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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 619/2015

In the matter between:

**THE MINISTER OF HUMAN SETTLEMENTS,
WESTERN CAPE GOVERNMENT**

Applicant

and

KOLISWA ROSE BAMBA

First Respondent

NOMONDE PATIENCE LUWACA

Second Respondent

MATIWANA TOM

Third Respondent

SILUMKO MAQOQA

Fourth Respondent

NONTSOMI MAQOQA

Fifth Respondent

ESTATE NTOMBOTHINI SAZINGE

Sixth Respondent

MZAWNDILE MICHAEL KONISANI

Seventh Respondent

SINDISWA LYNETTE KONISANI	Eighth Respondent
ESTATE WANI MTHETHI	Ninth Respondent
ESTATE NOMAHOMBA MTHETHI	Tenth Respondent
PRIMROSE HOMVUME TYALI	Eleventh Respondent
NONTUTHUZELO MAVIS MANQUPHU	Twelfth Respondent
SIZWE JONGILE	Thirteenth Respondent
SINDISWA MARGARET JONGILE	Fourteenth Respondent
LAMLA WELCOME NTETA	Fifteenth Respondent
ESTATE NOMATHAMSANQA JANET NTETA	Sixteenth Respondent
NOMANDLOKWENYANI MATUSELA	Seventeenth Respondent
ESTATE JELIAT GERMS GQOZONGWANE	Eighteenth Respondent
ESTATE NOBAYEZA VONOLIA GQOZONGWANE	Nineteenth Respondent
NIKIWE MARIE MANYEFANE	Twentieth Respondent
ESTATE DRUMMOND ZOLA MANYEFANE	Twenty First Respondent
ESTATE NOKAYA MAHLOMBE	Twenty Second Respondent
ZILANDILE MXATULE	Twenty Third Respondent
NTOMBOXOLO MIRRIAM MXATULE	Twenty Fourth Respondent
BONGANI ZILWA	Twenty Fifth Respondent
THELMA NOMSANGAPHI ZILWA	Twenty Six Respondent
FEZIWE FELICIA MPANDE	Twenty Seventh Respondent
KHAYALETHU MARWAYI	Twenty Eighth Respondent
ZWELITSHA NONTSWABU	Twenty Ninth Respondent
NOMNANDIPHI NONTSWABU	Thirtieth Respondent
RICHARD WINGET TSHULISI	Thirty First Respondent
NONTOMBIZITENI MAVIS TSHULISI	Thirty Second Respondent

NOWEKENI TOZI NELANI	Thirty Third Respondent
JOSEPH NGQABA	Thirty Fourth Respondent
NOMTETO ADELAIDE NGQABA	Thirty Fifth Respondent
NOBEJILE NOTETANGAYE GONGOTA	Thirty Sixth Respondent
ESTATE FORTY KIBI	Thirty Seventh Respondent
ESTATE NOFINISH KIBI	Thirty Eighth Respondent
NOMATHEMBA ESTHER MATIWANE	Thirty Ninth Respondent
ESTATE ZINAKILE JOSEPH MATIWANE	Fortieth Respondent
NOCOUNTER MAVIS MKRWEQANA	Forty First Respondent
ESTATE XHAKALEGUSHA MKRWEQANA	Forty Second Respondent
LINCOLIN THOBILE GQOLA	Forty Third Respondent
CITY OF CAPE TOWN	Forty Fourth Respondent
REGISTRAR OF DEEDS, CAPE TOWN	Forty Fifth Respondent
SURVEYOR GENERAL, CAPE TOWN	Forty Sixth Respondent
STANDARD BANK OF SOUTH AFRICA	Forty Seventh Respondent

JUDGMENT DELIVERED ON 29 OCTOBER 2015

RILEY, AJ

[1] This is an application to enable two groups of property owners and the Western Cape Government ('the WCG') to obtain the correct title deeds to their respective properties situated at Philippi in the Municipality of Cape Town.

[2] The affected properties are subdivisions of erf [3.....] Philippi and are depicted in the general plan, number 1671/1993, as part of the Philippi allotment area in the Municipality of Cape Town. A copy of sheets 1, 3, and 4 of the general plan, an image map and an orientation map are attached to the applicant's founding affidavit with the affected property marked on the image and orientation maps (Annexure "E 1").

[3] Towards the end of the 1980s the acquisition of undeveloped and unoccupied property in the Philippi allotment area of greater Cape Town was part of a provincial programme aimed at relieving the housing backlog, especially for occupants of informal settlements in the Crossroads area. During the period 1991 and 2005 this area became part of a provincial project aimed at providing an integrated approach to the development of communities. The project was known as the integrated Serviced Land Projects ('iSLP').

[4] It is common cause that an error occurred, the exact manner in which it came about being unknown, which resulted in the incorrect numbering of the affected erven on the ground in relation to the erf numbers reflected on the general plan. As a result of the error, the registration of transfers at the Deeds office was done according to the incorrect erf numbers. After the transfers were registered, the owners of the affected properties were left with incorrect deeds for their own properties.

[5] With respect to the first group of properties comprising erven with numbers 3747 to 3768 the person or family originally identified as occupants of the service sites ("beneficiaries") hold the title deed to their neighbour's property in a numerical sequence

one less than the number of their own property, example the beneficiary of erf [3.....] incorrectly holds the title deed of erf [3.....] and so on. The beneficiary earmarked for ownership of erf [3.....] does not have any title to this property. The WCG holds incorrect title to two erven in this group of affected properties, namely, erf [3.....] and erf [3.....]. The title to erf [3.....] should have been over erf [3....]. Erf [3....] is occupied by the lawful beneficiaries of this erf who jointly and incorrectly holds title to erf [3.....]. The WCG hold title to erf [3.....] instead of erf [3.....].

[6] There are two bonds held by Standard Bank ('the forty seventh respondent'), incorrectly registered and secured over an erf in this group of properties, namely erf [3.....]. The title deed is incorrectly endorsed as well. The forty seventh respondent made loans to the beneficiary who occupies erf [3.....] but holds title to erf [3.....].

[7] With regard to the first group of affected properties, the outcome that the applicant seeks to achieve would be to:

- 7.1 place the beneficiaries with the correct title to the erven they occupy;
- 7.2 provide the WCG with the title to erven [3.....] and [3.....], to enable the applicant to pass title to beneficiaries assigned to these properties; and to
- 7.2 provide a solution to the lender and the borrower in the case of the bonds incorrectly registered and endorsed over erf [3.....].

[8] In the second group of properties comprising erven with numbers [3....] to [3.....] the beneficiaries of each of the properties involved hold the title deeds to their

neighbours' properties in a numerical sequence one greater than the actual number of their own properties, for example, the beneficiary of erf [3.....] holds the title deed to erf 3644. The WCG holds incorrect title to one erf in this group of affected properties, namely erf [3.....] instead of erf [3.....]. Erf [3.....] has been assigned to a beneficiary, the latter being unable to obtain title to the property.

[9] In this group of affected properties, two of the original beneficiaries assigned joint ownership of one residential property occupy a portion of erf [3.....] which is zoned as a public open space. They incorrectly hold the title deed of the neighbouring erf, namely, erf [3.....]. As appears later herein, the resolution of this particular error is subject to other legal processes and shall be pursued independently of the orders sought in this application.

[10] The outcome of this application with regard to the second group of affected properties would be to:

- 10.1 Provide the affected beneficiaries with the correct title deeds to their properties, and to
- 10.2 Provide the WCG with the title to erf 3649 and thus enable the applicant to pass title to the beneficiary assigned to this property.

[11] In the main the applicant seeks orders for either a renumbering of the affected erven on the general plan 1671/1993 or a rectification of transfers to create a situation where the affected parties are placed with the correct title deeds to their properties.

[12] The application is unopposed. At the outset I must express my gratitude to Mr Bhoopchand, counsel for the applicant, for his detailed heads of argument, his submissions and his efforts in assisting the court in arriving at the conclusion it ultimately reached considering the peculiar circumstances of this matter. It is further necessary to mention that the nature of the final orders sought was dependent on the reports and recommendations of the Registrar of Deeds (i.e. the forty fifth respondent) and the Surveyor General (i.e. the forty sixth respondent). This court is indebted to them for the reports that they submitted and for their positive and constructive engagement with the applicant, the State Attorney and counsel for applicant, in finding a solution to the problem that the applicant and the respondents are confronted with.

[13] The background facts are essentially common cause, are not in dispute and are set out in the founding affidavit of Lionel Cornelius Pieter Esterhuizen ('Esterhuizen') and the heads of argument of Mr Bhoopchand. For the sake of convenience I have taken the liberty of referring extensively to it.

BACKGROUND TO THIS APPLICATION

[14] The background to this application is that Erf [3.....], Philippi, in the Philippi Allotment area, Municipality of Cape Town, Western Cape Province, was approved for subdivision in terms of Section 19(1) of the Less Formal Township Establishment Act No. 113 of 1991, by the Department of Community Services, Western Cape, on the 7th October 1992. The parent erf was surveyed in February 1993 and subdivided into 518 erven and 8 public spaces. The erven were numbered consecutively from erf number

[3.....] to erf number [4.....]. General Plan number 1671/1993 of the subdivisions of erf [3.....] Philippi, as reflected in annexure “E1”, and the diagram was approved by the Surveyor General in terms of the Land Survey Act, Act No 8 of 1997, on 30 April 1993. The parent erf as subdivided was incorporated into the Western Cape integrated Serviced Land Project and the erven were made available to beneficiaries.

