

## **ATTENDANCE REGISTER**

As per attendance register circulated and signed

## **WELCOME**

The Chairman, Mr Raimund Pouliart, welcomes all to the general meeting and introduces the following attendees:

- Judith van der Walt (“JvdW”) who will brief the meeting on the body corporate structure and matters arising therefrom;
- Simon Wooley from Nolans Forensics;
- Business Rescue Practitioner – Mr Paul Vorster – who will brief the second meeting to follow;
- Mr Carl Smit of Sandak-Lewin Trust who will attend to the administration of the Body Corporate going forward.

### **Purpose of this meeting:**

Body Corporate matters under guidance of Judith van der Walt as to where the Body Corporate is, what needs to be done to become compliant with new regulations

The Chairman hands the meeting over to Judith van der Walt (JvdW).

It is noted that JvdW is not involved in any matters pertaining to the business rescue and will only discuss sectional title matters relating to member units.

During the brief with the Chairman it became evident that the Body Corporate is not setup properly. The hotel is running the business of a hotel and units are made available to the hotel to manage. Sectional Title Schemes are governed by the act and very little of the provisions are being applied. The question is : what is the Body Corporate’s (BC) role in various issues, e.g. business rescue proceedings. There is no obligation on the BC to get involved in the hotel. There are however many examples of hotel businesses in Cape Town where the BC handles hotel operations. The Pezula Hotel BC is not doing anything. The hotel manages everything except the scheme in terms of the provisions of the Act.

This brings about questions such as: who maintains the common property? Should the hotel disappear, management of the common property will revert to the hands of the owners. It should have been in the hands of the BC (owners) but never was.

Pertinent questions pertaining the afore:

1. Does the BC have funds to maintain common property?
2. Who pays the Municipal bills, e.g. water, electricity?
3. Who pays insurance? If the units burn down, who will pick up the tab for that?
4. Is the insurance in the name of the BC?
5. Is the interest of the owners properly noted in the insurance policy?

The above are all functions of a BC and the hotel has a separate function with its own financial statements, duties, responsibilities, etc.

Members electing to be part of a rental pool can do this but, subject to the Sectional Titles Schemes Management Act, cannot interfere in the processes.

A BC is required to have an AGM annually with budgets reflecting what is required in terms of expenses. An auditor must be appointed and a manager to manage the scheme. Trustees are required to meet on a regular basis. These are all basic rules and must be applied. There are statutory duties that the BC must comply with.

The intention was, and notice issued, that this meeting was to be an AGM. There are however certain steps that need to be taken before the BC is ready to call its AGM. It does not exonerate members from the legal obligation to pay levies though as these were approved at a previous AGM.

Sandak-Lewin Trust (Carl Smit) has been appointed by the Trustees to take over the functions of management agent going forward. The firm has excellent ground level sectional title experience and this is a good step in the right direction. The trustees, together with Carl Smit, need to prepare a basic budget reflecting typical expenses. The Trustees also need to approach the business rescue practitioner to determine questions raised regarding insurance, the status of municipal accounts, etc. The Trustees have a duty to know exactly what accounts there are as well as the status of these accounts and what is happening with them.

The question is raised that, if the owners have contractual agreements in place with the hotel, and the suite owners pays levies to the BC to take care of all charges, can the hotel, as a member, be invoiced for levies? In the agreements it clearly states that the Hotel is responsible for the common property, municipal charges, etc.

Response: The BC has a statutory obligation to maintain common property. This obligation cannot be contracted out. As the hotel is a member of the BC, as with all other owners, the BC needs to determine the levy payable and not enter into an agreement with the hotel for payment of same. The hotel, as a member of the BC, has a statutory obligation. There is no distinction between the different owners forming members of the BC. If the hotel contracts with individual owners to maintain the suites, they can do so, but the BC must be a party to it. The BC is at present not a party to any such contracts. If the BC is to become a 3<sup>rd</sup> party to such agreements, the contracts need to be properly drafted with agreement that the BC is ultimately responsible for maintaining common property. This statutory obligation cannot be contracted out of. Should the hotel insist on this, however, the agreement must be proper in that the Hotel will hold the BC harmless.

Question: is the current contracts between hotel and owners in contradiction with or a violation of the Sectional Title Schemes Act?

Response: JvdW cannot comment on these agreements. The BC never entered into any agreement with the hotel dealing with management of property. If the hotel continues to operate, the BC needs to realise its statutory obligation to do as is set out in legislation. Whatever happens between hotel and owners, owners need to realise that, if paying any monies to the hotel, the owners are not exonerated from paying levies to the BC.

