

**REPORT IN RESPECT OF EXISTING STRUCTURE AND PROPOSAL IN RESPECT OF
THE RE-STRUCTURING OF THE LA BELLA VITA WINE ESTATE AND THE
REMAINING 6 PORTIONS OF 791/27**

1 INTRODUCTION

- 1.1 Client is the La Bella Vita Property Owners' Association ("**LBV-POA**").
- 1.2 We have been instructed by Mr Martin van Zijl, on behalf of LBV-POA, to express an opinion as to what (1) the legal requirements are for the structure of the La Bella Vita Wine Estate ("**LBV Estate**") and the whole of 791/27 ("**Akarana Estate**"); (2) what the existing structure is; and (3) to make proposals as to the manner in which the LBV Estate and the Akarana Estate would best be restructured.

2 SCOPE OF REVIEW

- 2.1 As part of our review, we have perused and considered the various documents made available to us which relate to the subdivision of 791/27 and 791/39 as well as the title deeds to the various subdivided portions of these properties.
- 2.2 Our comments in this document (including appendices) in relation to the Constitutions of the LBV-POA, the Akarana Master Home Owners' Association ("**AMHOA**") and the La Bella Vita Farming Association ("**Farming Association**") are based on the copies of the Constitutions handed to us. There is however uncertainty as to whether these drafts are the final drafts that were approved by the Boland District Municipality ("**Council**") in Council's letter of 10 July 2001, or whether they include the amendments of Council referred to therein. We are advised by Mr Van Zijl that Council has no copies of these Constitutions on file.

2.3 We have not been presented with the Conditions of Approval for the Subdivision of 791/27 nor with a Deed of Sale in respect of the sale of any of the portions arising from this subdivision. We accordingly cannot comment thereon.

2.4 We have also not reviewed in detail the material handed to us that relates to the dispute with the developers of the Kunnenberg Estate (a matter which we understand Mallinicks attorneys were advising client on) and we do not express any opinion thereon, save for our comments in 7.3 below.

3 CONDITIONS OF APPROVAL FOR REZONING OF 791/39

3.1 The Conditions of Approval for Rezoning of 791/39 are set out in **Appendix 1** hereto (“**Conditions**”).

3.2 We also set out in **Appendix 1** (1) the current position in relation to each condition, where relevant; (2) whether the condition has or has not been complied with (or where we have not been able to ascertain whether there has been compliance we have stated so); and (3) action required.

3.3 For your ease of reference, we repeat herein that there has not been compliance with Conditions 4, 6, 7, 9, 11, 14, 15, 17 and 32 and we have been unable to ascertain whether there has been compliance with Conditions 10, 12, 20, 21, 23, 24 and 27.

4 THE ASSOCIATIONS

4.1 The following Associations are referred to in the documents reviewed –

4.1.1 the AMHOA;

- 4.1.2 the Akarana Water User Association (“**Water Association**”);
- 4.1.3 the LBV-POA; and
- 4.1.4 the Farming Association.
- 4.2 We set out in **Appendix 2** the requirements of these Associations, save for the Water Association (see our comments in 5.1.5 below) in respect of *inter alia* formation, membership, purpose and object, levies and voting.
- 4.3 An organogram of the current and existing members of the AMHOA and the LBV-POA is set out in **Appendix 3** hereto.

5 PROPOSAL

After conducting our review of the documents referred to in 2.1 and after various consultations with Mr Van Zijl, we make the following proposals –

5.1 *Akarana Master Home Owners’ Association*

The AMHOA be retained and formally constituted on the following basis –

5.1.1 *Membership*

- 5.1.1.1 Membership will comprise all registered owners of erven and sectional title units resulting from the subdivision of 791/27 and any further subdivisions of portions thereof, including 791/39.
- 5.1.1.2 This is in compliance with the Conditions.
- 5.1.1.3 The existing and current members will be those entities set out in **Appendix 3**. It is a condition contained in each of these entities’ title

deed that it is compulsory to be a member of the AMHOA and therefore it will be possible to enforce membership.