[15] The beneficiaries were allocated serviced land and were assisted by building contractors to build their homes. The national housing subsidy was accessed on behalf of the beneficiaries to finance their acquisition of land and the building of houses. The overall management of the land and housing project was outsourced by the WCG to a professional resource team BKS (Pty) Ltd (“BKS”), who in turn sub-contracted various tasks to other entities. The registration of transfers from the WCG to the beneficiaries was entrusted to Gibb Africa who in turn employed conveyancing attorneys Heunis and Heunis to do the conveyancing. The WCG oversaw the project and administered the applications for subsidies.

[16] From the information contained in the copies of the title deeds which forms part of the application, the bulk of the affected erven were acquired by the beneficiaries in 1998 and registered in the year 2000. In and during 2012 an occupant of one of the erven in this area was unable to obtain transfer of the erf he occupied. He sought help from a non-governmental organisation, known only as Level Ground, to assist him to obtain transfer of the erf allocated to him. Upon investigation Level Ground discovered that a number of beneficiaries in the first group of properties comprising erven 3747 to 3768 were affected by an error that had occurred during the transfer process of land

from the WCG to the beneficiaries. The affected beneficiaries held the title deeds to their neighbour's property in a numerical sequence one less than the number of the erf they occupied. The occupant of the first erf in this sequence, i.e. erf [3.....], had no title deed at all. The beneficiary of erf number [3.....] held the title deed to erf [3.....] with the error being perpetuated sequentially. According to Level Ground the error occurred due to the incorrect numbering of the erven when erf numbers were painted onto the toilet structures built on these erven. They established that the numbers painted onto the toilet structures differed by one from that reflected on the general plan. The beneficiaries obtained the incorrect title deeds to their properties as it appears that the registration of transfers was done in accordance with the incorrect numbering of the toilet structures on the erven.

[17] Level Ground attempted to correct the problem with the co-operation and agreement of all affected parties by rectification of the transfers. Level Ground was however unsuccessful due to *inter alia* the following facts and circumstances:

1. The time period that had elapsed from the allocation and the registration of transfer of the properties to the discovery and reporting of the error;
2. They were unable to obtain the documentation required for rectification of transfers;
3. The various affected parties did not give their co-operation in the process.

[18] On 31 July 2012 Level Ground referred the matter to Alderman Ian Neilson of the forty-fourth respondent (The City of Cape Town) on 31st July 2012. The forty-fourth

respondent in turn referred the matter to Esterhuizen, a director with the applicant responsible for land and asset management. Esterhuizen caused an investigation to be conducted in the area to determine the extent of the problem. The investigation revealed that in addition to the first group of properties a second group of erven were also affected. The second group comprised erven numbers [3.....] to [3.....]. In this group of erven, the beneficiaries held the title deeds of their neighbours' erfs in a numerical sequence one greater than the erfs they occupied.

[19] It is common cause that BKS, Gibb Africa and Heunis and Heunis did not retain any of the documentation relating to their involvement in this project and the whereabouts of Level Ground are unknown. As the documentation relating to this project is no longer available, applicant found himself in a situation where he could shed no further light on how the errors occurred.

THE EXTENT OF THE ERRORS

[20] In the first group of affected properties comprising erven [3.....] to [3.....] the two erven situated at the ends immediately adjacent to this group, i.e. erf [3.....] and erf [3.....], are public open spaces. The title deeds to these erven are registered in the name of the WCG but ownership vests in the forty fourth respondent in terms of the provisions of the Less Formal Township Establishment Act. The beneficiary of erf [3.....] does not have a title deed.

[21] On the available evidence the title deed to erf [3.....] is endorsed with two bonds registered in the name of the forty seventh respondent. The twenty seventh respondent is the recipient of the two loans from the forty seventh respondent. The twenty seventh respondent occupies erf [3.....]. The incorrect title deed to erf [3.....] is held between the twenty seventh respondent and the forty seventh respondent. In effect the twenty seventh respondent has two loan agreements with the forty seventh respondent but the latter has no security for the loans that it has made to the former.

[22] The WCG holds the title deeds to erven [3.....] and [3....]. The WCG should in fact hold title to erven [3.....] and [3.....] respectively.

[23] In the second group of affected properties the extent of the problem is slightly more complex. [Erf 3.....] is zoned for public use as a public open space. The WCG holds title to this property although ownership vests in the forty fourth respondent in terms of the Less Formal Township Establishment Act.

[24] It further appears that the thirty first and the thirty second respondents who jointly and incorrectly hold the title deed to [erf 3....] occupy a portion of [erf 3.....], which is public open space. I pause to mention here that applicant does not seek orders in this application to place the thirty first and thirty second respondents in possession of the correct title deed to the property they occupy. What is clear, is that applicant seeks to find and provide a solution for the thirty first and thirty second respondents, whether it be in the form of the rezoning of the portion of the public open space or otherwise.

[25] [Erf 3.....] is a 25 square metre plot. It houses an overhead light mast. The title deed to this property is registered and held by the WCG.

[26] The beneficiary of [erf 3.....] does not have a title deed.

[27] The WCG holds title to [erf 3.....] in this group of affected erven instead of erf 3649. The applicant intends passing transfer of [erf 3.....] to the beneficiary assigned to this property once the orders in this application are realised.

PROBLEMS CAUSED BY THE ERRORS

[28] The applicant accepts that as long as the affected respondents do not hold the correct title deeds to their properties, they will experience difficulties in raising finances to improve their properties, selling their properties and passing on their properties to their heirs, on death. The affected respondents will not be able to access the national housing subsidy as the subsidies that they are entitled to have been accessed and registered in their names and used on their behalf to provide finance to the project to provide them with homes.

[29] The applicant is unable to transfer erven [3.....], [3.....] and [3.....] to the beneficiaries who have been allocated these erven.

THE APPLICANTS' ATTEMPTS TO SOLVE THE ERRORS

[30] In an attempt to remedy the errors, the applicant appointed Lukhozi, a professional resource team. Lukhozi attempted to rectify the incorrect transfers with the co-operation and the agreement of the beneficiaries affected by the errors. They invited the beneficiaries to two meetings. The first meeting was held on the 9th March 2013. This meeting was however poorly attended, with just five of the holders of incorrect title identifiable on the list of attendees. A second meeting which was held on the 14th March 2013 was better attended with at least twenty attendees identifiable from the attendance register as holders of incorrect title. The second meeting was addressed by Thobile Gqola, the ward councillor for the area. An arrangement was then made to collect the necessary documents to effect rectification of transfers from the affected title holders on the 16th March 2013. However, only seven of the incorrect title deeds were collected.

[31] Lukhosi then did house to house visits to explain the process and collect documents on the 21st March 2013 and again on the 26 March 2013. Their efforts were met with little further success. It became apparent to Lukhozi that they were unable to secure the co-operation of the affected respondents and that the rectification of transfers by agreement would not succeed. Lukhozi then returned the title deeds collected by them to their respective holders in June 2014 and informed the applicant accordingly. Since the applicants' attempt to rectify the registration of transfers with the co-operation of the beneficiaries who held incorrect title deeds to their properties was unsuccessful, Esterhuizen was then forced to pursue correction of the errors through other means.

THE OPTIONS

[32] In the present matter the applicant seeks orders for one of three options, or orders based on a combination of aspects of the three options, or alternative relief, in its quest to remedy the problems encountered by the applicant and the affected respondents. The options can be summarised as follows:

1. The first option is an innovative method of renumbering the erven on the general plan to correspond with the numbers on the title deeds. Thus for the benefit of the First Respondent (in the first group of affected properties) who occupies erf number [3.....] and holds a title deed with erf number [3.....], erf number [3....] on the general plan shall be changed to erf number [3.....]. Similarly for the benefit of the thirty-third respondent (in the second group of affected properties) who occupies erf number [3.....] and holds a title deed with erf number [3.....], erf number [3.....] on the general plan shall be changed to erf number [3.....]. In similar vein the numbering of each of the other affected erven shall proceed.
2. In the second option the applicant seeks a court ordered rectification of transfers which in essence requires the simultaneous co-operation of all affected owners. This will mean that the affected owners will have to surrender their incorrect title deeds and provide further documentation, including identification documents, and sign the transfer documents. It is envisaged that in the absence of co-operation the court is requested to order

that the Sheriff of the Court perform certain functions that would have been completed by the uncooperative respondents. In the foregoing circumstances the court is required to order the forty-fifth respondent to waive certain requirements, for e.g. the production of the incorrect title deeds. During argument, Mr Bhoopchand, for the applicant, did not pursue the orders sought under this option with any vigour given the failure of the attempts to obtain rectification transfers by agreement.

