

FORM A
FILING SHEET FOR EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

PARTIES: **A V CALCUTT + 2 v K C MACLEAN + 7 OTHERS**

Case Number: **871/09**

- High Court: **PORT ELIZABETH**
- DATE HEARD: **25 February 2010**
- DATE DELIVERED: **23 March 2010**
- JUDGE(S): **EKSTEEN J**

LEGAL REPRESENTATIVES -

Appearances:

- **ADV P SCOTT (APPL)**
- **ADV BUCHANAN S.C (1ST RESP)**
- **ADV V D LINDE S.C. (4TH AND 5TH RESP)**
- **ADV GAJJAR (6TH RESP)**
- **ADV CERTFONTEIN**

Instructing attorneys:

- **APPL: BOQWANA LOON & CONNELLAN**
- **1ST RESP: RUSHMERE NOACH INC**
- **4TH & 5TH RESP: OOSTHUIZEN HAZEL & WILMOT**
- **6TH RESP: RUSHMERE NOACH INC**

CASE INFORMATION -

- *Nature of proceedings:*
- *Key Words:*
- *Summary:*

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: 871/09

Date delivered: 23 March 2010

In the matter between:

ANNE VERONICA CALCUTT (born HYDE)	First Applicant
SHAWN HALGREEN NO	Second Applicant
NICO DE VILLIERS NO	Third Applicant

and

KIM CHRISTINA MACLEAN	First Respondent
THE REGISTRAR OF DEEDS, CAPE TOWN	Second Respondent
THE SURVEYOR-GENERAL, CAPE TOWN	Third Respondent
STEPHEN CANTER	Fourth Respondent
TRACEY CANTER	Fifth Respondent
HEMSLEY & KOTZE	Sixth Respondent
ROBERT MARTINDALE NO	Seventh Respondent
DR KOTZE NO	Eighth Respondent

JUDGMENT

EKSTEEN, J:

[1] The Kini Bay Trust (“KB Trust”) was at all material times the sole owner of a vacant erf, Erf 105, Kini Bay. The Kamma Mews Trust (“KM Trust”) owned Erf 97, Kini Bay which adjoins Erf 105. The KM Trust had erected a

dwelling on Erf 97 which enjoyed an attractive sea view across Erf 105. The trustees of the KM Trust, being the seventh and eighth respondents herein (referred to jointly herein as the KM Trust), wished to secure this view and accordingly entered into negotiation with the trustees of the KB Trust, the second and third applicants herein (referred to jointly herein as the KB Trust), to acquire a portion of Erf 105 together with an undertaking that the KB Trust would not construct any building on Erf 105 which would impede the sea view from the balcony of the dwelling erected on Erf 97. This culminated in a deed of donation entered into on 19 July 2001 (“the first deed of donation”).

[2] In February 2002, a mere six months after the donation, the KB Trust, inexplicably, entered into a deed of sale in terms of which the KB Trust sold the entire Erf 105 to the first applicant without any mention of the donation. At the same time the first applicant also purchased, from a third party, Erf 106 Kini Bay which also adjoins Erf 105, with the intention of extending the dwelling which had previously been erected on Erf 106 onto portion of Erf 105.

[3] After the purchase, while awaiting transfer, the first applicant learnt of the existence of the deed of donation. She challenged the validity of the deed of donation, which dispute was ultimately determined by arbitration. The arbitrator held that the deed of donation was in fact valid and, because it had

been concluded prior to the agreement of sale, remained enforceable in the face of the deed of sale.

[4] During September 2002 the KM Trust sold Erf 97, together with its rights in the donated portion of Erf 105 to the fourth and fifth respondents. At the time of the conclusion of the latter agreement the subdivision had not occurred, the donated portion of Erf 105 had not been transferred into the name of the KM Trust and litigation relating to the validity of the donation was raging. When ultimately the litigation was concluded and the subdivision effected a new Erf 125 was created and a fresh deed of donation ("the second deed of donation") was entered into in terms of which the newly subdivided Erf 125 was donated directly from the KB Trust to the fourth and fifth respondents. The remainder of Erf 105 was transferred into the name of the first applicant and the subdivided portion, Erf 125, which forms the subject of the present dispute was transferred into the name of the fourth and fifth respondents and Erf 125 was consolidated with Erf 97, forming what was henceforth known as Erf 126, Kini Bay. Erf 126 was thereafter sold and transferred to first respondent.

[5] During or about the latter part of 2007 the first applicant discovered, to her horror, that a change had occurred in the boundary line of the property which had originally been donated with the effect that Erf 125, prior to consolidation, was slightly larger than the area set out in the first deed of

donation. The effect thereof is that the remainder of Erf 105 which had been transferred to her was smaller than anticipated. The KB Trust contend that they were unaware of the change which had occurred and now seek to reverse the donation, the subdivision, the consolidation and the transfer of the property. These events give rise to the present application.

[6] The Relief Sought.

The applicants seek a declaratory order as follows:

- “1. That the deed of donation dated 19 July 2001 was cancelled.
2. That the deed of donation dated 15 December 2004 is void *ab initio*, and
3. That the deed of sale entered into between the First Applicant and the Kini Bay Trust relating to Erf 105 Kini Bay includes that portion of property which was the subject matter of the deed of donation dated 19 July 2001.”

[7] On this basis the applicants seek the following additional orders:

- “1. That the consolidation of Erf 125 Kini Bay with Erf 97 Kini Bay to create Erf 126 Kini Bay be set aside.
2. That the First, Fourth and Fifth Respondents, jointly and severally be directed to take all steps necessary to procure the subdivision of the property previously known as Erf 125 Kini Bay from Erf 126 Kini Bay.
3. That the First, Fourth and Fifth Respondents, jointly and severally, be directed to take all steps necessary to procure the registration of transfer of Erf 125 into the name of the First Applicant, and to effect the consolidation of Erf 125 Kini Bay with Erf 105 Kini Bay, and that the First, Fourth and Fifth Respondents, jointly and severally, be ordered to pay all the costs associated therewith.”