5.1.1.4 The LBV-POA will become a member once it takes transfer of the common areas within the LBV Estate.

5.1.2 *Voting*

5.1.2.1 Each member would be entitled to 1 (one) vote per erf and/or sectional title unit registered in its name.

5.1.2.2 Alternatively, the voting rights of each member of the AMHOA could be determined proportionately by the ratio of each land owners property extent to the extent of the Akarana Estate (including the LBV Estate) as a whole, provided that for purposes of determining the votes of the members who are also LBV-POA members, the extent of the whole of the LBV Estate (i.e. 791/39) will be applied to the extent of the entire Akarana Estate (including the LBV Estate).

5.1.2.3 By allocating 100 votes between the 7 portions on the basis set out in 5.1.2.2 above, -

5.1.2.3.1 the owner of portion 36 (27,15 ha) would have 17 votes;

5.1.2.3.2 the owner of portion 37 (40.95 ha) would have 26 votes;

5.1.2.3.3 the owner of portion 38 (17.32 ha) would have 11 votes;

5.1.2.3.4 the owner of portion 40 (11.82 ha) would have 7 votes;

5.1.2.3.5 the owner of portion 41 (12.83 ha) would have 8 votes;

5.1.2.3.6 the owner of portion 42 (9.58 ha) would have 6 votes;

- 5.1.2.3.7 the owners, collectively, of the portions within 39 (38.27 ha) would have 24 votes.
- 5.1.2.3.8 a rounding difference of one vote would need to be allocated.
- 5.1.2.4 A further alternative could be that votes are allocated to the various properties on an agreed arbitrary basis. This would however require agreement between all parties as there would not be any objective basis upon which the votes would in this instance be allocated.
- 5.1.2.5 Each member (and, in the case of the members of the LBV-POA, the LBV-POA) will be entitled to appoint one representative to the committee of the AMHOA. It will, however, be a term of the AMHOA Constitution that any committee member can refer any matter to the members to decide by vote in general meeting.
- 5.1.2.6 The number of votes of the LBV-POA members of the AMHOA could be pooled and the Trustees of the LBV-POA will, in terms of the LBV-HOA Constitution, have the power to exercise these votes, on behalf of all the LBV-POA members, in their discretion.
- 5.1.2.7 We are of the opinion that in deciding the manner in which votes will be allocated to the members of the AMHOA, the principle that must be established is that every land owner (and, in the case of the LBV-POA members, land owners collectively) must have a meaningful vote at the AMHOA level and that no individual member can exercise control of the AMHOA without having to act in concert with another member.

5.1.3 *Business and Object*

- 5.1.3.1 The main business and object of the AMHOA will be –

- 5.1.3.1.1 to maintain, control and manage the common areas, facilities and amenities in respect of the Akarana Estate (including refuge removal, all common roads, paths, walkways and trails) for the mutual use and benefit of its members, but specifically excluding any common facilities and amenities falling under the jurisdiction of the LBV-POA;
 - 5.1.3.1.2 to control the architectural design and maintenance of buildings and other improvements on the Akarana Estate;
 - 5.1.3.1.3 to promote and control security of the entire Akarana Estate, including the LBV Estate, and to generally regulate access to and the use of the Akarana Estate;
 - 5.1.3.1.4 to promote, control, manage and improve the farming activities of the entire Akarana Estate;
 - 5.1.3.1.5 control and manage the water rights vesting in members or in the AMHOA;
 - 5.1.3.1.6 the promotion, advancement and protection of the communal and group interest of the members generally.
- 5.1.3.2 We propose that the day-to-day operational responsibilities that relate to common amenities, including security and refuge removal, be contracted out to LBV-POA. The rationale for this is (1) LBV-POA is currently carrying out these responsibilities and (2) security is of material importance given the fact that the LBV Estate is highly developed and accordingly it is important for the LBV-POA to retain control of security.

