also not covered herself in glory in terms of making a clean breast to the extent possible as earlier indicated. Therefore, even though the application fails, I am of the view that no costs should be borne by the applicant. I consider it appropriate that each party must pay its own costs.

[57] In the result I would make the following order:

1. The application is dismissed with each party to pay its own costs.

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[6] Note 2 supra

M.S. JOLWANA

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

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F. DAWOOD

JUDGE OF THE HIGH COURT

GOVINDJEE J

Background

[58] I have considered the detailed exposition of the facts and legal analysis offered by my brother, Jolwana J ('the main judgment'). The main judgment concludes that the application stands to be dismissed, with each party to pay its own costs.

[59] I understand the ratio of the main judgment, as expressed in paragraph 32, to be premised on the absence of conclusive proof that the disputed signature was that of the respondent. The main judgment concludes that the applicant could have performed more detailed investigations before approaching the court. It finds that many aspects of the matter have been treated unsatisfactorily, also on the part of the

respondent. The interpersonal relationships at play are emphasised as relevant background material. The main judgment expresses uncertainty whether it may be expected of the respondent to consider the disputed signature and conclude whether it is a forgery. Emphasis is placed on the large number of documents typically signed by the respondent. Little is made about the wording of the respondent's initial response to the allegations or the affixation of her stamp together with the signature in question, although the respondent is criticised for a lack of candour. Ultimately, the main judgment takes the view that there are simply not enough facts presented to warrant a finding of misconduct, and that the applicant has fallen short of the required minimum threshold (at para 44).

General observations

[60] These proceedings are disciplinary in nature and *sui generis*. The LPC is required to place facts before the court explaining its contention that the respondent has acted unprofessionally. It is then for the court to determine how to deal with the legal practitioner.[7] The inquiry depends on the circumstances of the case.[8] The court has inherent jurisdiction to penalise attorneys found unfit to practice by either striking them from the roll or suspending them from practice for a period.[9] While a court is not bound by the views of the LPC in exercising disciplinary jurisdiction over legal practitioners, those views carry a distinct weight given the role of the LPC in safeguarding the legal profession and protecting the public in its dealings with attorneys.[10]

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[7] *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 at 408-409.
[8] See *Malan and Another v The Law Society of the Northern Provinces* [2008] ZASCA 90 ('*Malan*') para 9; *The South African Legal Practice Council v Melato* [2021] ZAFSHC 305 ('*Melato*') para 15.
[9] *Malan* supra para 23.
[10] *Melato* supra para 23. On the protection of the public being the main consideration, see *Malan* supra para 7.

[61] The first enquiry is to determine whether offending conduct on the part of the respondent has been proved on a balance of probabilities. As the main judgment has noted, this is a factual enquiry.[11] In evaluating the evidence, however, the court is not constrained by conventional rules of evidence and the ordinary *Plascon-Evans* approach is inappropriate.[12] Importantly, attorneys in the position of the respondent are expected to co-operate and provide all necessary information so that the full facts are placed before the court to enable it to make a correct and just decision:[13]

> 'By reason of the *sui generis* nature of the proceedings, this would require a full and frank disclosure of all material information so as to allow the court to make a proper and informed decision. There is no room for an attorney who wishes to remain on the roll to be coy about material facts in a matter of this nature. As officers of the court, attorneys are at all times expected to be scrupulously honest and observe the utmost good faith in their dealings with the court, even if it means disclosing information which may be adverse to their own interests, and this rule applies equally in applications to strike them off.'[14]

[62] Similar sentiments have been expressed by Ranchod J in *Melato*, quoting *Malan*:[15]

> 'An attorney is therefore not entitled to approach the matter as if it were a criminal case and rely on denial upon denial and, instead of dealing with the allegations, to deflect them and, as part of the culture of blame, blame others … If allegations are made by the LPC and underlying documents are provided which form the basis of the allegations, they cannot simply be brushed aside; the attorney is expected to respond meaningfully to them and to furnish a proper explanation … as their failure to do so may count against them.'

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[11] *Melato* supra para 11.
[12] *Van den Berg v General Council of the Bar of SA* [2007] 2 All SA 499 (SCA) para 2. Also see *South African Legal Practice Council v Bobotyana* [2020] ZAECGHC 114 ('*Bobotyana*') para 62.
[13] *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 853, as cited in the judgment of Leach JA in *Hewetson* supra para 44.
[14] *Hewetson* supra para 49 (footnote omitted).
[15] *Melato* supra para 18 quoting *Malan* supra para 12. Also see *Bobotyana* supra para 76.

Analysis

[63] Unfortunately, the approach of the respondent is precisely of the kind that has been deprecated. As the applicant suggests, one would have expected the respondent, as an officer of this Court, to state without hesitation that she would not have signed the document as a witness in the absence of the main signatory. If she seriously suggested that the signature purporting to be hers was forged, this could have been expressed, together with some explanation for the presence of her stamp underneath her signature. The main judgment highlights a plethora of shortcomings in her approach and does so in piquant terms (at paras 23 and 47 of the judgment). The respondent is, correctly in my view, criticised for a lack of candour and the main judgment expresses its disquiet at her approach, adding a reminder to attorneys of the standard of accountability to which they are held (at para 48 of the judgment). Even leaving aside the consequence of the respondent's evasive approach for purposes of evaluating the factual matrix, there is a clearer and more direct basis for finding that the respondent is guilty of the alleged misconduct on a balance of probabilities.