[8] The Evidence.

The first deed of donation concluded on 19 July 2001 recorded that the KB Trust, as donor, donated to the KM Trust, as donee, “portion of Erf 105 Kini

Bay as per annexure A". It further recorded an undertaking by the donor not to erect any building on Erf 105 which would impede the sea view from the balcony of the dwelling on Erf 97, Kini Bay. The "annexure A" to the first deed of donation contained a sketch which depicted two rectangular blocks adjacent to one another representing Erf 105 and Erf 97 respectively. A broken line was drawn parallel to the boundary line between Erf 105 and Erf 97 across the length of Erf 105. The annexure contains a key which indicates that the area between the boundary line separating Erf 105 and Erf 97 and the broken line represents the donated area. The key indicates that the broken line demarcating the donated area is situated exactly 10 metres back from the boundary between the two properties.

[9] In terms of the deed of donation all costs associated with the subdivision of Erf 105, the costs of consolidation of the donated area with Erf 97, the costs of transfer and any donation's tax would be borne by the donee.

[10] After the first deed of donation had been duly executed the KB Trust entered into the deed of sale in respect of the entire Erf 105, as referred to above, with the first applicant. Some time after the first applicant had concluded this agreement of sale and the agreement of sale in respect of Erf 106, to which I have referred above, and whilst the transfer was pending she learned of the deed of donation. Understandably she was upset. She immediately objected to the subdivision. She instituted action claiming

transfer of the entire Erf 105 and challenging the validity of the deed of donation. All of this came to nought. The issue relating to the validity of the deed of donation was referred to arbitration. On 15 December 2004 the arbitrator made the following award:

“The deed of donation ... is declared to be valid and enforceable, subject only to the Nelson Mandela Municipality approving the application to subdivide erf 105 Kini Bay, pursuant to the deed of donation (application 5171).”

The first applicant's objection to the subdivision was similarly dismissed and the subdivision was duly approved by the Nelson Mandela Metropolitan Municipality in approximately March 2006 pursuant to the first deed of donation.

[11] In the interim, during the latter part of 2002 the KM Trust, resolved to sell erf 97 together with the rights which it had obtained under the first deed of donation. The fourth respondent and his wife, the fifth respondent, showed an interest in acquiring the property. The fourth respondent states that they were shown the property by an estate agent. In front of the dwelling was a grassed area which was incorporated into the garden of the home. The sea view which the property enjoys is across this area. They were not advised of any deed of donation and were entirely unaware of any dispute relating to the pending subdivision. The estate agent, however, represented to them that the entire grassed area was included in the sale. The fourth respondent insisted

that the representation made by the estate agent be confirmed and recorded in the contract of purchase when they ultimately made an offer to purchase.

The contract records as follows:

“20. Additional clauses/fixtures and fittings ... Confirmation in writing that the property includes extended erf seaside of house being erf 105 (part thereof). ...”

[12] The fourth respondent states that he would not have entered into the contract unless the entire grassed area was included as he required the entire grassed area to secure an unimpeded view of the sea. The contract of purchase was duly concluded in late September 2002 on this basis.

[13] A few weeks after the conclusion of the contract of purchase the fourth respondent entered into discussion with the eighth respondent, as trustee of the KM Trust, about the occupation of the dwelling. At this stage he was first informed of the deed of donation and the challenge to its validity. Later, towards the end of 2002 he was advised by a neighbour of the objection to the application for subdivision. This was followed by the institution of action which challenged the validity of the deed of donation. Fourth respondent was joined as a defendant in this litigation to the extent that he had an interest in the property. No relief, however, was sought against him. Upon receipt of the summons he consulted attorney Martindale (seventh respondent) who advised that he had been joined only as an interested party and accordingly he paid no further attention to those proceedings.

[14] The litigation raged forth for approximately three years before finality was reached. As a result of the ongoing dispute the fourth and fifth respondents, who were now paying occupational interest on Erf 97 over an extended period resolved to take transfer of Erf 97 in the meantime, leaving the transfer of the donated area in abeyance. It was, however, expressly agreed that the KM Trust would remain responsible for ensuring that the subdivision of portion of Erf 105 was effected and that it was consolidated with Erf 97. This agreement was confirmed by the seventh respondent, on behalf of the KM Trust, in writing on 12 September 2005.

[15] Pursuant to the arbitrator's award on 15 December 2004 the Nelson Mandela Metropolitan Municipality approved the subdivision on or about 31 March 2006. It is not in dispute that the sixth respondent, a firm of land surveyors, had been instructed by the seventh respondent to survey the donated area and to attend to the subdivision. There was no contractual relationship between the fourth and sixth respondents.

[16] In the course of 2005, the fourth respondent says that he first saw the original diagram prepared by the sixth respondent which had been submitted to the Nelson Mandela Metropolitan Municipality for purposes of the application for subdivision pursuant to the first deed of donation. This diagram had been prepared even prior to the purchase by the fourth and fifth

applicants of the property. The diagram is similar to, although more sophisticated than, the diagram which had been annexed to the first deed of donation, save that it reflected the boundaries of the donated area as being “± 10 metres” back from the cadastral boundary between Erf 105 and Erf 97. The fourth respondent noted that the boundary set back approximately 10 metres as depicted on the diagram did not incorporate the entire grassed area which he had been assured would be included in the purchase. It was further apparent that setting the boundary back by 10 metres on either side would enable the owner of the remainder of Erf 105 to erect a building which would impede the view of the sea from the balcony of the dwelling on Erf 97.