3. The third option is one put forward by the Registrar of Deeds. The option seeks orders in terms of section 6 of the Deeds Registries Act 47 of 1937. This method entails a cancellation of all of the affected title deeds, a reversion of ownership in the properties to the Applicant (as previous owner) and a simultaneous re-transfer of all of the properties to their correct owners.

[33] It appears that the applicant has considered other methods to remedy the problem but has rejected them due to their impracticality considering the circumstances that prevail in this matter. The other methods include an expropriation of all the affected properties and re-transfer to the beneficiary owners.

THE REPORTS OF THE FORTY-FIFTH AND FORTY-SIXTH RESPONDENTS

[34] It is common cause that the forty-fifth and forty-sixth respondents were requested to, and did, provide statutory reports in which they provided guidance and recommendations to this court on the issue to be decided.

[35] The forty-fifth respondent (The Registrar of Deeds, Cape Town) was established to deal with, amongst other functions, the registration and transfer of immovable property in the Western Cape region. The forty-fifth respondent was established by and acts in accordance with the provisions of the Deeds Registry Act 47 of 1937 (“the Deeds Registries Act”).

[36] The forty-fifth respondent was in particular requested to provide guidance and recommendations with regard to the rectification of transfers if it recommends this course of action in the following respects:

1. Whether the correction of title to the affected properties should be dealt with by renumbering of the general plan or by rectification of transfers;
2. How the two bonds registered over erf [3.....] should be dealt with;
3. The manner wherein the incorrect title deed to erf [3.....] held by the thirty-first and thirty-second respondents should be dealt with.

[37] The forty-sixth respondent (‘The Surveyor General, Cape Town’) was established in terms of the provisions of the Land Survey Act 8 of 1997 (“the Land Survey Act”) to deal with, amongst other functions, the survey of land, the approval of general plans for land surveyed and for effecting amendments to general plans.

[38] The forty-sixth respondent was requested to provide guidance and recommendations to this court relating to the renumbering of the erven on the general plan in the following respects:

1. The feasibility of renumbering the affected erven to place the affected parties with the correct title deeds to their properties;
2. The procedure involved in the renumbering of the affected erven and any difficulties that may arise in the renumbering process,
3. How erf [3.....] should be renumbered,
4. The consequent adjustments that shall be required to be effected to the general plan, other survey documents and the title deeds relating to the affected properties.

[39] In a report dated the 19th February 2015 the forty-sixth respondent states as follows:

- “1. *The Surveyor General, Cape Town is listed as the forty-sixth respondent in the above case no. 619/15 in the matter between The Minister of Human Settlements, Western Cape Government and Forty Seven Respondents.*
2. *Note is taken of paragraph 1 on pages 3 and 4 of the Notice of Motion, namely for the court to order the Surveyor-General Western Cape, to renumber Erven on general Plan no. 1671/1993 in the Philippi Allotment Area, Western Cape according to the table listed, except for the renumbered to [erf 3.....] instead of [erf 3.....] listed.*
3. *Note is taken of paragraph 2, page 4 of the Notice of Motion, namely for the court to order the Surveyor-General Western Cape to make adjustments and changes to the General Plan no. 1671/1993, Philippi*

Allotment Area and any other survey documents consequent upon the renumbering of the erven as mentioned.

4. *Note is taken that the Registrar of Deeds, Cape Town is to be ordered by the court to make any amendments to the title deeds of any erven consequent to the renumbering of the erven as mentioned on page 4, paragraph 3 in the Notice of Motion.'*

[40] In his report on renumbering of the erven on General Plan no. 1671/1993, Philippi Allotment Area he states as follows:

'1. Feasibility

The renumbering of the affected erven by court order in the Surveyor General's office may be more feasible than the alternative as outlined on page 5 in the Notice of Motion. For the alternative the full co-operation of all title holders must be obtained. The renumbering of the General Plan shall not require the co-operation of the affected respondents;

2. Procedure involved in the renumbering of the affected erven

The Surveyor General does not have the statutory power or discretion to renumber the affected erven on the General Plan except by an order of the court.

The provisions of sections 36 and 37 of the Land Survey Act allow in principle for the alteration, amendments to and correction of the numbering of erven on a general plan.

Following the court order a note will be added to sheet 1 of the General Plan listing the renumbered erven.

The erf numbers of the affected erven on sheets 3 and 4 of the General Plan to be deleted and to be amended in this office according to the court order.

Caution must be exercised when the erven are renumbered to provide for the discrepancies in the areas of the affected erven.

On sheet 1 of the General Plan, the Area Column must be amended to correspond to the renumbered erf. The erf numbers of the affected erven are to be deleted and be replaced by the renumbered erf number on sheet 1. This will result in the renumbered erven reflecting the area as presently occupied by the occupiers of the erf.

3. *Renumbering of Erf 3651*

Erf number [3.....] should be renumbered erf [3....]. The erf number [3.....] cannot be allocated to erf [3.....] as the Approved General Plan does not provide for the number [3.....]. (Remark: Erf 3.....] is an erf on approved General Plan no. 8006/1991).

4. *Consequent Adjustments to be done in this office*

The applicable noting sheets to be amended to reflect the renumbered erven as per court order.

The GIS noting section to update Map guide to reflect the renumbered erven as per court order.

Date Capture to amend erf numbers in accordance with the renumbered erven on General Plan to reflect the correct area.

The Deeds office to amend the title deeds of the affected erven as per court order, consequent to the renumbering of the erven on the General Plan by this office.

5. *Other aspects arising*

The Deeds office is cautioned to identity the correct owner of an erf after renumbering especially in the case where a third party's right is at stake e.g. a bondholder.'

[41] In a report dated 9 March 2015 the forty-fifth respondent states the following:

‘3. Considering the order sought in the Notice of Motion, I will deal with the alternatives in the Notice of Motion as well as a third option.

Amendment of the General Plan by the Surveyor General

4. The relief sought in paragraph 1 of the Notice of Motion deals with how the Surveyor General may solve the problem which is the subject of this application. Whilst it appears on the face of it to be the easiest and the most practical solution given the complex procedures necessary for an alternative such as rectification transfers in each case, this office cannot easily cause such amendments to be made on the relevant title deeds registered in this office.

As we understand the source of these errors is the conveyance of the wrong properties to the respective transferees and not the allocation of wrong numbers to the respective properties. In other words this situation is not a surveying error but a conveyancing error.

5. A title deed deals with many aspects in respect of the property transfer it represents. The property identification, more commonly referred to as the erf number, is but one of such aspects.
6. There are further components of a title deed which are unique to that deed, such as the extent (size) of the property and the title deed conditions under which a particular property is being transferred.
7. From that it follows that should this office agree to an order to amend the erf number pursuant to an amendment of the general plan, such action might cause an incorrect extent (size) and registered conditional clauses.
8. A mere amendment of a general plan changing erf numbers on an already registered title deed does not take this into consideration.

9. There is no mechanism in the Deeds Registries Act 47/1937 to effect a change to the erf number, extent as well as conditional clauses in a single act of registration on a single deed. Doing that would in effect change everything in the title deed except the vesting clause (the clause containing the registered owner's particulars).
10. Rectification (substitution) of the vesting clauses (names of the occupants) by way of an endorsement in the registered deeds of each of the affected properties would have been an easy solution to this problem if it were not tantamount to a transfer of rights and this is *ultra vires* the said Deeds Registries Act.
11. It needs also to be pointed out that if the general plan is amended by the office of the Surveyor General then this may be tantamount, given the arguments raised above, to a transfer of rights.
12. Rectification of any mortgage bond registered on a property in the above circumstances cannot take place because there is no mechanism in the Deeds Registries Act allowing for this. The court's attention is respectfully drawn to the provisions of section 31(1) of the said Deeds Registries Act which gives a clear indication that an amendment to the mortgaged security cannot be registered.

Rectification Transfers

13. Since this matter concerns itself with the situation where multiple owners have obtained registered title to properties which do not correspond with the *de facto* situation, one of the remedies available would be for each affected registered owner to follow the route of rectification transfers supported by the necessary documentation required for this type of act of registration.

14. Should the route of rectification transfers be followed, any registered mortgage bond will have to be cancelled by agreement and a fresh mortgage bond registered against the correct title of the relevant owner.
15. However, this particular matter deals with multiple rectifications, and given the circumstances as set out in copious detail in the supporting affidavit, following this route would create immense problems and will delay the achievement of a solution to this matter to the detriment of all concerned.

Cancellation of transfers

16. Section 6 of the Deeds Registries Act, 47/1937 provides a mechanism by which a registered deed of transfer may be cancelled upon an order of court.
17. It is submitted that given the problems associated with the procedure described in paragraphs 15 – 17 above, that this might be a less cumbersome route in that such procedure does not require participation by respondents 1 – 42.
18. If all the incorrect transfers are cancelled then the situation reverts back to what it was before the incorrect transfers were registered. See section 6(2) of the said Deeds Registries Act.
19. If this option is preferred an order to simultaneously with the cancellation of the incorrect title deeds in terms of the said section 6, registration of transfers to the correct transferees, (as per the original allocation of properties) providing them with a title deed with the correct property particulars, extent and title deeds conditions, will ensure that they are not prejudiced by this option.
20. In respect of certain the present occupiers of properties (those that are deceased or cannot be located), the issues raised in this matter should be dealt with

separately. I might mention that their title rights should be dealt with bearing section 14 of the Deeds Registries Act, 47/1937 in mind.