[64] The charge levelled against the respondent centres on unprofessional conduct for contravening a rule and brining the attorneys' profession into disrepute 'by signing a suretyship document as a witness to a forged signature and thereby either signed knowingly or in the absence of the signatory'. Her initial responses to the complaint, (quoted comprehensively at paras 5 and 6 of the judgment) are telling. The respondent's answer to a police enquiry included an affidavit and additional remarks contained in a letter. The relevant extract of the affidavit, dated April 2016, reads as follows:

> ‘I am not able to confirm or deny whether Mr Labuschagne signed the surety in my presence as I have no independent recollection of this document being signed.’

[65] The accompanying letter included one notable addition.

> ‘I … *was a party to a document* whereby it is alleged that Mr Neels Labuschagne signed surety … I with regret cannot confer (sic) or deny whether Mr Neels Labuschagne had or had not signed in my presence, as I have no recollection of the said signature …’ (Own emphasis).

[66] Both documents go on to provide other background information about Mr Labuschagne and the circumstances in which a suretyship document would be required. There is no hint that there is any real dispute that the respondent’s signature and stamp appear on the document. When the Cape Law Society investigated the matter, the respondent reiterated those responses on 11 May 2016,

[67] Read together, the respondent unequivocally acknowledges that she was a party to the document in her letter. There is no suggestion that the appearance of her own signature was in dispute, possibly a forgery or otherwise appearing due to some form of skulduggery. Nothing is said about the appearance of the stamp. Instead, the focus of the correspondence is on the lack of recollection *whether Mr Labuschagne had or had not signed in my presence*. The only viable conclusion on the probabilities, on my analysis, is that the respondent immediately accepted that she had signed the document. It is now common cause that Mr Labuschagne’s signature has been forged. The consequence is that the respondent must be guilty of the misconduct for which she has been charged. At the very least, it has been established on the probabilities that she is guilty of signing the document as a witness in the absence of the main signatory.

[68] The respondent's subsequent prevarication as to the signature does nothing to shift the probabilities in her favour. That the Cape Law Society afforded her an opportunity to provide a clear explanation for the appearance of her signature, rather than merely rely on the wording of her earlier responses, does not change the position. The failure of the professional body to conduct a more exacting enquiry also cannot alter the outcome in circumstances where the misconduct has been demonstrated on the probabilities. The outcome of the handwriting analysis, unfortunately based on documents of poor quality, is similarly of no further assistance. The test is not whether the applicant has demonstrated *conclusively* that the disputed signature was that of the respondent. Finally, the respondent's attempt to backtrack from the clear wording of her initial responses in her answering affidavit, by suggesting that, '… in retrospect I appreciate that the wording of my response could have been better', and much of her subsequent attempt at rationalising what has transpired, also does not tilt the probabilities back in her favour.

[69] In my view the probabilities favour the explanation offered by the respondent at para 30 of her answering affidavit. Crucially, the respondent acknowledges the following:

> '… whilst I would never in the normal course of events bear witness to the signature of a document in circumstances where I had not in fact witnessed the actual signature of the document I must acknowledge [if it is demonstrated that it is my signature which appears on the suretyship document] that I may have been persuaded to do so in this particular instance …'

[70] The respondent adds various reasons explaining why she may have conducted herself in this manner on this particular occasion. Jacky was her 'most trusted employee' and 'someone whom I regarded as a friend'; she would never have contemplated that people who were relatives would have falsified one another's

signatures; and she would have placed some reliance on the appearance of Cor's signature as first witness and 'not have anticipated that the signatures of either Neels or his mother Jacky may have been inauthentic'. This is, on the probabilities, what occurred. Unfortunately, it is reflective of a legal practitioner willing to bend the rules and operate unethically in certain circumstances, based on the identity of the parties to transactions before her and courtesy of her own personal relationship with the role-players. This is unacceptable and worthy of censure.

[71] In all the circumstances, I am of the view that the applicant has succeeded in proving, on a balance of probabilities, that the respondent is guilty of having initialled and signed a document as a witness in the absence of the main signatory. This is conduct unbecoming of a legal practitioner operating in a profession that is expected to uphold values such as honesty and integrity. I would exercise a discretion to hold that the respondent's conduct demonstrates that she is not a fit and proper person to continue to practise, but find that an order of suspension from practice would suffice. The usual ancillary orders involving surrender of the certificate of enrolment and appointment of a curator would follow and the respondent would be directed to pay the costs of the application on an attorney and client scale. As this is a minority judgment, it is unnecessary to consider the appropriate period of suspension.

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A. GOVINDJEE

JUDGE OF THE HIGH COURT

Appearance:

Counsel for the applicant: K.L. WATT

Instructed by: WHEELDON RUSHMERE & COLE INC.

MAKHANDA

Counsel for the respondent: D.H. DE LA HARPE SC

Instructed by: HUXTABLE ATTORNEYS

MAKHANDA

Date heard : 18 July 2022

Date delivered : 10 August 202