The Chair comments that, should the hotel close, it is not clear as to where the BC will stand with regards common property, power connections, garden services, etc. The details of these are not known to the Trustees.

The Trustees are advised to obtain as much information as is necessary from the business rescue practitioner to determine the current situation and to plan from there. Once this exercise is done, in conjunction with the management agent, proper budgets can be prepared and an AGM called. For

the BC to determine this, it needs to work with the hotel, operators and business practitioner. With regards individual agreements, owners are advised to obtain legal opinion.

Noted that the hotel is not owned by the operators managing the businesses thereof. The operations are owned by the company under business rescue, but it does not own the property.

Question is raised that there was no formal handover between the developer and the BC and the developer is long since no part of the process. Is there a way to rectify this?

Response: the Act makes allowance for steps to be taken, e.g. inaugural meeting, etc. The time for this is however long gone and the BC needs to start afresh. As the handover was never formally done, it is neither here nor there and needs to be dealt with now. There is no statutory obligation to include them now and the right to extend the scheme lapsed.

Question: the current situation is that there are business rescue proceedings. Is it a stumbling block or can it hold up the process with regards statutory work to be done on the BC?

Response: The BC needs to do the work of establishing what the current financial situation is with regards e.g. Municipality. The trustees need to work with the business rescue practitioner to see what is happening with the hotel. This is purely administrative work. The BC cannot stop functioning because the hotel is operating. This is where Nolans Forensics steps into the picture.

Simon explains that the process is not complex. There is an Act with a current situation where there are three generic parties : (1) hotel; (2) members as owners and (3) the BC. The BC is an infant and not a mature functioning BC. The fact that the developer never handed over is immaterial. There is an administrative process that now needs to happen and the only possible hurdle is information. The BC largely knows what needs to be attended to and it was agreed that it was premature to hold the AGM today. Compliance needs to be addressed for the BC to function properly.

Questions to be answered by the BC:

- Are accounts in the correct name, e.g. insurance, municipality;
- What is common property?
- Are there ancillary liabilities?

There is operating assets under business rescue which means there is risk that cannot be ignored. Prior to business rescue the BC could argue it had no running costs. Correct governance applied from the start would have made provision for running costs, even if it was zero. With business rescue in place there is a foreseeable risk that the business rescue proceedings do not result in a successful exit and could convert into liquidation. If liquidation takes place, the BC needs to be prepared to take over the entire operations and a budget needs to be in place for that. The hurdle going forward is that, as soon as possible, the various parties need to engage, information accessed and the BC become compliant. The practical issues are addressing the stumbling blocks e.g, at the last meeting with the Chairman it became evident that there are owners who understood that they purchased parking with their units. The question : did they purchase exclusive use or is it common property? How was this formalised? There are several foreseeable conflicts that Nolans Forensics does not want to go into detail about, e.g. parking and room revenue agreements and nothing to do with the BC.

- What is common property?
- Who is paying the expenses?

If business rescue practitioner is unable or refuses to give access to information, it could be problematic. The sales agreements made provision for the developer to amend the BC rules. This did not happen. The BC is operating from a standard set of rules. The RRA makes provision for parking.

Parking is however not regulated or addressed in the standard set of rules. There are no parking listed on title deeds and therefore the subject of the sale must be exclusive use. There are no proper rules, therefore there are no parking, only common property. Once the BC is compliant, it needs to address these snags. There are 20 parking bays but an alignment issue. There are contractual arrangements between the hotel and each owner to have access and the parking are on common property. Either the BC needs to align with the RRA's or some form of negotiation needs to take place to remedy and rehabilitate the parking arrangement.

The BC could become a creditor in the business rescue proceedings, e.g. Municipal accounts. If it is not in the name of the BC, it needs to be sorted. The BC is therefore an interested party. The BC going forward in the business rescue proceedings is a third party thereto and should be represented at proceedings. It should engage independently with hotel and the business rescue practitioner. Today's meeting focuses mainly on the compliance issues however and it is crucial that, whatever is decided at dispute level, will have a knock-on effect on the BC. The BC needs to skip through the 10 years of operations and get up and running as soon as possible.

For the BC to meet its obligations, it must budget which is not difficult. What about revenue? The BC budgets its income according to levies receivable. Owners pay these levies. The hotel's underlying asset company needs to pay this levy. Who collects payments of levies from the asset company?

The BC has an obligation to collect levies. The stumbling block is that the hotel operating company no longer owns the asset. The hotel itself has no assets and the property now resides within the Buffshelf company. Buffshelfco is therefore also an owner and member and needs to be addressed directly. Carl Smit is aware of what the levies are and will be actioned to collect those levies.