21. Furthermore, if this option is ordered by the court, then the office of the Surveyor General need not amend the general plan as pleaded in paragraph 1 of the Notice of Motion.
22. Section 6 of the Deeds Registries Act, 47/1937 does not prohibit the Registrar of Deeds to cancel a mortgage bond per se, but the question remains how to deal with a mortgage bond, which has been registered against a title deed which is being cancelled in terms of the said section. In *Ex parte Raulstone NO (4) SA 606(N)* the court decided it also has the power to cancel a bond in terms of Section 6 of the Act. The annual conference of Registrars of Deeds confirmed the situation. In terms of Registrar's Conference Resolution for 1/2009, in a situation where the title deed, against which a mortgage bond is registered, is cancelled, the issues surrounding the disposal of the bond must be referred to the court for an order to state the manner in which the bond must be dealt with.

Conclusion

23. From the above in our opinion that there are only two practical options available to resolve the situation, that of:
 - 23.1 The renumbering of the properties on the relevant general plan by the office of the Surveyor General and the consequent amendment of the relevant title deeds; or
 - 23.2 The cancellation of the existing title deeds as contemplated in section 6 of the said Deeds Registries Act, restoring the *status quo ante*.

24. The option mentioned in paragraph 23.1 would require, with respect, the court to evaluate if this procedure is indeed tantamount to the transferring of property rights.
25. The option mentioned in paragraph 23.2 would be a clinical way of restoring the situation to what it was before the incorrect conveyancing took place, yet it creates the obstacle of seeking an order of court to deal with any mortgage bond which is registered against an affected title deed.
26. This office will abide by the order of court.'

[42] In his further report dated the 10th March 2015 the forty-sixth respondent states as follows:

- '1. *Further to the telephonic discussion with Advocate Bhoopchand and myself concerning the renumbering of erf [3....] and referring to paragraph 2 of the Surveyor-General's letter dated 19th February 2015, reference Nyanga 495, the following for your attention please:*
2. *Instead of renumbering erf [3.....]1 to erf [3.....] as mentioned in paragraph 2 of the Surveyor-General's previous letter dated 19th February 2015, the court is respectfully asked to order that erf [3.....] be renumbered to erf [2.....] on General Plan no. 1671/1993.*
3. *The court is also respectfully asked to order the layout by survey of erf [3.....] Public Place on General Plan no. 1671/1993 into two portions, being a Public Place and registered erf [3.....] to deal with the existing overlap.'*

[43] On 13 April 2015 the forty-fifth respondent prepared a report in which he states the following:

- “3. Considering the orders sought in the amended Notice of Motion, I will deal with the alternatives dealt with in the Notice of Motion as well as a third option. This report, whilst being in essence similar to my report date 9 March 2015, will also deal with paragraph 3 on page 5 of the amended Notice of Motion. (dealing with the survey of public open space, erf [3.....] Philippi) and will add details to clarify my previous report and to address issues raised in the amended Notice of Motion which are underlined ease of reference.

A. Amendment of the General Plan by the Surveyor General

4. The relief sought in paragraph 1 of the Notice of Motion deals with how the Surveyor General may solve the problem with is the subject of the application. Whilst it appears on the face of it to be the easiest and the most practical solution given the complex procedures necessary for an alternative such as rectification transfers in each separate case, this office cannot easily cause such amendments to be made on the relevant title deeds already registered in this office by an endorsement pursuant to a change in respect of the erf number, and where applicable, also the extent (size) of the property as well, as the Deeds Registries Act 37/1947 does not provide for such a procedure which leaves an application to Court as the only way to achieve the prayer described in paragraph 2 on page 3 of the amended Notice of Motion.(emphasis provided)
5. The source of these errors is the conveyance of the wrong properties to the respective transferees and not the allocation of wrong numbers to the perspective properties, although in practical terms this is what indeed has happened during the physical allocation process in situ. In other words this situation is tantamount to not

dealing with a surveying error but a bona fide unintended conveyancing error.
(emphasis provided)

6. *The effect of the present situation is that each of the affected transferees in possession of a title deed for the wrong property through a conveyancing error.*
7. *A title deed deals with many aspects in respect of the property transfer it represents. The property identification, more commonly referred to as the erf number, is but one of such aspects.*
8. *There are further components of a title deed which are unique to that deed, such as the extent (size) of the property and the title deed conditions under which a particular property is being transferred.*
9. *From that it follows that should this office agree to an order to amend the erf number pursuant to an amendment of the general plan, such action might cause a different extent (size) and registered conditional clauses to affect such property.*
10. *A mere amendment of a general plan changing erf numbers on an already registered title deed does not take this into consideration.*
11. *There is no mechanism in the Deeds Registries Act 47/1937 to effect a change to the erf number, extent as well as conditional clauses in a single act of registration on a single deed. Doing that would in effect change everything in the title deed except the vesting clause (the clause containing the registered owner's particulars).*
12. *Rectification (substitution) of the vesting clauses (names of the occupants) by way of an endorsement in the registered deeds of each of the affected properties (and leaving the erf number and extent intact) would have been an easy solution to this problem) if it were not tantamount to a transfer of rights and this is ultra vires the said Deeds Registries Act. (See section 16 of the said Deed Registries Act).
(emphasis provided)*

13. *It needs also to be pointed out that if the general plan is amended by the office of the Surveyor General then this is tantamount, given the arguments raised above, to a transfer of rights and this, with respect, cannot take place. However, the court may find differently, and should this happen, then we will abide by such finding.*
(emphasis provided)
14. *Rectification of any mortgage bond registered on a property in the above circumstances cannot take place because there is no mechanism in the Deeds Registries Act allowing for this. The court's attention is respectfully drawn to the provisions of section 3(1)s of the said Deeds Registries Act which gives a clear indication that an amendment to the mortgaged security cannot be registered.*
15. *Since this matter concerns itself with the situation where multiple owners have obtained registered title to properties which do not correspond with the de facto situation, one of the remedies available would be for each affected registered owner to follow the route of rectification transfers supported by the necessary documentation required for this type of act of registration.*
16. *Should the route of rectification transfers be followed, any registered mortgage bond will have to be cancelled by agreement and a fresh mortgage bond registered against the correct title of the relevant owner.*
17. *However, this particular matter deals with multiple rectifications, and given the circumstances as set out in copious detail in the supporting affidavit to the original Notice of Motion, , following this route would create immense problems and will delay the achievement of a solution to this matter to the detriment of all concerned.*

C. Cancellation of transfer

18. *Section 6 of the Deeds Registries Act, 47/1937 provides a mechanism by which a registered deed of transfer may be cancelled upon an Order of Court. The principle*

is that “as soon as the registrar has attested or executed deeds or signed the registration endorsement such a registrar cannot go back and cancel his or her action even, for example, if property has been transferred to the wrong person” (see page 1 -203 et seq of “The Consolidated Practice Manuals of the Deeds Office of South Africa, Juta & Co, ISBN 978-0-7021-7416-2). In these cases it is submitted that the properties have indeed been transferred to the wrong persons.
(emphasis provided)

19. *It is submitted that given the problems associated with the procedure described in paragraphs 15 – 17 above, that this option might be a less cumbersome route to that of registering rectification transfers in that such procedure does not require participation by respondents 1 – 43, (as listed in the amended Notice of Motion).*
(emphasis provided)
20. *If all the incorrect transfers are cancelled then the situation reverts back to what it was before the incorrect transfers were registered. See section 6(2) of the said Deeds Registries Act.*
21. *If this option is preferred an order to simultaneously with the cancellation of the incorrect title deeds in terms of the said section 6, registration of transfers to the correct transferees, (as per the original allocation of properties) providing them with a title deed with the correct property particulars, extent and title deeds, will ensure that they are not prejudiced by this option.*
22. *In respect of certain of the present occupiers of properties (those that are deceased or cannot be located), the issues raised in this matter should be dealt with separately. I might mention that their title rights should be dealt with bearing Section 14 of the Deeds Registries Act, 47/1937 in mind.*
23. *Furthermore, if this option is ordered, then the office of the Surveyor General need not amend the general plan as pleaded in paragraph 1 of the Notice of Motion.*

24. *Section 6 of the Deeds Registries Act, 47/1937 does not prohibit the Registrar of Deeds to cancel a mortgage bond per se, but the question remains as to how to deal with a mortgage bond, which has been registered against a title deed which is being cancelled in terms of the said section. In Ex parte Raulstone NO (4) SA 606 (N) the court decided it also has the power to cancel a bond in terms of section 6 of the Act. The annual conference of Registrars of Deeds confirmed the situation. In terms of Registrar's Conference Resolution for 1/2009, in a situation where the title deed, against which a mortgage bond is registered, is cancelled, the issues surrounding the disposal of the bond must be referred to the court for an order to state the manner in which the bond must be dealt with.*

D. In summary: Options A, B and C

25. *From the above it is clear that there are only two practical options available to resolve the situation, that of:*
- 25.1 *Renumbering of the properties on the relevant general plan by the office of the Surveyor General and the consequent amendment of the relevant title deeds; or*
 - 25.2 *The cancellation of the existing title deeds as contemplated in section 6 of the said Deeds Registries Act, restoring the status quo ante.*
26. *The option mentioned in paragraph 25.1 would require, with respect, the court to evaluate if this procedure is indeed tantamount to the transferring of property rights.*
27. *The option mentioned in paragraph 25.2 would be a clinical way of restoring the situation to what it was before the incorrect conveyancing took place, yet it*

creates the obstacle of seeking an Order of Court to deal with any mortgage bond which is registered against affected title deed.