[17] The fourth respondent set up a meeting with one John Kotze, a member of the sixth respondent being the land surveyor dealing with the matter and with the seventh respondent, being the attorney for the KM Trust and a trustee of the said Trust. This meeting occurred early in 2006. At this stage when the meeting was held the subdivision had already been approved. In the meeting the fourth respondent enquired what was meant by “± 10 metres”. No doubt the question was raised in the context of what had been represented to the fourth respondent relating to the grassed area. There is some dispute between the fourth respondent and the said Kotze as to the events hereafter. The fourth respondent states that Kotze indicated that he thought that a deviation of 1,5 metres from the diagram approved by the Nelson Mandela Metropolitan Municipality was permissible and undertook to

find out and to revert. The fourth respondent says that Kotze reverted some weeks later declaring that such deviation was indeed in order. Kotze, for his part, states that he had informed the fourth respondent and seventh respondent there and then in the meeting that such deviation was in fact permissible. Nothing turns on this dispute.

[18] It is common cause that when Kotze advised that such deviation was indeed permissible the fourth respondent enquired whether it would be equally permissible to extend one side by 12,5 metres and make no extension to the other, thus keeping the extended area within the same limits. Kotze confirmed that this would be permissible.

[19] Clearly the fourth respondent found the latter proposal acceptable, although he states that it still did not include the entire grassed area which he believed was included in his contract of purchase with the KM Trust. Whilst the fourth respondent does not expressly say so, Kotze states that the fourth respondent requested such a deviation. That is not inconsistent with the fourth respondent's version.

[20] Kotze accordingly revised the diagram and, it is common cause, the revised diagram was in due course approved by the Surveyor General. There is a considerable dispute on the papers as to who "instructed" Kotze to effect such a revision and the KB Trust contends that they were neither consulted

nor advised. The KB Trust states that they were not aware of the change in the boundary and that the fourth respondent's conduct in procuring such change was unlawful and fraudulent whilst Kotze acted improperly. I shall revert to this dispute below.

[21] Up until this amendment to the boundary line the seventh respondent, in his capacity as an attorney, had been charged with the subdivision process. It is not in dispute, and he confirms, that he originally engaged the sixth respondent to attend to the subdivision. This accords with the records of the sixth respondent as attested to by Kotze. At some stage, probably after the meeting referred to above, the seventh respondent states that he proposed to the fourth and fifth respondents that attorneys Greyvensteins Nortier (the name of the firm changed to Greyvensteins at some point, however, the firm is referred to herein as Greyvensteins Nortier) attend to the registration of the subdivision as they were the attorneys for the KB Trust and were attending to the transfer of the remainder of Erf 105 to the first applicant. This, he says, was accepted and he accordingly requested attorneys Greyvensteins Nortier to obtain the survey diagrams directly from the sixth respondent, which they duly did. It is not in dispute that at all times prior to the institution of the present proceedings the KB Trust were represented by Greyvensteins Nortier.

[22] The Surveyor General approved the revised diagram on 8 September 2006. After the meeting referred to above Martindale Attorneys had no further

involvement in the subdivision. The subdivision and the conveyancing of the subdivided portions were attended to by, attorneys Greyvensteins Nortier, attorneys for the KB Trust. The subdivided erf was, upon subdivision, allotted Erf No. 125. It would in due course, upon consolidation with Erf 97 form part of the consolidated Erf 126. The subdivision occurred in accordance with the revised diagram which reflected an amended boundary line as set out above.

[23] The revised diagram referred to above differs from the diagram previously approved by the Nelson Mandela Metropolitan Municipality in a number of respects as a result of the revised boundary. The original diagram depicted the proposed subdivided erf as a parallelogram with two boundaries of “ ± 28 metres”, two boundaries of “ ± 10 metres” and an area of “ ± 280 square metres”. The revised diagram depicted a trapezium which did not indicate the length of the sides on the sketch itself. The exact length of each side is, however, set out in large print at the top left hand side of the document. It records the boundaries of the trapezium as 28,01 metres, 10,0 metres, 28,07 metres and 12,5 metres respectively. The area of the subdivided erf is shown as 315 square metres. The change which has occurred between the previous diagram and the one submitted to the Surveyor General is apparent at a cursory inspection.

[24] At approximately the time of the approval of the surveyed diagram the fourth and fifth respondents resolved to market Erf 97 together with their rights

to the donated area which was in the process of subdivision. In April 2007 the fourth and fifth respondents entered into an agreement of sale in terms of which they sold Erf 126, the appellation given to the consolidated erf, to the first respondent. First respondent had no knowledge of the events which had preceded her purchase and she was a *bona fide* third party, entirely oblivious of all the disputes, who had viewed a property which was available on the market and purchased same.

[25] At the time of the conclusion of this deed of sale in April 2007 the newly formed Erf 125 had not yet been transferred to the fourth and fifth respondents. Seventh respondent recommended to fourth and fifth respondents that Erf 97 and Erf 125 be marketed as one and that all the transfers be effected simultaneously. The property was accordingly marketed in this manner and the contract entered into in respect of Erf 126 being the yet to be formed consolidated erf. After the sale to the first respondent was concluded seventh respondent, on behalf of the KM Trust, proposed to transfer Erf 125 directly from the KB Trust to the fourth and fifth respondents, thus leaving the KM Trust out entirely. The correspondence between the parties in this regard has assumed some importance in the applicants' argument and I shall accordingly set out the material portions thereof. Initially attorneys Greyvensteins Nortier acting on behalf of the KB Trust had some difficulty with this proposal and addressed a letter to attorney Martindale on 23 April 2007 which records as follows:

“We further confirm that we have been advised that it has been suggested that transfer takes place directly from Kini Bay Trust to S & T Canter, however we confirm that we are required to follow the procedure of registration in terms of the court’s decision in the matter of the validity of the existing Deed of Donation between Kini Bay Trust and Kamma Mews Trust.”

[26] Seventh respondent, a trustee in the KB Trust, responded on the same day. He recorded as follows:

“The court’s decision in which it held that the Deed of Donation is valid, is with respect, irrelevant. The Deed of Donation can always be changed. It is simply a matter of changing the donee to S & T Canter. It makes no difference to the donor who the transferee is. He can simply sign the new Deed of Donation with a different donee.”