More concerning now is the obtaining of information. From the first meeting with the Chair it became evident that the blind spot is what should have been happening on this common property.

The Chair explains that, going forward, the Trustees appointed JvdW to assist with the compliance matters and the new administrators are Sandak-Lewin Trust (Carl Smit). All information required will come through the new management agents and the trustees will follow with additional information in preparing the budgets and plan and action the AGM accordingly.

The appointed managing agent will ensure that the day to day building up to annual compliance develops and JvdW and Nolans Forensics will deal with the strategic legal issues. This is largely a process of engagement by the various parties to obtain information and to assist in the process. At the next AGM to be called there will be snags and there will be issues. At this stage, the business rescue is not in sync or ahead or behind and, as members, decisions need to be taken. The trustees will table the issues, discuss and move forward.

With regards annual financial statements, the fiscal year end was February 2017. The trustees were not in a position, due to information to be gathered, to draw up a budget. Therefore, the levies raised for the previous year will automatically continue until a budget can be revised and adjusted.

Nolans Forensics explains that the BC has no cost provided for insurance or common property in its annual financial statements. The annual financial statements are factually correct but statutory incorrect. There is a large piece of common property running at a zero cost which is not possible. This is the first real hurdle to sort. The flipside is that there is revenue in the form of levies and the revenue is being collected. There is however a 51% owner who is not contributing yet and this needs to be remedied.

The afore summarises the basis of the issues and who were appointed to sort the various matters.

Comment: there are two potential scenarios:

1. The business rescue practitioners need to prove that the owners can come up with a plan to make the hotel viable.
2. The BC needs to take care of its own affairs with a potential issue with the hotel but also end up with a legal issue that has nothing to do with business rescue.

Question: What happens to the BC if the expenses are not covered by the income?

Nolans Forensics explains there are two parallel processes. The BC operates on a day to day basis and is excluded from private disputes. There are common linkages.

- 1) There is common property and the hotel operates on common property registered in the name of the BC;
- 2) Insurance policy is registered in the name of the hotel and not the BC;
- 3) Municipal accounts are not in the name of the BC.

The issues could resolve themselves through the business rescue process whereby the hotel aligns its interests and move forward. If they not align, there could be parallel legal processes. In terms of the BC very specific to Sectional Title Scheme Management Act and not about hotel contracts.

Question: What interest would the business rescue practitioner have in not cooperating?

Response: the BC could become a very big debtor in the books. The municipal accounts were agreed to be paid by the hotel and individual owners are submitting same to the business rescue practitioner. The business rescue practitioner can again claim the rates and taxes from the BC as well as the insurance. The longer the process continues, the BC would have another big expense which it should not have – being legal expenses. The sooner the BC engages with the business rescue practitioner, the sooner the BC can be extricated from the battle.

The function of the BC is entrenched in value and protecting its underlying collateral. It needs to separate itself from the business rescue proceedings. The problem is that the core asset of the entity under business rescue is an operating contract. The operating contract has a nebulous matrix which includes the common property which, in turn, is an asset of the BC. The opinion is that it is preferred that professionals engage coldly, clinically on facts and dissolve the operations and separate issues but there is a cross-contamination at present. There is a battle of one problem in one court and a different battle in another.

The end goal is for the BC to take of what it is obligated to take care of, to take care of the statutory obligations.

JvdW cautions the BC against an agreement whereby the BC will be held harmless if the hotel takes over its functions. Reason: the BC has statutory obligations. It is emphasised that owners should not look at the BC to resolve their problems. The owners have contracts with the hotel operator. If there are issues outside the scope of the BC functions, the owners need to address this with the hotel operator direct. There could be a huge conflict between owners contracted with the hotel and owners as members of the BC.

The outcome of the business rescue proceedings cannot resolve what will become key engagement with the hotel. If the BC is compliant and takes responsibility of its assets, ownership of common property and obligation to maintain, collect funds, etc., the contingent responsibility on the trustees are to collect these costs from the operating company. The operating company is using the property to derive income and the trustees need to benchmark what the levy / value is.

The BC needs to pick up all costs and agree on a contribution model. Measurement of value is crucial. The BC has not functioned properly for a long time and must get a mechanism to measure what costs are and what contributions should be. There is no correct answer or formula for this, it is a negotiating process.

Three committees at present:

1. Trustees
2. Financial Committee
3. Steering Committee

The steering committee operated separately from the BC functions. The BC has a commercial interest in the scheme and the trustees need to protect the BC.