D. Amendment of General Plan 1671/1993

28. *This office has no objection to implementing prayer number 3 on page 5 of the amended Notice of Motion. Procedures exist for this office to note changes effected by the Surveyor General on general plans on the relevant title deed which in this case would be the deed under which the property on which the general plan was laid out, is held.*

E. Conclusion

29. *This office will abide by an order of any of the alternatives mentioned in paragraph 25 supra. Thereafter the necessary administration acts as mentioned in paragraph 28 supra can be effected.* (emphasis provided)

[44] In his final report dated 10 June 2015 the forty-fifth respondent states that:

- “1. *The Registrar of Deeds has been briefed by Counsel for the Applicant on Monday 8th June 2015 on aspects of the two previous reports requiring clarification by the court hearing this matter. The reports submitted by the Registrar were dated 9th March 2015 and 13 April 2015.*
2. *The Registrar of Deeds has taken the circumstances underpinning this matter and recommends the renumbering process to remedy the errors identified in this application. To this end it is recommended that it is not necessary for the court to dwell on the section 6 process alluded to earlier.*
3. *The Registrar of Deeds has been advised that no amendments to the erf numbers will be required on the title deeds of the affected properties and*

that the only amendments sought from the Deeds office are to the erf size (extent) on the ten affected properties. The applicant must set out clearly the ten properties and the amended extent of each.

4. *The amendments to the title deeds as to the change in the erf size will be recorded upon receipt of confirmation by the Surveyor General of having amended his records in accordance with the court order. He will do so upon receiving the court order to amend his records. It is also advised that the court also order the deeds office to note caveats in its records to record the change in the extents of the ten properties and to further endorse the title deeds of the affected properties when the property is next dealt with in the deeds office.*
5. *No specific orders are required to be made with regard to the twelve owners who have died.*
6. *With regard to title deed [3.....] and the two bonds registered over that property: Provided that there is no difference in the erf size between erf [3.....] and erf [3.....] there will be in our opinion no change in the security relating to the mortgage bond registered over property [3.....] after the renumbering process. It is submitted that the court need not make any specific order with regard to this property.”*

[45] It is necessary to highlight the following points as they appear from the reports of the forty-fifth and forty-sixth respondents:

- 45.1 The forty sixth respondent indicates that the provisions of ss 36 and 37 of the Land Survey Act in principle allow for the alteration, amendments to and correction of the numbering of erven (and other data) on a general plan.
- 45.2 The forty-sixth respondent does however not have the statutory powers or the discretion to renumber the affected erven on the general plan except by an order of court. The forty-sixth respondent has outlined the procedure to be followed in the renumbering exercise including how the data captured on the first sheet of the general plan needs be changed.
- 45.3 There are ten erven that have different sizes. The forty-sixth respondent has cautioned that the renumbering procedure should provide for the discrepancies in the areas of the affected erven.
- 45.4 The forty-sixth respondent has recommended that in the first group of affected erven the last erf in the sequence, namely erf number [3.....], shall be renumbered to erf number [3....]. If this is done, the number 3768 then becomes available for use in renumbering the first erf in this affected sequence. The forty-sixth respondent has recommended that erf [3.....] is renumbered to erf [3.....]. The current erf [3.....] shall be renumbered to erf number [3....].
- 45.5 In the second group of affected erven the option of using the first number in the sequence of affected properties to renumber the last erf that will be left without a number is not available. The last erf in the affected sequence is the erf with number [3.....]. As the owner/beneficiary of this

erf does not have a title deed to his property it is recommended that erf [3.....] shall be the number assigned to the erf that is currently reflected as erf [3.....] on the general plan. Erf [3.....] does not form part of this application and its title is correct. If the exercise in renumbering in the first group of affected properties is followed then the last erf in this group would have been renumbered erf number [3.....].

- 45.6 In regard to the thirty-first and thirty-second respondents who jointly hold the title deed to erf number [3.....] and occupy a portion of the public open space with erf number [3.....], it is recommended that the erf number [3.....] is better utilised. The forty-sixth respondent has proposed that the erf with number [3.....] should be renumbered to erf [2....], a number that does not have a duplicate erf with the same number in the township.
- 45.7 The forty-sixth respondent recommends that the forty-fourth respondent is ordered by the Court to subdivide, by survey, the public open space, i.e. erf number [3.....], into two erven namely erf [3.....] and erf [3.....]. This would follow that the size of this erf would be 165 square metres which would correspond with the size reflected on the title deed held jointly by the thirty-first and thirty-second respondents. It is necessary to note that the erf size of the new erf [3.....] on the public open space may require determination by the forty-fourth respondent to accord with the size of the formal buildings erected on this erf. The erf size of the new erf

[3.....] should thus be left open for determination between the Applicant and the forty-fourth Respondent.

- 45.8 The forty-sixth respondent has noted that the deeds office will be required to amend the title deeds of the affected erven consequent to the issue of the court order. It bears noting that the only amendments consequent to the renumbering exercise that need be effected on the title deeds in the deeds office relate to the changed sizes of ten of the affected erven.
- 45.9 The forty-fifth respondent produced two reports, the content of which are essentially similar. In the first report the forty-fifth respondent acknowledges that the renumbering method may be the easiest and most practical solution for rectifying the errors given the complex procedures that are necessary for an alternative such as rectification of transfers in each case. The forty-fifth respondent qualifies the foregoing by stating that the deeds office cannot easily cause such amendments to be made on the relevant title deeds already registered in the deeds office.
- 45.10 The forty-fifth respondent characterises the error as a conveyancing error and not an error involving the allocation of wrong numbers to the respective properties, i.e. it is not a surveying error. Mr Bhoopchand contended that the forty-fifth respondent incorrectly assumes that the renumbering process will require the deeds office to amend the erf number on the title deeds.

45.11 The forty-fifth respondent also expressed caution against any amendment to the title deeds that may amount to a transfer of rights which would be “ultra vires” the Deeds Registries Act. The forty-fifth respondent initially seemed to have the view that any amendment to the general plan would also be tantamount to a transfer of rights. Mr Bhoopchand disagreed with this view and pointed out that the forty-fifth respondent was also under the mistaken impression that a rectification of the mortgage bond registered over one of the erven referred to above was required considering that in terms of section 3(1) (s) of the Deeds Registries Act an amendment to mortgaged security cannot be registered.

45.12 The forty-fifth respondent however concedes that if a rectification of transfers is pursued, it would create immense problems as there are multiple rectifications involved in this matter. He concedes that in light of the circumstances detailed in applicant’s supplementary affidavit (which inter alia emphasises the peculiar circumstances of this matter, including lack of the poor co-operation of the affected Respondents), the process of rectification of transfers would delay the achievement of a solution to this matter which will be to the detriment of all concerned.

45.13 The forty-fifth respondent is of the view that when regard is had to section 6 of the Deeds Registries Act that it is clear that a mechanism is available by which a registered deed of transfer may be cancelled upon an order of court and that this process does not require the participation of

the affected respondents and it may be a less cumbersome route to follow.

45.14 Accordingly the forty-fifth respondent is of the view that if all the incorrect transfers are cancelled then the situation reverts to what it was before the incorrect transfers were registered. An order to simultaneously register transfers to the correct transferees must then be made. The position of the deceased owners should be dealt with separately. The forty-fifth respondent does however not indicate how the position of deceased owners should be dealt with except to say that the provisions of section 14 of the Deeds Registries Act should be heeded.

45.15 In dealing with the bonds registered on an erven in the first group of affected properties the forty-fifth respondent recommends that the two bonds are to be cancelled. In this regard reliance is placed on Ex Parte Raulstone, NO 1959 (4) SA 606 (NPD) in support of the contention that the Court has inherent power to cancel a bond in terms of section 6 of the Deeds Registries Act. The issues surrounding the disposal of the bonds must then be determined by the Court. The forty-fifth respondent does however not provide any guidance on how the mortgage bond should be disposed of.

