Ex parte:

LA BELLA VITA PROPERTY OWNERS' ASSOCIATION

In re:

AKARANA MASTER HOME OWNERS' ASSOCIATION

OPINION

Eduard Fagan S.C.

Chambers

Cape Town

Introduction

1. Consultant is the La Bella Vita Wine Estate Property Owners' Association.

2. I am instructed to advise Consultant about whether the consent of the Akarana Master Home Owners' Association ("the Akarana HOA") is required to effect the transfer of certain common properties to Consultant.

Background

3. In 1997 or 1998 Portion 27 of the Farm Simonsvlei 791, Paarl, was subdivided into seven portions, Portions 36 to 42.

4. In October 2000 the Department of Planning, Local Government and Planning approved an application for the rezoning of Portion 39 (a portion of Portion 27) to Resort zone I, Resort zone II and Open Space zone II. The approval was subject to a number of conditions.

5. Condition 12 was that a homeowners' association be established, the constitution of which was to be approved by the Winelands District Council. The constitution was to include "*all the owners involved in the entire property*".

6. In terms of condition 13, "*A compulsory membership of the Home Owner's Association must be registered against the title deed of each unit (the 15 Individual Resort Zone II units, the guest house as well as the individual farm portions: 791/36, 791/37, 791/38, 791/39, 791/40, 791/41 and 791/42.*"

7. The remainder of portion 39 as well as the other six portions of the farm – i.e of Portion 27 of Farm Simonsvlei 791 – had to retain their Agricultural I zoning and had to be used accordingly, with the constitution of the home owners' association to address the operation of the agricultural section.

8. On 26 March 2001 Portion 39 was transferred from Dewgro (Proprietary) Limited to Fundeals Sixteen CC ("Fundeals"), a developer. The transfer was made subject to the following conditions (item D) imposed by the Winelands District Council in terms of section 42(3) of the Land Use Planning Ordinance 15 of 1985 ("LUPO") when approving the subdivision of Portion 27:

> "*a. The owner of this property and his successors in title shall be obliged to become a member of the AKARANA MASTER HOME OWNERS ASSOCIATION and the AKARANA WATER USER ASSOCIATION of which … associations the transferee shall automatically become a member on registration of transfer.*
>
> *b. This property shall not be sold or alienated without the prior written consent of the AKARANA MASTER HOME OWNERS ASSOCIATION being obtained.*"

9. A constitution was prepared. (The copy with which I have been briefed contains manuscript amendments or intended amendments, and one of the defined terms has not been completed. I am accordingly not sure whether this is the final version.) It records, in clause 1, that Consultant is constituted as a body corporate in terms of section 29 of LUPO which shall come into existence simultaneously with the registration of transfer "*of the first deducted portion at LA BELLA VITA WINE ESTATE*". That term is defined in clause 2.1 as meaning the group housing development constructed on Portion 39.

10. Membership of Consultant is in terms of clause 6.1 compulsory for every registered owner (the term which is undefined) of a unit erf. Unit erven are defined in clause 2.1 as meaning the residential (or resort – there is a manuscript annotation) erven resulting from the subdivision of Portion 39.

11. On 29 March 2001 the Council of the Boland District Municipality resolved that the constitution be approved, subject to certain amendments. (It may be that the amendments are the manuscript annotations on my copy.) The Council also accept a site development plan for Portion 39.

12. At the same time, the Council resolved that the constitution of the Akarana HOA be approved. I have not had sight of that constitution, but have been briefed with a constitution of the Akarana HOA that was approved by Drakenstein Municipality on 28 May 2021 (to which I refer further below). The difference between Consultant and the Akarana HOA may be seen from the description of their areas of jurisdiction in the letter from the Boland District Municipality of 10 July 2001 advising a Mr A Marais (presumably of Fundeals) of the approvals. Consultant's name is followed by "*Farm No. 791/39*", whereas the Akarana HOA's name is followed by "*Farm No. 791/27*".

13. On 12 July 2001 the subdivision of Portion 39 was approved by the national Department of Agricultural in terms of the Agricultural Subdivision of Land Act 70 of 1970. On the sketch plan accompanying that approval there are 21 portions, numbered from 1 to 21. Portion 10 is named "*Resort*". Portions 18 and 19 are roads on the border of Portion 39. Portion 21 is a dam. The rest appear to be residential erven.

14. Approval for that subdivision was obtained from Drakenstein Municipality on 21 August 2001. The same sketch plan of subdivision – the site development plan – was annexed to the letter of approval. The letter stipulated that all other conditions are still relevant and must be adhered to.

