Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 25064/2011

In the matter between:

N Q (I.D. NUMBER:)	Applicant
and	
S T Q (In his personal capacity) (I.D. NUMBER:)	First Respondent
S T Q (in his representative capacity as natural father and guardian Of his minor child **T Q** ID:)	Second Respondent
S T Q (In his representative capacity as natural father and guardian Of his minor child, **L Q** ID:)	Third Respondent
THE REGISTRAR OF DEEDS CAPE TOWN	Fourth Respondent
THE MASTER OF THE HIGH COURT, CAPE TOWN	Fifth Respondent

Court: Acting Judge J I Cloete

Heard: 22 May 2012

Delivered: **6 JUNE 2012**

JUDGMENT

CLQETE AJ:

[1] The applicant who is married in community of property to the first respondent seeks certain declaratory relief relating to the ownership of an immovable property situated at erf 12961 Bellville *("the property").* The first respondent is the biological father and coguardian of the second and third respondents, both of whom are minors. The relief sought against the fourth respondent is consequential upon the main relief. The fifth respondent is cited only by virtue of any interest which he may have in the matter.

[2] The first to third respondents opposed the relief sought by the applicant until the eleventh hour when it was conceded in heads of argument filed on their behalf that the applicant is entitled to the relief claimed, save for costs.

[3] The applicant persists with her claim against the first respondent for costs on the scale as between attorney and own client. The only issues which thus remain to be determined are whether the first respondent is liable for the applicant's costs and if so, the scale upon which such costs should be awarded.

[4] The facts which are common cause or not seriously in dispute are as follows.

[5] The applicant and the first respondent were married to each other on 19 March 2005 and are the parents of a 6 year old child who resides with the applicant at the property.

[6] The marriage has irretrievably broken down and the parties separated during February 2009 whereafter the applicant instituted divorce proceedings which are still pending. The property is one of the assets in the joint estate.

[7] During early 2010 the applicant discovered that on 18 June 2009 the first respondent had transferred ownership of the property to the second and third respondents. Upon further investigation the following emerged:

1. On 20 March 2009 the first respondent *“sold”* the property to the second and third respondents for a purchase price of R754 000 although the purchase price was never paid. The applicant says that she did not sign the deed of sale and claims that the signature appearing thereon in the place above where her maiden name is reflected was forged, either by the first respondent or by someone acting on his instructions. The applicant also says that she has never met Moyra de Lange, the person who signed the deed of sale as the applicant’s “*witness”* and de Lange has subsequently confirmed to the applicant’s attorney that she did not witness the applicant’s *"signature”* which the latter in any event claims does not even remotely resemble her own.

2. The power of attorney to pass transfer was not signed by the applicant, nor was it signed in the presence of the conveyancer who had been instructed to attend to the

transfer of the property or the two persons who *“witnessed”* her signature. The applicant similarly alleges that the signature appearing thereon is not her signature and that it was forged.

3. The applicant’s *"Personal Affidavit* which also required her signature in the presence of a commissioner of oaths in order to enable the transfer to proceed was not signed by her, whether in the presence of a commissioner of oaths or otherwise, and does not even bear the signature or details of a commissioner of oaths. In fact the handwritten details which purport to be those of the commissioner of oaths are those of the applicant, but in her maiden name.

4. The same applies to the *“Affidavit by Seller”* for purposes of compliance with the Financial Intelligence Centre Act No. 38 of 2001. Again, the applicant claims that her signature on these documents was forged.

5. The conveyancer who was instructed to attend to the transfer admitted to the applicant’s attorney that he never met the applicant prior to the transfer of the property and further that he had failed to even verify the applicant’s identity, thus forsaking his professional duty as conveyancer.

[8] From the affidavit of the conveyancer himself it appears that he was presented with a different deed of sale on 16 April 2009 reflecting a selling price for the property of R290 000. The relevant documentation submitted to SARS in order to obtain a transfer duty receipt was rejected on the basis that the *“selling price”* was substantially lower than the fair market value of the property. He discussed the matter with the estate agents involved and suggested that the deed of sale be amended to reflect a fair market value for the property as a selling price. The *“selling price”* was then *“amended”* to R754 000 and the “*amended”*

deed of sale delivered to the conveyancer on 8 May 2009. It is unclear how the deed of sale provided by the conveyancer to the applicant’s attorney, although reflecting a price of R754 000, is nonetheless dated 20 March 2009 and that the estate agent’s commission was calculated, and paid, on the basis of a selling price of R290 000.