[27] Upon consideration Greyvensteins Nortier responded as follows on 24 April 2007:

“We confirm that Mr & Mrs Canter are not prepared to pay for the transfer fees associated with the registration costs for Erf 125 (Portion 105) Kini Bay. If both parties are willing to enter into a new Deed of Donation then we will be in a position to amend our transfer documents.”

[28] Seventh respondent responded on 30 April in which he states, *inter alia*, as follows:

“Mr & Mrs Canter are prepared to pay the transfer fees. What they are not prepared to pay is the transfer duty. There should be no transfer duty payable.

I propose that a new Deed of Donation be entered into directly between the Kini Bay Trust and Mr & Mrs Canter.

In the normal course, there would be transfer duty payable from the Kini Bay Trust to the Kamma Mews Trust, but there would be no transfer duty payable from the Kamma Mews Trust to Mr & Mrs Canter. In other words, although two registrations were anticipated to (be) registered the donated portion into the Canter's names, the South African Revenue Services would only get one amount of transfer duty on the value of the donated portion on the first transfer.

In effect transfer duty has already been paid on the donated portion when the Canter's took transfer of Erf 97. In this regard, I refer you to the Deed of Sale dated 30 September 2002 in which the Canter's bought Erf 97 including the donated portion (I refer you to paragraph 20 of the Deed of Sale) ...

It is suggested that you please explain the above to the South African Revenue Services and in particular that it does not prejudice the South African Revenue Services for the donation to go directly from Kini Bay Trust to the Canter's.”

[29] On this basis the second deed of donation was prepared. Although there is some debate on the papers as to how and when this deed of donation was signed it was common cause when the matter was argued that the second deed of donation was prepared and signed in 2007, shortly after the exchange of correspondence referred to above. It was, however, backdated

to 15 December 2004, being the date of the arbitrator's award. The second deed of donation records as follows:

"The Donor hereby donates to the Donee, the property situate at

also known as ERF 125 (A PORTION OF ERF 105) KINI BAY ("the Property") and the Donee hereby accepts this Donation."

[30] At this stage Erf 125 had been surveyed and the subdivision approved and registered. It is, as a matter of interpretation, the new subdivided Erf 125, having the amended boundaries as set out above, which forms the subject of the second deed of donation.

[31] Pursuant to the second deed of donation the KB Trust, represented by the second respondent, completed a power of attorney in favour of its attorneys, attorneys Greyvensteins Nortier, to pass the transfer of Erf 125 in favour of the fourth and fifth respondents. The KB Trust states that the power of attorney consists of a bundle of documents which are annexed to the first applicant's founding affidavit. Included in the bundle which constitutes the power of attorney is the diagram approved by the Surveyor General which records expressly the dimensions of the erf and the length of each boundary.

[32] Transfer of Erf 125 was duly effected into the name of the fourth and fifth respondents by attorneys Greyvensteins Nortier pursuant to the power of attorney and Erf 125 and Erf 97 were consolidated into the newly formed Erf

126. Erf 126 was then transferred into the name of the first respondent pursuant to the agreement of sale referred to above. At approximately the same time the remainder of Erf 105 was transferred to the first applicant during or about July/August 2007.

[33] In September 2007 the first applicant first became aware that the boundaries of the original donated area had been changed as set out above and that the subdivided Erf 125 was in fact larger than she had been led to believe that it would be. She instructed her present attorneys, Boqwana Loon & Connellan, to investigate the matter. Correspondence again passed between her attorney and attorney Martindale. On 8 May 2008 Martindale recorded as follows:

“Further to our telephone discussion yesterday regarding the transfer of the donated portion directly to Canter, and your letter dated 8 May, I enclose herewith copies of the following:

- (a) Letter from Greyvensteins dated the 23rd April 2007;
- (b) My response dated 23rd April 2007;
- (c) Greyvensteins’s response dated the 24th April;
- (d) My response to Greyvensteins dated the 30th April.

Canter was never my client. My client is Dr Kotze. Greyvensteins dealt directly with Canter, and Halgreen.

In regard to your question about whether the original Deed of Donation was required to be cancelled, I would submit that the exchange of correspondence between myself, and Greyvensteins who represented the donor, amounts to a cancellation.

The arbitrator made no comment about who the donated portion may be transferred to. He ordered only that Halgreen transfer the remainder (excluding the donated portion) into the Plaintiff’s name.

To the extent that Halgreen may not have transferred the full extent of the remainder into the Plaintiff's name, due to the boundary of the donated portion being changed, Halgreen is accountable for the error. The Kamma Mews Trust had nothing to do with the transfer of the remainder."

[34] The seventh respondent does not, in his affidavit filed, allude at all to the question of the cancellation or otherwise of the original deed of donation. The second applicant, who acted on behalf of the KB Trust, admits that he signed the second deed of donation, however, in his supporting affidavit he has no recall of where, when or how he came to append his signature thereto. This notwithstanding, he makes the bald statement that prior to signature of the second deed of donation the KM Trust and the KB Trust "cancelled" the first deed of donation. He does, however, confirm the averments of first applicant in this regard. First applicant, who was not a party to any of these events, relies exclusively on the correspondence set out above and the conclusion of seventh respondent in his last letter of 8 May 2009. In the letter referred to above he "submits" that the correspondence "amounts to" a cancellation. In argument Mr **Scott**, who appears for the applicant, relies only on the series of correspondence between attorneys Greyvensteins Nortier and Martindale Attorneys for the contention that the donation was cancelled. The second applicant is, however, adamant that no one at any time told him that the diagram annexed to the first deed of donation dated 19 July 2001 had been changed. He contends that he did not intend to donate or to transfer Erf 105 with the enlarged boundaries and accordingly the applicants contend that

the second deed of donation is void and the transfers and subdivision fall to be set aside.