[46] In the supplementary affidavit deposed to by Esterhuizen the applicant levels a series of criticisms at the first report of the forty-fifth respondent. These included the following:

- 46.1 The forty-fifth respondent had misconstrued the extent of the amendments required to be effected by the deeds office in the renumbering option. According to applicant all that was required of the deeds office was for it to amend the size of ten of the erven on their respective title deeds. These amendments would follow the renumbering process.
- 46.2 The renumbering option did not require the deeds office to change the erf numbers on any of the title deeds as the renumbering process would result in the title deeds held by the owners now having the correct erf numbers on them.
- 46.3 The characterisation of the error as a conveyancing error based on the reason provided by the non-governmental organisation as to how the errors could have happened did not take into account that the reason was speculative, and that in the absence of accurate information as to how the errors occurred, it would be incorrect to direct the outcome of this matter on speculation.
- 46.4 The forty-fifth respondent had raised the issue of differing title deed conditions from property to property without indicating whether there were differing conditions attached to each of the affected title deeds.
- 46.5 The forty-fifth respondent characterised the renumbering option as a transfer of rights without explaining how this conclusion was arrived at.
- 46.6 The forty-fifth respondent recommended that the deeds of the mortgaged property should be cancelled and left it to the court to determine how the

cancelled bonds should be dealt with. No guidance was given in this regard.

46.7 The position of the thirty-first and thirty-second respondent would not be addressed in the section 6 procedure.

46.8 The procedure recommended by the forty-fifth respondent would involve a protracted clerical process which would require some form of co-operation of the affected respondents which co-operation was already illustrated as being severely lacking.

[47] It is important to note that in his final report the forty-fifth respondent, in response to the criticisms levelled against the first report, acknowledges that he would abide by the court's decision and that the deeds office had no objection to implementing the consequential actions required by it if the court ordered the renumbering option.

[48] The forty-fifth respondent withdrew his misgivings against the renumbering option and supports it as the option to solve the errors. In his view, amendments to the erf sizes would be addressed with a caveat for further action if a future transfer arose or with an endorsement of the title deed in its possession. In this regard the deeds office would be required to note a caveat against a property as a reminder to itself and interested parties that some other action is required when next the property is dealt with in any way. For example, in the event that a property is re-surveyed the property details may change as a result. In this event the forty-fifth respondent will then note a caveat against the property so that when next the property is dealt with, the amended details

are noted in the titled deed and deeds office database. According to the forty-fifth respondent the two mortgaged bonds registered over erf [3.....] could remain undisturbed and the renumbering process would not result in a change in security provided the erf sizes of erven [3.....] and [3.....] were the same (i.e. 160 m²). No court orders were necessary to deal with the mortgaged property. The position of the twelve respondents who had died did not require any special orders to be made on the title deeds.

[49] The change in the stance of the forty-fifth respondent is welcomed as it takes into account the peculiar circumstances confronting the affected respondents and the applicant and illustrates an appreciation for the need for a composite solution to the errors and the problems identified in this application.

THE LEGAL POSITION

[50] It is necessary to consider the law and the provisions of the applicable legislation to arrive at a solution to the problems applicant and the affected respondents are confronted with. The transfer of ownership and registration of land is dealt with in terms of the provisions of the Deeds Registries Act 47 of 1937. In some instances the establishment of certain townships like the one referred to in the present matter came about in terms of the Less Formal Township Establishment Act. The survey of townships and the division of tracts of land into numbered erven is determined by the provisions of the Land Survey Act 8 of 1997. Considering the issue to be decided, I

have decided to limit reference to particular sections of the Deeds Registries Act and the Land Survey Act.

[51] Section 3(1)(v) of the Deeds Registries Act provides that the Registrar shall, subject to the provisions of this Act-

‘make, in connection with the registration of any deed or other document, or in compliance with the requirements of any law, such endorsements on any registered deed or other document as may be necessary to give effect to such registration or to the objects of such law.’

[52] Section 4, which deals with the powers of the registrar of deeds, provides that *‘(1) Each registrar shall have power –*

(a) to require the production of proof upon affidavit or otherwise of any fact necessary to be established in connection with any matter or thing bought to be performed or effected in his registry;

(b) whenever it is in his opinion necessary or desirable to rectify in any deed or other document, registered or filed in his registry, an error in the name or the description of any person or property mentioned therein, or in the conditions affecting any such property to rectify the error: Provided that -

(i) every person appearing from the deed or other document to be interested in the rectification has consented thereto in writing;

(ii) if any such person refuse to consent thereto the rectification may

be made on the authority of an order of Court;

(iii) if the error is common to two or more deeds or other documents, including any register in his or her registry, the error shall be rectified in all those deeds or other documents, unless the registrar, on good cause shown, directs otherwise;

(iv) no such rectification shall be made if it would have the effect of transferring any right;

(v) ”

(c) to issue, under conditions prescribed by regulation, certified copies of deeds or other documents registered or filed in his registry;

(d) if in his opinion any deed or other document submitted to him has become illegible or unserviceable, to require that a certified copy thereof be obtained to take its place.

(2) ”

[53] Section 6 of the Deeds Registries Act provides that:

“(1) Save as is otherwise provided in this Act or in any other law no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of Court.

(2) Upon the cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond as provided for in

subsection (1), the deed under which the land or such real right in land was held immediately prior to the registration of the deed which is cancelled, shall be revived to the extent of such cancellation, and the registrar shall cancel the relevant endorsement thereon evidencing the registration of the cancelled deed.”

[54] Section 14 of the Deeds Registries Act provides that “(1) Save as *otherwise provided in this Act or in any other law or as directed by the court –*

(a) transfers of land and cessions of real rights therein shall follow the sequence of the successive transactions in pursuance of which they are made, and if made in pursuance of testamentary disposition or intestate succession they shall follow the sequence in which the right to ownership or other real right in the land accrued to the persons successively becoming vested with such right;

(b) it shall not be lawful to depart from any such sequence in recording in any deeds registry any change in the ownership in such land or of such real right: Provided that -

(i) if the property has passed in terms of a will or through intestate succession from a deceased person to his descendants, and one or other of these descendants has died a minor and intestate and no executor has been appointed in his estate, transfer or cession of the property which has vested in that descendant may be passed by the

executor in the estate of the deceased person direct to the heirs ab intestato of the descendant;

(ii) if the registrar is satisfied that the value of the immovable property which has vested in any heir or legatee in terms of a will or through intestate succession would be equalled or exceeded by the costs involved in transferring or ceding it to the heir or legatee, and the heir or legatee has sold the property, transfer or cession thereof may, with the consent in writing of the heir or legatee, be passed by the executor in the estate of the deceased person direct to the purchaser;

(iii) if in the administration of the estate of a deceased person (including a fiduciary) any redistribution of the whole or any portion of the assets in such estate takes place among the heirs and legatees (including ascertained fideicommissary heirs and legatees) of the deceased, or between such heirs and legatees and the surviving spouse, the executor or trustee of such estate may transfer the land or cede the real rights therein direct to the persons entitled thereto in terms of such redistribution;

(iv) in a redistribution mentioned in proviso (iii) it shall be lawful to introduce movable property not forming part of the estate for the purpose of equalizing the division;

(v) the provisions of proviso (iii) shall apply mutatis mutandis with reference to a redistribution of assets of the joint estate of spouses who were

married in community of property and have been divorced or judicially separated, and with reference to a redistribution of assets of a partnership on dissolution of the partnership;

(vi) if a fiduciary interest in land or in a real right terminates before transfer of the land or cession of the real right has been registered in favour of the fiduciary, it shall be competent to transfer the land or cede the real right direct to the fideicommissary;

(vii) if the right of any person to claim transfer of such land or cession of such real right from any other person has been vested in any third person in terms of any judgment or order of any court (including a magistrate's court), or in terms of a sale in execution held pursuant to any such judgment or order, transfer of such land or cession of such real right may be passed direct to such third person by the person against whom such right was exercisable.

(2) In any transfer or cession in terms of any proviso to subsection (1)(b), there shall be paid the transfer duty which would have been payable had the property concerned been transferred or ceded to each person successively becoming entitled thereto."

[55] Section 36 of the Land Survey Act (*supra*) provides that "*The Surveyor-General may correct any error in the numerical data, figure or wording of a diagram registered in a deeds registry: Provided that if the correction affects the extent or designation of the*

land represented by the diagram, the Surveyor-General shall notify the Registrar of the correction, and that Registrar shall thereupon amend the relevant title deed and registers in his or her deeds registry in accordance with the corrected diagram and before effecting any further registration of that land or any portion thereof or share therein shall likewise amend the relevant duplicate title deed belonging to the owner of that land.”

[56] Section 37(1)(a) of the Land Survey Act (*supra*) provides that “Any general plan which is filed in a Surveyor-General's office or is registered in a deeds registry may be altered or amended by the Surveyor-General for the purposes of rectifying errors in the numerical data, figure or wording: Provided that if the correction affects the extent or designation of erven, the Surveyor-General and the Registrar shall act in the prescribed manner.

(b) The Surveyor-General may, in order to make a correction contemplated in paragraph (a), require that a land surveyor submit in the prescribed manner a correction sheet of the whole or part of the general plan for examination and approval.

(2) Any general plan referred to in subsection (1) which represents the subdivision of land in accordance with or under any other law, or which represents a township established prior to the existence of any laws relating to the establishment of townships, may, with the consent of the Premier concerned, or by an order of the court, and subject to such conditions as the Premier or the court may deem necessary, be altered, amended or partially or totally cancelled by the Surveyor-General: Provided that where the alteration, amendment or partial or total cancellation affects a public place, the

Surveyor-General, prior to such alteration, amendment or partial or total cancellation, shall be advised by the Premier that the provisions of the laws relating to the permanent closing of any public place or part thereof have been complied with.