[9] The firm of attorneys who employ the conveyancer concerned tendered to pay the costs of the application to be brought by the applicant to set the transaction aside, although no tender was made to repay the conveyancing fees attendant upon the transfer. The tender was made by the attorneys prior to the launching of this application. This notwithstanding the first respondent, both in his personal capacity and on behalf of the second and third respondents, opposed the application on what can best be described as spurious grounds, essentially claiming that the transfer took place with the applicant’s consent. Notably the first respondent does not allege that any of the relevant documents in fact bear the applicant's signature. He admits the contraventions relating to the transfer by the conveyancer but simply passes the blame to the latter. In addition the best that the first respondent could proffer regarding signature of the various documents which resulted in the transfer was that the applicant had apparently signed these documents alone when not even he was in her presence.

[10] As pointed out by the applicant’s counsel this makes no sense whatsoever. There is no logical reason why the applicant, in the face of imminent divorce proceedings, would have

consented to transfer 50% of an asset worth R754 000, being the home in which she lives with the parties' minor child, to the minor children born of the first respondent's previous marriage, and without receiving any payment therefor. The overwhelming evidence (including the admissions made by the conveyancer) indicates exactly the contrary and I find that the first respondent either forged the applicant's signature or that it was forged by someone else on his instructions.

[11] In these circumstances there is no question that the first respondent must pay the applicant's costs and that in addition the amount paid by him from the joint estate in respect of transfer costs and estate agent's commission totalling R48 915.73 must be deducted as a first charge from such share of the joint estate as he may be awarded upon the granting of a decree of divorce.

[12] Further, this is exactly the type of matter in which a punitive costs order is warranted. First, the conduct of the first respondent was reprehensible. Second, he persisted in his opposition on the merits until the eleventh hour and only conceded them four days before the matter was argued. Third, an award of party and party costs will not sufficiently compensate the applicant since she will nonetheless be out of pocket for the attorney and own client portion of her legal costs. The tender for costs by the firm of attorneys is not relevant to the first respondent's blameworthy conduct towards the applicant and the joint estate.

[13] **In the result I make the following order:**

1. The immovable property situated at Erf 12961, Bellvilie *("the* property") is declared to be jointly owned by the applicant and the first respondent.

2. Title Deed no: T27919/2009 is hereby cancelled in accordance with s 6(1) of the Deeds Registries Act 47 of 1937 *{"the Act").*

3. Title Deed no: T22340/2005 is hereby revived and declared to be of full force and effect as if it had never been cancelled in accordance with s 6(2) of the Act, and the fourth respondent is hereby directed to cancel the relevant endorsement thereon evidencing the cancellation of the registered deed.

4. The fourth respondent is further authorised and directed to take such further steps as may be necessary in order to give effect to the provisions of paragraphs 1 to 3 above.

5. The first respondent shall upon demand pay ait costs, duties and fees in order to give effect to the provisions of paragraphs 1 to 4 above. All amounts so paid by the first respondent shall be deducted as a first charge against such share of the joint estate of the parties as is awarded to the first respondent upon the granting of a decree of divorce dissolving the marriage between the applicant and the first respondent, and be paid to the applicant.

6. In the event of the first respondent refusing or failing to sign any documents in order to give effect to this order, either in his personal capacity or in his representative capacity as natural father and co-guardian of the second and third respondents, upon request by registered mail to his address at No. 1, Uitsig Street, Bellville, Cape Town, the Sheriff of the High Court Bellville is

hereby authorised and directed to sign all such documents on his behalf.

7. The first respondent is ordered to pay the costs of this application on the scale as between attorney and own client and the applicant is authorised to execute upon such costs order on taxation thereof, provided that the amount payable by the first respondent, as well as the amount of R48 915.73 which was paid by the joint estate in respect of the transfer of the property under Title Deed no: T27919/2009, shall be deducted, also as a first charge, against such share of the joint estate as is awarded to the first respondent upon the granting of a decree of divorce dissolving the marriage between the applicant and the first respondent, and be paid to the applicant.

J I CLOETE, A.J.