[35] The Declaratory Orders.

The applicants seek a declaratory order that the first deed of donation dated 19 July 2009 was cancelled and that the second deed of donation is void. A contract can always be cancelled by mutual agreement. The mutual agreement to cancel the contract is a contract whereby another contract is terminated. See *Van Streepen and Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 588 (I); and *Atteridgeville Town Council And Another v Livanos t/a Livanos Brothers Electrical* 1992 (1) SA 296 at 304H. The ordinary rules relating to contracts apply equally to such an agreement. In the circumstances the onus to establish such a cancellation rests on the party seeking to rely on the cancellation.

[36] In the present matter the question to be determined is accordingly whether the exchange of letters set out above can be said to constitute an agreement to cancel the first deed of donation so as to terminate both the rights and obligations on both sides. In contrast to a cancellation of an agreement, however, where a creditor of an obligation does not intend to renounce the debt due to him unless a new debt is substituted in the place of the old one, a novation of the agreement occurs. A voluntary novation has its

origin in contract and it is accordingly essentially a question of whether the parties had the intention to replace a valid contract with another valid contract. See ***Swadif (Pty) Limited v Dyke NO*** 1978 (1) SA 928 (A) at 940G; and ***Weltsmans Custom Office Furniture (Pty) Ltd v Whistlers CC*** [1997] 3 All SA 467 (C) at 472c-e.

[37] Novation has two elements, namely the creation of a new debt and the extinction of an old debt, but the two elements are inextricably linked since in the absence of the creation of a new debt the old debt is not extinguished and in the absence of the extinction of the old debt a new debt is not created. (See Joubert: ***General Principles of the Law of Contract*** p. 297; Wessels: ***Law of Contract in South Africa*** (2nd ed) vol 2 para 2383.) There can accordingly only be a novation if there is a valid existing debt. In the present instance this matter has been resolved by arbitration and there is no doubt that the first deed of donation was valid. Where the second agreement creates an obligation inconsistent with the existing obligation it would ordinarily lead to the conclusion that the parties intended to novate the older, but this is not essential as an intention to novate may also appear from other *indicia*.

[38] The law recognises two kinds of novation, namely specific novation and novation by delegation. Where the new contract is between the original parties the category is specific; where there is a third person in the new

contract the category is novation by delegation. (See *Kerr: The Principles of the Law of Contract* (5th ed) p. 483 and the authorities referred to therein; and *Joubert (supra)* 298-299.) Unlike cancellation by agreement if the new contract is void, then, as set out above, novation does not take place and the old contract remains in being and in force.

[39] I have stated above that novation has its origin in contract and accordingly it is essentially a question of whether all the parties had a intention to replace one contract with another. The common intention of the parties may be express or it may be implied from the conduct of the parties or from correspondence between them (in respect of the latter see ***Sage and Co. v Lezard Bros*** (1891) 6 HCG 139 at 144; ***Sindall v Haddad and Co.*** 1920 (OPD) 262, 265 and 267-268).

[40] Reverting to the facts of the present matter the correspondence which passed between attorneys Greyvensteins Nortier, on behalf of the KB Trust and Martindale Attorneys on behalf of the KM Trust between 23 April 2007 and 30 April 2007, does not, in my view, exhibit any intention to terminate the rights which had been acquired under the first deed of donation. On the contrary the fourth respondent states that he was at all times advised by Greyvensteins Nortier Attorneys and by Martindale Attorneys that the second deed of donation was to be signed purely to simplify and give expeditious effect to the transfer of the subdivided erf directly to the fourth respondent and

his wife instead of going the long route via the KM Trust. The KM Trust was the beneficiary under the first deed of donation. It had sold on its rights under the first deed of donation to the fourth and fifth respondents. What the correspondence reveals is the firm intention by both the KM Trust and the KB Trust to enforce the rights which the KM Trust had acquired under the first deed of donation and to facilitate the onward transfer of the subdivided portion of Erf 105, which had been subdivided pursuant to the first deed of donation, to the fourth and fifth respondents. What it sought to achieve was to substitute the fourth and fifth respondents for the KM Trust as donee. I do not think that it can conceivably be inferred that the KM Trust intended to abandon its rights obtained under the first deed of donation in the event of the second deed of donation being void. Such a course would have opened the KM Trust up for a damages claim by fourth and fifth respondents. The very purpose of the second deed of donation was to facilitate the transfer of the rights obtained by the KM Trust, which all parties wanted to enforce, to the fourth and fifth respondents pursuant to the sale by the KM Trust of those rights.

[41] In the light of the correspondence I consider that all parties had the intention that the fourth and fifth respondents would substitute the KM Trust as donee and that the second deed of donation would substitute the first as the instrument containing the obligation. It is for that purpose that the second deed of donation was signed.

[42] It is argued on behalf of the applicants that a “delegated” novation can only exist where a third party is introduced as debtor and not where the new party enters as creditor. It is true that the substitution of creditors is frequently effected by cession, however, there is no reason in principle why it cannot be achieved by a delegated novation (see *Joubert: supra* p. 299; *Van der Merwe et al: **Contract General Principles*** (3rd ed) p. 531 footnote 132; *Wessels: supra* para 2443).

[43] It is further argued that in order for there to be a delegated novation it is essential that the new obligation must be identical to the old. No authority is referred to for this submission. I do not consider this to be correct. On the contrary, as set out above, where the second agreement creates an obligation inconsistent with the original agreement it would ordinarily lead to the conclusion that the parties intended to novate. (See *Joubert: supra* p. 299; and *Van der Merwe et al: supra* p. 531.)

[44] In these circumstances the conclusion reached by the seventh respondent, *ex post facto*, that the correspondence “amounts to a cancellation” is, in my view, incorrect. I hold accordingly that the first deed of donation was not cancelled and was novated by the second deed of donation. The second deed of donation substituted the first deed of donation as the instrument containing the obligation to pass transfer of the subdivided portion.