15. On 13 September 2001 the Surveyor-General approved the general plan of subdivision of Portion 39. The general plan is of course properly surveyed, and detailed accordingly. The 21 portions are numbered Portions 43 to 63. The two roads are indicated as Portions 60 and 61 and the dam is indicated as Portion 63. I refer to these three portions collectively as "the common properties".

16. Fundeals, which appears to have converted from a close corporation to a company called Fundeals Sixteen (Proprietary) Limited, was provisionally liquidated on 25 November 2005 and finally liquidated on 20 December 2005. At the time of its liquidation, Fundeals had not transferred the common properties to Consultant. Fundeals accordingly remained the owner of the common properties.

17. Joint liquidators of Fundeals were appointed on 16 May 2006. On 16 July 2010 Fundeals was erroneously deregistered. On 30 June 2022 this was corrected. The liquidators are able to continue with the winding-up of Fundeals.

18. In the meantime, a letter was obtained from Mr H G Strijdom, Manager: Land Use Planning and Surveying at Drakenstein Municipality, dated 8 April 2019, in which Mr Strijdom confirmed that Portions 60, 61 and 63 – having been

created as part of the subdivision of Portion 39 – need to be transferred to Consultant.

19. Also in the meantime, on 15 January 2021, the Akarana HOA adopted a new constitution. It was approved by Drakenstein Municipality on 28 May 2021. It records (in paragraph 1 of the preamble) that the Akarana HOA had on two previous occasions, 26 August 2005 and 6 November 2010, adopted updated constitutions. The new constitution is the subject of legal challenge. I have not seen the pleadings in that matter, which was originally set down for hearing on 13 March 2023 but has been postponed to a future date.

20. The new constitution specifies, in clause 14(2), that "*any portion of the common property which is currently not registered in the name of the association, be transferred to, and registered in the name of a Non-Profit company, established for the sole purpose of taking transfer of the common property of the association*". The term "*common property*" is defined in clause 2(1)(i) as meaning "*any land forming part of the relevant subdivision of Portion 27 of the Farm Simonsvlei No. 791, which does not form part of a land unit*". Whilst it is unnecessary for the purposes of this opinion to come to a final view on this, it is at least arguable that the common properties fall within this definition, and are therefore intended by the Akarana HOA to be transferred to a company to be formed by it.

21. That company has been formed.

The dispute

22. A dispute has arisen regarding the common properties. Consultant has demanded that the common properties be transferred to it. The Akarana HOA has demanded that the common properties rather be transferred to the company formed by it. The liquidators sit in the middle.

23. On 20 September 2022 Mr Chris van Zyl, one of the joint liquidators, addressed a letter to all interested parties in which he said that the provisions of the new Akarana constitution appear to conflict with the position as contended for on behalf of one of Consultant's members, Mr André van der Westhuizen (now its chairperson); and that the title deed in respect of Portion 39 provides that the property cannot be transferred without the Akarana HOA's consent, which may cause difficulties.

24. On 10 July 2023 attorneys acting on behalf of the Akarana HOA addressed a letter to Mr van Zyl in which they referred to the fact that the Akarana constitution provided for the common properties to vest in the Akarana HOA. They also said that in terms of the title deeds all the owners, including Mr van der Westhuizen, are subject to the constitutions of both Consultant and the Akarana HOA, and are therefore bound by the provisions of those constitutions. The Akarana HOA will, say the attorneys, refuse to consent to the transfer of the common properties to Consultant unless servitudes are registered in favour of the members of the Akarana HOA.

25. On 12 July 2023 attorneys acting for Consultant expressed their client's support for the position adopted by Mr van der Westhuizen. The point is made

in their letter that Consultant is not a member of the Akarana HOA and therefore not bound by the terms of its constitution. The provisions of that constitution are irrelevant to Consultant's entitlement to take transfer of the common properties. Consultant is prepared to have the necessary servitudes registered.

26. The point is further made that the relevant title-deed conditions (item D, quoted above) "*pertained to Portion 39 prior to its subdivision and the subsequent sales by Fundeals Sixteen CC (as it was then) of the subdivided portions to the members of [Consultant]*". It is a condition imposed by the Winelands District Council "*when granting approval for the subdivision of Portion 39*" in terms of section 42(3) of LUPO. Thus, the letter continues, "*only those owners who have taken transfer of subdivided portions of Portion 39, which are being used for residential purpose, have become members of AMHOA*".

The Akarana HOA's constitution

27. The attorneys representing Consultant have expressed the view that the provisions of the Akarana HOA constitution are irrelevant to the issue of Consultant's entitlement to take transfer of the common properties. I agree.