Business rescue practitioner comments that it could be beneficial for the 3 parties to get together and get into sync. If not, there could be expensive legal costs and negotiation of a tri-partite agreement is recommended.

Noted that a tri-partite meeting is an issue. The BC never met the third party (referencing Buffshelfco) although they are represented on the steering committee, the BC and the business rescue proceedings.

Nolans Forensics agrees as, engaging with the business rescue practitioner (1) relates to half the balance sheet, albeit a negative expenditure and (2) revenue side through Sandak-Lewin Trust (Chris). The BC acts on behalf of its members of which the third party is a 51% passive / silent member. The third party needs to take an active role. The fact that they are a debtor of the BC means they can engage and resolve and/or engage and collect.

The BC is not engaging with Buffshelfco as part of its engaging of the hotel, but engaging Buffshelfco as a member and engaging with the business rescue practitioner as operator of a common property.

JvdW recommends that, in terms of Sectional Title, the BC needs to look at registering the scheme. The very contentious issue is the parking bays and members are invited to speak to her in this regard. Members are also advised not to get rid of agreements of sale and these will be required to determine who purchases parking bays. Members are also cautioned to keep all supporting documents.

Parking bays are reflected in sales agreements and not defined in RRA's. parking is a common property issue and the developer sold units with parking bays but this was not registered as such.

The business rescue practitioner has, on record, between 8 and 11 copies of agreements and requires the balance to be able to determine the situation in that regard.

The Chairman notes that parking was defined in agreements and, in the case of presidential suites, two parking bays would be made available during occupancy. It was not an actual allocation of parking bays. This might be a distractor in the process.

Noted that all agreements should have been changed to align with the hotel and operations and therefore the contents of current agreements are not vital to the issues at hand.

Noted that Nolans Forensics states that it is a practical problem as there are 20 parking bays and 80 owners. Need to determine how they were allocated. This could be a practical issue that could become problematic. The BC has parking and it has members. It therefore needs to come up with its own mythology regarding this. On the map tabled, on the golf course side, there is a section of parking being used by the Hotel. There is also a section below the administration building on the golf course

that is not reflected on the diagram. This is on a separate piece of land and it needs to be investigated whether this is common property.

Parking below hotel was intended for use of occupants of hotel and currently this is being used by staff and half taken up as storage. There might be an agreement with the golf club to use their parking but this is not a certainty. This is an additional complication that needs to be sorted.

Effectively the second phase of the forensic investigation is into expenditure. Part of this process is to ascertain what is common property, how this is defined, sectionalised and the costs.

The Chair enquires from the business rescue practitioner whether, in the financial records of Pezula Hotel & Spa (Pty) Ltd, he has noticed any payments by the hotel to the Home Owners Association of Pezula. This could reflect that they are possibly renting from another Home Owners Association bordering on the development.

It is noted that this is referred to as “The Club” and owned by a Home Owners Association. The business rescue practitioner will endeavour to obtain clarity on the payments, if any.

Nolans Forensics: in determining with certainty what is common property may lead to additional matters pertaining to rights of access, articulation, water, power, etc. During this fact gathering process it will be determined whether there are any servitudes, how other home owner associations accesses property, how and where this is accessed, whether there are costs association and who the parties are to any such agreements. It may be that there is a situation where the hotel is a party representing the BC. If this is the case, the BC can then step up and start negotiating with the HOA involved, etc.

It is noted that there is a Share Block scheme which uses the common property, swimming pool, etc. The Private Residence Club also accesses their units via the hotel reception and part of the fact gathering process will include assessing whether PRC uses common property to access the units.

Priority is sorting the compliance and governance aspects of the BC and thereafter to engage with all neighbours and negotiate relationships with them. For this to happen, the BC needs to be credible and compliant.

Agreed that the levies will stay the same as the preceding year and levy invoices are to be issued accordingly. This status quo will remain until as a proper budget is prepared and the BC is able to call an AGM. Levy invoices are therefor to be issued shortly by Sandak-Lewin Trust and will be payable immediately. Invoices for difference between levy invoice now issued and approved budget will, at the time of approval of the budget, be issued to members for immediate payment.

Note: the business rescue practitioner spoke to insurers who agreed to add BC as a beneficiary to the insurance policy. Risk to trustees: members can hold the trustees personally liable if anything happens due to no statutory compliance. Under the new policy, the BC will have the right regarding allocation of insurance claims paid.

The Chairman thanks all for attending and the meeting is closed at 12h05.