By the signature of the second deed of donation fourth and fifth respondents accepted the KB Trust as its debtor in lieu of the KM Trust to pass transfer to it of the subdivided erf and the KB Trust accepted the obligation to fourth and fifth respondent. All this occurred with the agreement of the KM Trust. In the event of the second deed of donation being void *ab initio* then the first deed of donation survives.

[45] It is accordingly necessary to consider the validity of the second deed of donation. The second applicant, as a trustee of the KB Trust, is adamant, as set out above, that he was unaware of the change in the boundary line of the donated property which occurred as a result of the meeting which was held between the fourth respondent, seventh respondent and the said Kotze on behalf of the sixth respondent. He states that it was at all times his intention to donate and to transfer to the fourth respondent the original donated portion of Erf 105, that is the portion of land depicted on the diagram which is annexure A to the first deed of donation dated 19 July 2001. He declares that he never intended to donate or transfer to the fourth respondent that portion of land which is depicted on the diagram approved by the Surveyor General. He accordingly contends that there was no consensus between the parties and that the second deed of donation is void.

[46] It is of course impossible to determine the subjective state of mind of any party save by external manifestations. Blackburn J stated as follows in ***Smith v Hughes*** (1871) LR 6 QB 597 at 607:

“If, whatever man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other parties terms.”

This dictum has frequently been adopted and approved in South African courts. In assessing the second applicant’s allegation of ignorance it is necessary to consider the process of subdivision of Erf 105. Pursuant to the first deed of donation Erf 105 was subdivided in accordance with the provisions of the Cape Land Use Planning Ordinance 15 of 1985 (LUPO). The process is set out in section 24-27 of LUPO.

[47] Section 24(1) provides that “an owner of land may apply in writing for the granting of a subdivision under section 25 to the town clerk or secretary concerned as the case may be.” The remainder of section 24 sets out the process to be followed by the relevant authority.

[48] Section 25 empowers the administrator, or a council if empowered thereto, to grant or refuse an application for subdivision of land. Once an application for subdivision has been approved in terms of section 25 section

26 provides that “the owner of the land concerned” has to submit a general plan or diagram, as indicated by the Surveyor General concerned, to the Surveyor General for his approval.

[49] Section 27(1) then provides as follows:

“(1) If a Surveyor General has approved a general plan or diagram as contemplated by section 26, the owner concerned shall, ... furnish the Registrar of Deeds concerned with such documents and information as he may require ... and obtain the registration of at least one land unit.”

[50] It is apparent from the procedure that only the owner of land can apply for a subdivision. Once the application for a subdivision is finally approved, as envisaged in section 25 of the Ordinance, the owner of land is required to submit a diagram in the form required by the Surveyor General to the Surveyor General for his approval. Only after receipt of the approval by the Surveyor General of the diagram submitted may the owner of land in question apply to the Registrar of Deeds for confirmation of the subdivision. It is only the owner of land who is empowered to make such an application.

[51] In the present case there is no dispute that the KB Trust was the owner of Erf 105. The obligation flowing from the first deed of donation to obtain the subdivision of the erf and to pass transfer thereof was accordingly an obligation imposed upon the KB Trust. It is true that landowners would frequently, indeed usually, employ professionals to perform these functions on

their behalf. In the present instance it is common cause that the KM Trust, being the beneficiary of the deed of donation, appointed the sixth respondent to prepare the application for subdivision. The seventh respondent contends that he acted on behalf of the KM Trust. The papers do not explain on what basis the KM Trust obtained the mandate to act on behalf of the KB Trust. It is, nevertheless, clear that the KB Trust left the process of subdivision in the hands of the KM Trust. The actions of the KM Trust in this regard are actions on behalf of the owner of the land.

[52] The sixth respondent duly prepared a diagram in accordance with the first deed of donation which was, for purposes of an application in terms of section 24 of LUPO to be submitted to the Nelson Mandela Metropolitan Municipality for approval. During March 2006 the Nelson Mandela Metropolitan Municipality approved the subdivision in terms of section 25 of LUPO. LUPO then imposes an obligation upon the KB Trust as owner to submit a diagram to the Surveyor General for approval.

[53] It is at this stage of the process that the much debated meeting occurred between Kotze, the fourth respondent and the seventh respondent. It was as a result of this meeting that the diagram was amended and that the boundary line in respect of the donated property was extended by 2,5 metres at one side of the property. There is much debate on the papers as to who instructed Kotze to effect the amended boundary line. The facts giving rise to

the variation are however not seriously in dispute. Clearly the KB Trust had left the entire subdivision in the hands of the KM Trust. The seventh respondent, as trustee of the KM Trust appointed the sixth respondent to perform various functions in respect of the subdivision on behalf of the KB Trust, who were obliged to obtain the subdivision as set out in LUPO. In that sense the sixth respondent took its instructions from seventh respondent.

[54] The meeting, however, was called by the fourth respondent, who realised that the original diagram submitted to the Nelson Mandela Metropolitan Municipality for approval of the subdivision did not depict the area which he believed that the fourth and fifth respondents had purchased from the KM Trust. He accordingly called the meeting with Kotze, the land surveyor appointed for purposes of the subdivision and seventh respondent. It is apparent that the fourth respondent intended the meeting to address the deficiencies in the initial diagram as measured against his perception of his contractual rights as against the KM Trust. The meeting was set up with the seventh respondent, representing the KM Trust, they being the seller who had sold the property to the fourth respondent. At this meeting the discussion occurred in respect of extending the boundary. Kotze postulated the permissible deviations and the fourth respondent, although it is not expressly stated in the papers, clearly requested that the boundary be extended in the manner in which it was eventually done. The sixth respondent is of course

the land surveyor performing the functions which LUPO requires the KB Trust to perform

[55] The applicants contend that the fourth respondent and Kotze acted fraudulently, deceitfully and unlawfully in so amending the diagram. Kotze, for his part, contends that he was under the *bona fide* impression that the seventh respondent represented the interests of the donor. The seventh respondent had appointed the sixth respondent. The appointment was made in order to perform those functions which LUPO imposes upon the owner of the property. In these circumstances it appears to me that Kotze's assumption that the seventh respondent represented the interests of the donor was not only reasonable but it is indeed the only logical conclusion which he could have drawn from the facts.