- 5.1.3.3 The LBV-POA can, on behalf of the AMHOA, levy the members of the AMHOA in respect of these services and collect such levies. The AMHOA will however contractually be liable to pay to the LBV-POA all amounts incurred by LBV-POA in providing these services should the members of the AMHOA be in default of the payment of levies.
- 5.1.3.4 The AMHOA will in effect have strategic oversight of all Akarana Estate related issues, including any future developments.
- 5.1.4 *Farming Committee*
- 5.1.4.1 The Farming Association will be disestablished.
- 5.1.4.2 The responsibility for the control, management and improvement of the farming activities of the entire Akarana Estate (including the agricultural land within the LBV Estate) will fall under the jurisdiction of the AMHOA.
- 5.1.4.3 A Farming Sub-Committee could be formed to oversee the farming activities which could be contracted out to a third party operator as is currently the case. It will be the responsibility of the Trustees to appoint the members of any such committee, who need not also be members of the AMHOA i.e. the farm manager could be a member of the sub-committee.
- 5.1.4.4 A member of the AMHOA could share in the profit/loss relating to the farming activities in the same proportion to which it contributes towards the farming levies.

- 5.1.4.5 The rationale for this proposal is that it is a Council Condition that all agricultural areas on the entire Akarana Estate be holistically farmed in accordance with a planting, maintenance and harvesting programme. The Constitution of the Farming Association does not make it compulsory for the owners of the 6 portions of 791/27 to be members of the Farming Association. It is furthermore not a title condition to the title deeds of these properties that they must be members of the Farming Association. It is however a title condition that they be members of the AMHOA. Therefore bringing farming within the AMHOA will obligate all members to partake in the farming activities of the AMHOA.
- 5.1.4.6 Drakenstein Municipality have also advised the LBV-POA, in their letter of 21 July 2005, that in accordance with their interpretation of the Conditions, the AMHOA is ultimately responsible for the farming operations of the whole of the Akarana Estate.
- 5.1.4.7 The AMHOA Constitution already provides that the trustees can make regulations governing farming activities. This power can be delegated to the Farming Sub-Committee, who can make regulations *inter alia* in respect of –
- 5.1.4.7.1 the manner in which the farming of the agricultural portions of the Akarana Estate will be controlled; and
- 5.1.4.7.2 the responsibility for the selling of the crops from each of the agricultural portions.
- 5.1.5 *Water Committee*
- 5.1.5.1 Reference is made in the title deeds of the portions of 791/27 and 791/39 to compulsory membership of the Water User Association.

However, there is no evidence that such an association has been established and approved and we have not been presented with a Constitution of the Water Association.

5.1.5.2 We therefore propose that the AMHOA take responsibility for the control and management of the water rights and related infrastructure pertaining to all properties within the entire Akarana Estate.

5.1.5.3 Mr Glazer, representing Dewgro (Pty) Ltd, has made representations that Dewgro is prepared to sell its water rights to the AMHOA or donate its water rights if other members are prepared to donate an equivalent amount in cash or water rights.

5.1.5.4 We advise that the AMHOA and the LBV-POA engage professional water consultants to advise in relation to the management and allocation of water rights and affairs on the Akarana Estate and the potential transfer of water rights to the AMHOA.

5.1.5.5 A Water Sub-Committee could be formed to oversee the control and management of the water rights and affairs. It will be the responsibility of the Trustees to appoint the members of any such committee, who need not also be members of the AMHOA i.e. a professional water consultant could be a member of the sub-committee.

5.1.5.6 Although it is a title condition to the title deeds to all of the properties within the Akarana Estate that it is compulsory for the owner thereof to be a member of the Water Association, it is also compulsory for each such owner to be a member of the AMHOA. Therefore

bringing the management and control of water rights within the AMHOA will also give the AMHOA jurisdiction over all owners in this respect.

5.1.5.7 The AMHOA Constitution already provides that the trustees can make regulations governing water rights pertaining to individual parties. This power can be delegated to the Water Sub-Committee.

5.1.6 *Levies*

The levies charged by the AMHOA will comprise –

5.1.6.1 a levy in respect of the services contemplated in 5.1.3.3 above;

5.1.6.2 a farming levy to relevant members;

5.1.6.3 a water levy;

5.1.6.4 a normal levy, if necessary, in respect of general expenses.

5.2 *La Bella Vita Wine Estate Property Owners' Association*

5.2.1 *Membership*

5.2.1.1 Membership will comprise all registered owners of erven and sectional title units resulting from the subdivision of 791/39 and any further subdivisions of portions thereof.

5.2.1.2 The existing and current members will be those entities set out in **Appendix 3**. It is a condition contained in each of these entities' title deed that it is compulsory to be a member of the LBV-POA and therefore it will be possible to enforce membership.