28. A homeowners' association cannot extend its jurisdiction over neighbouring properties by including a provision in its constitution to that effect. That would be absurd. Even less can it actually incorporate neighbouring properties into the properties that lawfully fall under the administrative control of the homeowners' association by stating in its constitution that those properties will be transferred to a company under its control. That is not how the law of

property works. Section 2(1) of the Alienation of Land Act 68 of 1981 requires any alienation of land to be preceded by a deed of alienation signed by the parties or their agents.

29. The liquidators of Fundeals would have to sign such a deed of alienation. It is irrelevant to the question of whether they sign such a deed of alienation in favour of the company formed by the Akarana HOA that the constitution of the Akarana HOA indicates a desire to acquire the common properties.

The title-deed conditions

30. The title-deed conditions, on the other hand, would be relevant. If they apply to the common properties, then those properties cannot be alienated by the liquidators of Fundeals without the prior written consent of the Akarana HOA having been obtained. The registrar of deeds would not approve a proposed alienation. In effect the Akarana HOA would have a veto right over the transfer of the common properties.

31. We know from the relevant title-deed conditions themselves that they were imposed by the Winelands District Council in terms of section 42(3) of LUPO. Section 42(3) provided for a response by a council to objections by the imposition of additional conditions. The primary provision for the imposition of conditions was section 42(1). They were conditions imposed when a council granted an application. Additional conditions imposed under section 42(3) were deemed to be conditions imposed under section 42(1).

32. The relevant conditions were imposed by the Winelands District Council "*when approving the subdivision of Portion 27*". They were conditions of that subdivision. In extending the obligation to become a member of the Akarana HOA to the "*successors in title*" to the owner of Portion 27, the Council must sensibly be regarded as having had in mind the owners of the subdivided erven of Portion 27. Certainly the owner of Portion 39, being a portion of Portion 27, would have been a successor in title.

33. It follows that the restriction on the sale or alienation of "*[t]his property*" must sensibly be extended to a restriction on the sale or alienation of Portion 39. The noun phrase "*this property*" in condition D(a) bears the same meaning in condition D(b).

34. The question is whether it further extends to a restriction on the sale or alienation of portions of Portion 39, i.e. of the subdivided erven of Portion 39.

35. The mere fact that the relevant conditions accompanying the approval of subdivision of Portion 27 have been included in the title deed of Portion 39 does not assist one in answering that question. It may be intended as nothing more than an obligation imposed on Fundeals (or its successor in title as owner of Portion 39) to become a member of the Akarana HOA and a restriction imposed on Fundeals (or its successor in title as owner of Portion 39) not to alienate Portion 39 without the prior written consent of the Akarana HOA.

36. I do not think that the two conditions would necessarily, as a matter of law, continue to apply to the subdivision of Portion 39. The conditions that would

apply to that subdivision would have been those determined by Drakenstein Municipality when the application for subdivision of Portion 39 was approved.

37. The matter need not however be debated further. The last sentence of Drakenstein Municipality's letter of 21 August 2001 states (as previously indicated) that "*[a]ll other conditions are still relevant and must be adhered to*".

38. It would, in the light of that sentence, be very difficult to sustain a contention that Drakenstein Municipality did not extend the restriction on the sale or alienation of Erf 27 to the subdivided erven of Portion 39.

39. What remains to be considered is whether the transfer of the common properties to Consultant would constitute a sale or alienation.

40. As the wording of paragraph (b) of the relevant title-deed conditions is "*sold or alienated*", it is apparent that "*alienated*" means something other than (merely) "*sold*". The word "*alienate*" is defined in section 1(1) of the Alienation of Land Act as meaning "*sell, exchange or donate*". If the joint liquidators of Fundeals were to transfer the common properties to Consultant without requiring payment of a purchase price by Consultant, that would constitute a donation. It seems to me that on any basis there would be an alienation of the common properties.

41. It cannot be said that the common properties vested in Consultant by virtue of the subdivision of Portion 39. No such vesting resulted from section 42 of LUPO. It is not uncommon for a developer to retain one or more of the erven in a subdivision. That is effectively what Fundeals did with the common

properties. It may have intended to transfer the common properties to Consultant, but as a fact it did not do so. The common properties are therefore owned by Fundeals (in liquidation), and it is incumbent on the joint liquidators to alienate them as part of the winding-up process.

Conclusion

42. In the premises, I am of the view that the consent of the Akarana HOA is required to effect the transfer of the common properties to Consultant (or to any prospective acquirer of those properties). The veto right given to the Akarana HOA by the Winelands District Council at the time of approving the subdivision of Portion 27 has been extended by Drakenstein Municipality to the subdivision of Portion 39, which includes the common properties.

43. Having said that, the Akarana HOA itself has no right to have the common properties transferred to the company formed by it. The title deed gives it a veto right, not a right of acquisition.

Eduard Fagan S.C.

Chambers
Cape Town
2 October 2023