[56] The fourth respondent, for his part, approached the seventh respondent, who was a trustee of the seller of the property to him and who, on his own admission was representing the KM Trust. He was firmly of the view that he had purchased the entire grassed area in front of the dwelling situated on Erf 97 and was of the view that the diagram in existence did not depict that which he had purchased. He wished to obtain delivery of that which he had purchased.

[57] It may be that the KM Trust had sold to the fourth and fifth respondents more than that which they were entitled to sell. A person may of course validly and legally contract to sell a thing which does not belong to him and thereby undertake the duty to transfer ownership to the buyer. It is however, only the owner of the thing who can actually transfer the right of ownership in it. The seller of a thing which does not belong to him must first acquire it for himself and then transfer it, or induce the owner to transfer the real right of ownership direct to the buyer. (See *Silverberg & Schoeman's: **The Law of Property*** (5th ed) p. 73.) This, it seems to me, is what fourth respondent sought to achieve.

[58] The fourth respondent has no contract with any of the applicants. He is obliged to look to the KM Trust and to demand of the KM Trust that they ensure that that which he purchased would be transferred to him. I think that if any duty was owed to the KB Trust in respect of this extension it was a duty owed by the KM Trust not by the fourth respondent. In the circumstances I do not consider that either Kotze or the fourth respondent can be said to have acted fraudulently or unlawfully. On the evidence I consider that each of them acted *bona fide* in accordance with their understanding of the factual position.

[59] In any event, subsequent to the meeting referred to the seventh respondent advised that it would be prudent for the applicants' attorneys,

Messrs Greyvensteins Nortier, to deal further with the application for subdivision. This duly occurred and the seventh respondent states that the revised sketch plan prepared by Kotze pursuant to the request by the fourth respondent was obtained by Greyvensteins Nortier directly from Kotze. It follows that immediately after preparation of the revised plan by Kotze it was provided to the KB Trust by delivery to their attorneys. The revised plan sets out clearly the revision which is apparent from the shape of the diagram, the surface area of the donated portion and the measurements of the boundaries thereof as expressly set out on the revised diagram. The KB Trust, acting through their attorneys, submitted this diagram for approval as required by LUPO. It therefore appears to me that whatever Kotze may have believed at the time of the meeting referred to above, his subsequent conduct was not clandestine. When he prepared the revised drawing he delivered it to the KB Trust for all to see by providing same to the KB Trust attorneys.

[60] The applicants' papers do not expressly deal with the manner in which the registration of the subdivision was obtained, however seventh respondent states that the subdivision "was attended to by the Second and Third Applicants' attorneys Greyvensteins". This accords with the obligations imposed upon the owner of the property in terms of section 27 of LUPO. Approval of the revised diagram and the ensuing subdivision was accordingly procured by the KB Trust. I consider that both Kotze and fourth respondent were entitled to assume that the KB Trust acquiesced in the amended

diagram. That, I think, is the necessary inference which flows from the facts. The second applicant's subjective ignorance cannot in these circumstances assist him. The KB Trust, through their attorneys had been provided with the revised diagram immediately after the amendments were made. They procured the subdivision on this basis.

[61] The papers do not disclose who the author of the second deed of donation was. Attorneys Greyvensteins Nortier acted throughout on behalf of the KB Trust, although they did also act on behalf of the fourth and fifth respondent for purposes of the consolidation of Erf 97 and Erf 125 and for the transfer of the consolidated erf to the first respondent. It is apparent that the second deed of donation was signed at the offices of attorneys Greyvensteins Nortier during or about May 2007 and backdated to 15 December 2004. At the time of signature of the second deed of donation the donated property was not described with reference to any annexure but rather the KB Trust donated Erf 125, the newly created subdivided erf. It is the erf which the KB Trust had itself subdivided and registered through the medium of their attorneys, Greyvensteins Nortier.

[62] I think that the only reasonable inference to be drawn from the facts is that the KB Trust intended to donate Erf 125 as registered in accordance with the diagram approved by the Surveyor General on the application of the KB Trust. This is what the KB Trust represented to the fourth and fifth

respondents by its signature to the second deed of donation and this is what fourth and fifth respondent intended to accept. In the circumstances the second deed of donation is valid.

[63] In any event, even if I err in the conclusion to which I have come I do not consider that the contractual validity of either of the deeds of donation is material to the remainder of the relief sought by the applicants for the reasons which follow.

[64] Transfer of Ownership.

Transfer of a real right is in Roman-Dutch law regarded as a separate transaction from the underlying cause for the transfer. The conclusion of the underlying contract, whether it be a contract of sale or donation gives rise to personal rights and duties and an additional transaction is required in order to effect transfer of the real right from one party to another. A valid underlying contract is not required for a valid transfer of ownership.

[65] These principles arise from the fact that our law subscribes to the abstract theory of transfer of ownership as opposed to the causal theory. According to this theory the validity of the underlying cause is not an essential for the validity of transfer of ownership. What is required to pass transfer of ownership in terms of the abstract theory is firstly delivery – which in the case of immovable property is effected by the registration of transfer in the Deeds

Office – coupled with the so-called real agreement or “saaklike ooreenkoms”.
 (See **Legator McKenna and Another v Shea and Others** 2010 (1) SA 35 (SCA) at 44G-H; and **Du Plessis v Propitius and Another** 2010 (1) SA 49 (SCA) at 51H-52B.)