5.2.2 *Voting*

5.2.2.1 The LBV-POA Constitution currently provides that each owner of a residential erf has one vote and in practice this is applied as follows –

5.2.2.1.1 the owner of each of the Resort Zone II units has one vote;

5.2.2.1.2 the owner of each of the guest house has one vote; and

5.2.2.1.3 the owners of units within the sectional title scheme collectively have one vote.

5.2.2.2 We are instructed that this voting structure is accepted and in practice works.

5.2.2.3 An alternative voting structure would be to give each owner of an erf and/or sectional title unit one vote per erf and/or sectional title unit registered in its name.

5.2.3 *Business and Object*

5.2.3.1 The main business and object of the LBV-POA will be –

5.2.3.1.1 to maintain, control and manage the common areas, facilities and amenities within the LBV Estate for the mutual use and benefit of its members, but specifically excluding any common facilities and amenities falling under the jurisdiction of the AMHOA;

5.2.3.1.2 to control the architectural design and maintenance of buildings and other improvements on the LBV Estate. [Although this is also a function of the AMHOA, we feel it should also be controlled and managed at the LBV-POA level in respect of the LBV Estate];

5.2.3.1.3 the promotion, advancement and protection of the communal and group interest of the members generally.

5.2.3.2 In line with our proposal in 5.1.3.2 above, the day-to-day operational responsibilities of the AMHOA that relate to common amenities, including security and refuge removal, will be contracted out to LBV-POA. LBV-POA will therefore retain *de facto* control of these services.

5.2.4 *Levies*

LBV-POA will –

5.2.4.1 on behalf of the AMHOA, charge all members of the AMHOA a levy in respect of the services contemplated in 5.1.3.2 above and have the right to collect same;

5.2.4.2 charge a normal levy to its members in respect of general expenses.

5.3 *Farming Association*

The Farming Association will be disestablished and all farming activities on the Akarana Estate will be managed by the AMHOA. Refer to 5.1.4 above.

5.4 *Water Association*

5.4.1 It appears that the Water Association was never established.

5.4.2 The management of water rights and affairs will be brought under the jurisdiction of the AMHOA. Refer to 5.1.5 above.

5.5 *Drafting of Documents*

Should the members of the LBV-POA and the owners of the other 6 portions of 791/27 wish to implement the proposed structure set out above, we advise that the following documents be drafted –

- 5.5.1 A new Constitution of the AMHOA;
- 5.5.2 General conduct rules and regulations in terms of the AMHOA Constitution;
- 5.5.3 Farming related rules and regulations in terms of the AMHOA Constitution;
- 5.5.4 Water related rules and regulations in terms of the AMHOA Constitution;
- 5.5.5 A new Constitution of the LBV-POA;
- 5.5.6 General conduct rules and regulations in terms of the LBV-POA Constitution;
- 5.5.7 A management contract between the AMHOA and LBV-POA in respect of the management of the operational services;
- 5.5.8 An agreement between LBV-POA and the hotel in terms of which the hotel is appointed as the operator of the Villa rental pool.

6 ACCESS TO THE LBV ESTATE

We confirm that the members of the LBV-POA's right of access to the LBV Estate is protected by means of a servitude registered against the title deed to 791/38.

7 THIRD PARTY RIGHTS

- 7.1 We have reviewed the title deeds to the six portions of 791/27 and all of the erven within 791/39.
- 7.2 The title deeds make these properties subject, as well as entitled, to various reciprocal pipeline, furrow, dam, reservoir and road servitudes between these various properties. None of these conditions appear to be abnormal in any manner.

- 7.3 Further, we can confirm that none of the properties being portions of 791/39 are subject, in accordance with their title deeds, to any servitudes in favour of the Kunnenberg development. This includes 791/60 and 791/61 which comprise the roads within the LBV Estate. A deed of servitude may however have been concluded between the owner of 791/35, or such other adjoining land, and the owner of 791/60 and 791/61, namely Fundeals Sixteen (Proprietary) Limited, and remain unregistered against the title deeds to these properties.

Hofmeyr Herbstein Gihwala Inc.

27 July 2005