(3) The Premier may, in respect of any alteration, amendment or partial or total cancellation of a general plan, contemplated in subsection (2), delegate his or her powers to an officer in the service of the provincial administration or to a local authority, and the local authority may, with the concurrence of the Premier, further delegate the delegated powers to an officer in the service of that local authority.

(4) When a general plan is altered, amended or partially or totally cancelled in terms of this section the Surveyor-General shall inform the Registrar, who shall make the necessary alterations, amendments or endorsements to or on the relevant title deeds and registers in his or her deeds registry.”

[57] In **Weinerlein v Goch Buildings Limited** 1925 AD 282 at 293 the court held that *“The Roman Law did not know of the transfer of property by registration: That is an innovation of the Roman Dutch Law. The object of our law of registration of transfer is that a person shall hold his title in accordance with what is found upon the register ... The policy of our registration laws with regard to fixed property requires the true contract under which land is held to be reflected on the register.”*

[58] It is commonly accepted that the identification of land ownership in South Africa is founded on two bases, namely, a cadastral system of surveying that identifies the boundaries of the properties and collates data relating to those properties and a

registration system of title deeds to the properties. The information contained in the title deeds must correspond with the cadastral data (i.e. a depiction of the land and the associated data on an approved surveyed and/or general plan).

[59] It is now accepted law that the abstract theory of transfer applies to immovable property. See **Legator McKenna Inc v Shea and Others** 2010(1) SA 35 (SCA) para 21. According to Legator McKenna (*supra*), the requirements for the passing of ownership in the case of immovable property are twofold, namely: delivery, which is effected by registration in the deeds office, coupled with a so-called real agreement (“*saaklike ooreenkoms*”). The essential elements of the real agreement are an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property. See Legator McKenna (*supra*) at para 22.

[60] Brand JA held in Legator McKenna (*supra*) at para 22 that, ‘*Although the abstract theory does not require a valid underlying contract, e.g. sale, ownership will not pass – despite registration of transfer – if there is a defect in the real agreement.*’ The main purpose of registration of ownership is to comply with the publication requirement. In an abstract system there is no need for a formally valid underlying transaction provided that the parties are *ad idem* regarding the passing of ownership. See **Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others** 2011(2) SA 508 (SCA) at paragraph [12

[61] In the present matter the ownership of the affected properties or at least the initial allocation and ownership of the affected properties is not disputed by the 43 affected respondents. On the authority of Legator McKenna (*supra*) and the abstract theory I must therefore accept that there is no defect in the '*real agreement*' between the applicant and the affected respondents with regard to the ownership of the land occupied by the affected respondents.

[62] As the affected respondents are owners of the erven they occupy it must therefore follow that they are entitled to hold title deeds to such properties and the deeds office records must therefore properly reflect the true ownership of their properties.

[63] Our SCA has held that the record of title deeds in the deeds office needs to be accurate. There is no guarantee of title and the record is subject to correction when the need arises. See **Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others** (*supra*) at paragraph 13.

DISCUSSION

[64] On a consideration of the papers before me it is clear that it was the intention of the WCG, as transferor, to transfer ownership of land to the transferees who are the affected respondents in this matter. It is further clear that the common intention between the WCG and the affected respondents was to pass ownership of property. The written expression of their intention went awry. The exact manner wherein the error

occurred is not easily discernible from the information that is available. There is however no defect in the real agreement between the WCG and the affected respondents with regard to the passing of ownership of the erven occupied by the respondents. The error is in the recordal of that agreement. The object of the correction of the errors in this application is to enable the affected beneficiaries and the WCG to obtain the correct title deeds to their respective erven as the deeds register should correctly reflect the true ownership of the respective properties.

[65] It is clear that the applicant had hoped to achieve a situation where the affected parties would co-operate and agree to a rectification of transfers to correct the errors. The nature of the errors in both groups of properties however required the holders of the title deeds to surrender their incorrect title deeds, to provide the other necessary documents and to provide written consent to the rectification of transfers, and this had to be done simultaneously as the rectification of transfers in each of the two affected groups could only be completed together as a batch. It is clear that the full co-operation of all title holders concerned could not be obtained and rectification of transfers by agreement was not feasible in the circumstances.

[66] In the present matter the court is required to find a legal solution to the errors identified hereinbefore, with the ultimate aim of creating a situation where the respective owners of the erven are left with their correct title deeds.

[67] It is so that Section 4 of the Deeds Registry Act (*supra*) provides for the rectification of errors that are discovered in title deeds. It permits rectification of an error in the name or the description of any person or property or the conditions attaching to a title deed, provided that there is no transfer of rights during the rectification process.

[68] Section 6 of the Deeds Registries Act (*supra*) on the other hand prohibits a Registrar of Deeds from cancelling a registered title deed unless the cancellation is ordered by a Court or as may otherwise be provided in the Deeds Registries Act or in any other law. Laws that contained provisions for the cancellation of registered title deeds included some of the laws under apartheid, like the Black Administration Act 38 of 1927. The effect of the cancellation under this section is that the title then reverts to the previous owner. See section 6 (2). The SCA has held that section 6 is not an empowering provision. See **Kuzwayo v Representative of the Executor in the Estate of the late Masilela** [2011] 2 All SA 599 (SCA) at paragraph 25.

[69] The Courts have interpreted the provisions of section 6 to mean that courts are empowered to cancel the registration of a bond. It does however appear that section 6 empowers a Registrar of Deeds to cancel the registration of certain mortgage bonds. See *Ex parte Raulstone NO* (*supra*).

[70] Section 6 of the Deeds Registries Act finds application where deeds are lodged in batches for, amongst other reasons, linking of deeds for registration as well as for registration of bonds simultaneously. In the absence of any indication the Registrar of

Deeds is entitled to register them. In this instance section 6 prohibits any subsequent cancellation of registration by the Registrar of Deeds. See Jones, Conveyancing in South Africa, 4th ed, H S Nel p. 18 – 19.

[71] The provisions of section 6 thus relate to deeds office registration errors. In recommending a section 6 procedure, it was more likely that the forty-fifth respondent was recommending a procedure akin to a section 6 procedure where the Court would order a cancellation of all the last registrations on the title deeds and the bonds registered over one property. The effect of the court order would be that title would then revert to the applicant who was the previous owner. The Court would then order the registration of transfer to the correct owners.

[72] In my view there may be some merit in the criticisms levelled by the applicant against adopting the procedure provided for in section 6 considering that there are additional factors that weigh against pursuing this option. The procedure would entail a double conveyancing process with the attendant costs and it further does not deal with the mortgaged property, the cases of the owners who are deceased and the case of the respondents who occupy a portion of the public open space.

[73] Section 3(1) (v) of the Deeds Registries Act empowers the forty-fifth respondent, in connection with the registration of any deed or other document, or in compliance with the requirements of any law, to make such endorsements on any

registered deed or other document as may be necessary to give effect to such registration or to the objects of such law.

[74] According to our law, once rectification of a title deed is granted, it operates from the outset. In **Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd** 2001 (4) SA 1315 (SCA) at paragraph 33 the court held that, “*Rectification does not alter the terms of the agreement; it perfects the written memorial so as to accord with what the parties actually had in mind... Having been rectified with retroactive effect the agreement is deemed to have so provided at the time of its conclusion*”. In **Intercontinental Exports (Pty) Ltd v Fowles** 1999 (2) SA 1045 (SCA) the SCA held at para. 11 that [Rectification] ‘*enables effect to be given to the parties actual agreement.*’

[75] In my view the means available to correct or rectify transfers in terms of the Deeds Registries Act are in the main geared to correct errors on single title deeds. The errors on multiple title deeds relating to properties that lie adjacent to each other require simultaneous correction and the co-operation of all the affected respondents, making correction utilising this method virtually impossible.

[76] Aspects of the new land law and the on-going discussion of land reform accords enhanced standing to the circumstances of possession and make significant inroads into the security of what appear ex facie the deeds office records. I am satisfied that this court has inherent jurisdiction in matters pertaining to land registration and matters ancillary thereto. See *Ex parte Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T).

There is thus room for this court to exercise its inherent jurisdiction in property matters such as the present, beyond the constraints of the provisions of the Deeds Registries Act or any practice that has been followed by the deeds office, in circumstances that require a departure. This is of course not to say that wholesale circumventions or departures from the provisions of the Deed Registries Act should be allowed. The peculiar facts of this case however require that this court give careful consideration to what remedy is best suited to the problems that the parties are confronted with in this matter.

[77] In the first group of twenty three properties and the second group of nine plus one properties the owners of the properties have in their possession title deeds that correctly reflect their names but not the erf numbers they occupy. None of the respondents or any third parties have come forward to dispute the ownership of any of the affected properties. As I have already stated, I am satisfied that valid real agreements existed between the owners and the seller at the time of the sale regardless of how each owner came to be in possession of title deeds with incorrect erf numbers.

[78] I am further satisfied that the owners, whether singularly or jointly, do hold title deeds which were secured through a conveyancing and registration process involving a conveyancer and the deeds office. I agree with Mr Bhoopchand that it would be an exercise in futility to try and construct from the dearth of information, the accuracy of which is blurred with the passage of time, how the errors occurred. The case involves a

number of properties and requires a simultaneous correction. The original documents relating to the development of the township are lost or unavailable. The manner wherein the errors occurred is subject to speculation. A considerable period of time has passed from the initial allocation of properties to the time that the errors were discovered to the time that this application was made. There has been minimal co-operation of the affected owners in circumstances where universal co-operation is required if rectification of the errors is to be obtained by agreement. Some of the property owners have died. The affected properties are situated next to each other in two groups and this lends itself to a renumbering process. The conditions of title are the same. The sizes of the erven do not pose a difficulty and are amenable to amendment by the forty-fifth and the forty sixth-respondents. The renumbering option is supported by both the forty-fifth and forty-sixth respondents. There is no objection to this process from the Respondents. The process is intended to retain ownership of the affected properties in the names of the original beneficiaries as and per the initial allocation and sale of the properties. The rights of third parties are also protected in the process. In my view, a common sense and practical approach must be adopted in deciding what the most appropriate relief should be considering the circumstances of this case.

[79] The options presented to this court include renumbering the general plan, rectification of transfers by court order, a process akin to section 6 of the Deeds Registries Act to correct the initial transfers and a combination of the elements of the foregoing three options.

[80] In my view this court is required to grant relief which will have the effect that the affected respondents are matched with the correct title deeds to their respective properties. In effect a correction procedure is called for rather than a re-enactment of a transfer of ownership fraught with the difficulties referred to hereinbefore. After careful consideration of all the options presented to the court, I am of the view that the renumbering option as recommended by the forty-sixth respondent is the most appropriate mechanism of achieving the desired outcome.

[81] I am fortified by my finding that the correction sought in this application will not constitute any delivery, symbolic or otherwise, of the properties, nor will it change the rights and obligations of the parties. It will simply correct the erroneous reflection of those rights. See **Bester NO and Others v Schmidt Bou Ontwikkelings** CC 2013 (1) SA 125 (SCA) at paragraph 11. In addition, I am satisfied that the amendments to a general plan are in principle permissible and are expressly permitted in terms of the provisions of the Land Survey Act (*supra*).

[82] In the first group of properties erf 3746 and erf 3769 are the erven adjoining the affected properties on the extreme ends of the sequence. They are public spaces. I am satisfied that the title deeds are correct for the purposes of this application. The owner is reflected as the applicant but in law it is the City of Cape Town that is deemed to be the owner of public spaces in this township in terms of the Less Formal Township Development Act. No order is sought to change the position as it appears on the title deeds. In accordance with the recommendations of the forty-sixth respondent, erf 3747 the first erf, will be renumbered to erf 3768, the last of the affected erven.

[83] In the second group of affected properties, the first erf in the sequence must be subdivided to cater for the respondents that occupy a portion of the public space. The erf adjoining the last of the affected erven in the sequence is erf 2652. Erf 3652 is a tiny piece of land on which a mast with an overhead light is erected. This erf is considered to be correctly numbered and is not part of this application.

[84] The position of the thirty-first and thirty-second respondents who occupy a portion of the public open space must be dealt with by this court by the making of orders for the forty-fourth respondent to act upon.

[85] In accordance with the recommendations of the forty-sixth respondent, the mortgage bonds registered over an erf will be rendered correct by the renumbering option. The forty-sixth respondent holds the view that no orders beyond the orders to renumber need be made with regard to this erf as the renumbering option renders the position correct as was intended by the owner and the mortgagor. There is accordingly no prejudice to the forty-seventh respondent.

[86] Should the renumbering option by the forty-sixth respondent be followed by this court the procedure would include the renumbering of the affected erven and the consequent adjustments that are to be made to the data reflected on the general plan with regard to each of the affected properties. The differences in erf sizes are to be

recorded against the erven where the erf sizes differ. All that is required of the deeds office is the amendment of the title deeds where the erf sizes will change.

[87] I am satisfied that the renumbering option still provides an accurate and correct reflection of the sequence of the events and the history of the transfers. They will be corrected and would be capable of being ascertained and researched if required.

[88] Most importantly, the title deeds held by the affected respondents and the title deeds in the Deeds office relating to the affected erven would correspond to the identification of the erven on the general plan. The title deeds can once again be regarded as legal instruments evincing ownership and the affected erven can be legally disposed of, encumbered and/or devolve to the heirs where the original owners have passed on.

CONCLUSION

[89] I must stress that the decision to adopt the renumbering option in the present matter should not be seen as setting a precedent for the correction of errors occurring in the registration process and the production of title deeds. There are recognised methods of correcting errors in the transfer process as provided in the Deeds Registry Act and other applicable legislation.

[90] I am accordingly satisfied that the peculiar circumstances of this matter is such that the renumbering option as recommended by the forty-sixth respondent and endorsed by the forty-fifth respondent is the legal solution for the applicant and the affected respondents.

[91] In the result I make the following order:

1. (a) That the Surveyor General, Cape Town, is ordered to renumber erven on general plan 1671/1993 in the Philippi Allotment area, Western Cape Province and amend the erf sizes as identified according to the following table:

[illegible]

3.....	3.....	
3.....	3.....	
3.....	3.....	
3.....	3.....	
3.....	3.....	
3.....	3.....	180
3.....	3.....	165
3.....	3.....	
3.....	3.....	150
3.....	3.....	156
3.....	3.....	159
3.....	3.....	185
3.....	3.....	185
3.....	3.....	159
3.....	2.....	206

2. That the Surveyor General, Cape Town, is ordered to make any adjustments and changes to the general plan 1671/1993, Philippi Allotment Area, and any other survey documents consequent upon the renumbering of the erven. For reference purposes the report of the Surveyor General with two notes thereto and sheets 1, 3 and 4 of general plan 1671/1993 of subdivisions of erf 3378 Philippi in the Philippi Allotment areas are attached to this order.
3. That the City of Cape Town is ordered to subdivide by survey, public open space erf 3642 on general plan 1671/1993 into two erven namely erf 3642 and erf 3643.
4. That the Registrar of Deeds, Cape Town, is ordered to make any amendments to the title deeds of any erven consequent to the renumbering of the erven including the noting of caveats in its records relating to the properties where the renumbering on the general plan has resulted in a change in the size (extent) of the erven and to further endorse the title deeds when the property is next dealt

with in the deeds office. The third column in the table under order 1 above lists the properties requiring amendments to the erf size on the title deeds.

5. It is declared that once the orders in 1, 2 and 4 are complied with the owners of the erven are as indicated in the following table:

Erf number:	OWNER	IDENTITY NUMBER
3.....	Koliswa Rose Bamba	6.....
3.....	Nomonde Patience Luwaca	6.....
3.....	Matiwana Tom	4.....
3.....	Silumko Maqoqa Nontsomi Maqoqa	5..... 5.....
3.....	*Ntombothini Sazinge	6.....
3.....	Mzwandile Michael Konisani Sindiswa Lynette Konisani	6..... 6.....
3.....	*Wani Mthethi *Nomahomba Mthethi	4..... 5.....
3.....	Primrose Homvume Tyali	5.....
3.....	Nontuthuzelo Mavis Manquphu	6.....
3.....	Sizwe Jongile Sindiswa Margaret Jongile	6..... 6.....
3.....	Lamla Welcome Nteta *Nomathamsanqa Janet Nteta	5..... 6.....
3.....	Nomandlokwenyani Matusela	4.....
3.....	*Jeliat Germs Gqozongwane *Nobayeza Vonolia Gqozongwane	5..... 5.....
3.....	Nikiwe Marie Manyefane *Drummond Zola Manyefane	5..... 5.....
3.....	*Nokaya Mahlombe	3.....
3.....	Zilandile Mxatule Ntomboxolo Mirriam Mxatule	5..... 6.....
3.....	Bongani Zilwa Thelma Nomsangaphi Zilwa	6..... 6.....
3.....	Feziwe Felicia Mpande	6.....
3.....	Western Cape Government	
3.....	Khayaletu Marwayi	7.....
3.....	Zwelitsha Nontswabu Nomnandiphi Nontswabu	5..... 5.....
3.....	Nowekeni Tozi Nelani	3.....

3.....	Joseph Ngqaba Nomteto Adelaide Ngqaba	4..... 4.....
3.....	Nobejile Notetangaye Gongota	4.....
3.....	*Forty Kibi *Nofinish Kibi	5..... 5.....
3.....	Nomathemba Esther Matiwane *Zinakile Joseph Matiwane	4..... 4.....
3.....	Nocounter Mavis Mkrweqana *Xhakalegusha Mkrweqana	4..... 4.....
3.....	Western Cape Government	
3.....	Lincoln Thobile Gqola	6.....
2.....	Western Cape Government	

*deceased

6. It is declared that once the order in 3 is complied with then the owners of erf 3643 are:

3...	Richard Winget Tshulisi	4.....
....	Nontombiziteni Mavis Tshulisi	6.....

RILEY, AJ