[66] Although the abstract theory does not require a valid underlying contract ownership will not pass, notwithstanding the registration of transfer, if there is a defect in the real agreement. (See **Legator McKenna and Another v Shea and Others** (*supra*) at 44I-J.) The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and an intention on the transferee to become the owner of the property. (See **Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en ‘n Ander** 1980 (3) SA 917 (A) at 922E-F; **Trust Bank van Afrika Beperk v Western Bank Beperk** 1978 (4) SA 281 (A) and **Legator McKenna and Another v Shea and Others** (*supra*) at 44H-I.) The underlying agreement may be relevant and may be indicative of an intention to pass ownership, however, such an intention may be proved in various other ways. Thus Centlivres JA, in **Commissioner of Customs and Excise v Randalls Brothers and Hudson** 1941 (AD) 369 states at follows at p. 411:

“The legal transaction preceding the *traditio* may be evidence of an intention to pass and acquire ownership, but there may also be direct evidence of an intention to pass and acquire ownership and, if there is, there is no need to rely on a preceding legal transaction ... To put it more briefly it seems to me that the question of whether

ownership passed depends on the intention of the parties and such intention may be proved in various ways.”

[67] The principles applicable to contracts in general apply equally also to real agreements. In the circumstances the dictum of Blackburn J in ***Smith v Hughes*** which is set out above finds equal application in respect of the real agreement. (Compare *Silverberg and Schoeman’s Law of Property supra* at p. 79 para 5.2.2.5.)

[68] I have dealt above with the KB Trust’s knowledge of the dimensions of the subdivided erf which it had created and registered. The second deed of donation provides expressly for the donation of Erf 125. There was no confusion as to the subject matter of the donation. It was that erf which the KB Trust had subdivided from Erf 105. Subsequently to the conclusion of the second deed of donation the KB Trust provided a power of attorney to their attorneys, Greyvensteins Nortier, to pass transfer of Erf 125. The second applicant declares that the power of attorney consisted of a number of documents which are annexed as a bundle to the first applicants founding affidavit. The first document contained in the authority given to attorneys Greyvensteins Nortier confirms the second applicant’s authority to represent the KB Trust. It proceeds to clothe one John West Hendricks and/or Christo Philip Notnagel with power of substitution to be the lawful attorney and agent in the name of the Trust to pass transfer to the fourth and fifth respondents of the property described as-

“Erf 125 (portion of Erf 105) KINI BAY
 In the Nelson Mandela Metropolitan Municipality
 Division of Port Elizabeth, Province of the Eastern Cape
 IN EXTENT: 315 (THREE HUNDRED AND FIFTEEN) square
 meters
 HELD by Deed of Transfer no. T42805/1996”.

I pause to mention that the area of 315 square metres represents the area depicted on the revised diagram and is at variance with the area depicted on the original diagram attached to the first deed of donation.

[69] Further included in the bundle which constitutes the power of attorney is the revised sketch plan which depicts the donated area in the shape of a trapezium as opposed to the parallelogram contained in the first deed of donation and in the original diagram submitted to the Nelson Mandela Metropolitan Municipality. It sets out expressly the exact length of each of the boundaries of the property which the attorneys are mandated to transfer.

[70] The power of attorney was signed on 11 May 2007, at approximately the same time as the second deed of donation. The KB Trust had the benefit of legal assistance at the time of the conclusion of these documents. I am of the view that the facts are strongly indicative of an actual intention on the part of the KB Trust to pass transfer of Erf 125, as it had been registered, to the fourth and fifth respondents. Not only was the KB Trust, through the medium of their attorneys, in possession of the actual revised diagram at the time

when the second deed of donation and the power of attorney were executed but the actual revised diagram formed part of the power of attorney. The KB Trust were assisted by their attorneys in the process of subdivision which I have discussed above, in the registration of the subdivision, in the execution of the second deed of donation and in the execution of a power of attorney to pass transfer. I consider that the only and necessary inference which may be drawn from these facts is that the KB Trust intended to, and represented to the fourth and fifth respondents that it intended to, give transfer of Erf 125 as depicted on the revised diagram which formed part of its power of attorney given to its attorneys to pass transfer. The KB Trust's subjective ignorance does not assist and I consider that the real agreement is valid. Ownership of Erf 125 accordingly passed to the fourth and fifth respondents upon registration.

[71] Relief against first respondent.

It follows from the conclusion which I have reached above that fourth and fifth respondents, as new owners of Erf 125 and of the consolidated Erf 126 had the capacity to legitimately pass ownership to first respondent. Her title is accordingly unassailable.

[72] In any event, as set out above, the KB Trust took no steps to satisfy themselves as to the dimensions of the revised diagram which they themselves requested the Surveyor General to approve, albeit through the

medium of their attorneys. They took no steps to satisfy themselves as to the dimensions of the subdivided erf which they themselves, albeit through their attorneys, requested the Registrar of Deeds to register. They took no steps to determine the extent of Erf 125 when they signed a deed of donation in favour of the fourth and fifth respondents. They did not attempt to satisfy themselves as to the dimensions of the property which they authorised their attorneys to transfer to the fourth and fifth respondents. In these circumstances the first respondent, a *bona fide*, third party came to purchase the property and took transfer of the property into her name.

[73] Even if I err in concluding, as I have done, that the KB Trust were not misled into believing that Erf 125 equated to the original donated property I do not consider that they may attack the legitimate title of the first respondent in circumstances where the KB Trust had every opportunity, and indeed obligation, to obtain the true facts prior to passing transfer and where they have simply neglected to take any reasonable steps to satisfy themselves as to the truth. In these circumstances ownership in Erf 126 passed to the first respondent (Compare ***Standard Bank v Du Plooy*** (1899) 16 SC 161 at 169; and *Christie: The Law of Contract in South Africa* (5th ed) p. 3231).

[74] In all the circumstances the application is dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT