

**ADJUDICATION ORDER IN TERMS OF SECTION 54
OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT NO.9 OF 2011**

Ref: CSOS314/FS/21

IN THE MATTER BETWEEN

VICTOR MANUEL FERNANDES DOS SANTOS

APPLICANT

And

LAKEVIEW BODY CORPORATE

RESPONDENT

ADJUDICATION ORDER

EXECUTIVE SUMMARY

- Relief applied for in terms of the CSOS Act:

Section 39(4) In respect of meetings

(a) an order requiring the association to call a general meeting of its members to deal with specified business.

- Date Adjudication conducted: 11 January 2022.
- Name of the Adjudicator: Thandeka Qwabe.
- Order: **REFUSED.**
- No order as to costs.

INTRODUCTION

1. The Applicant is Victor Manuel Fernandes an owner of unit 3 at Lakeview Body Corporate, which is situated at Melt Brink Street, Sasolburg, Free State .
2. The Respondent is Lakeview Body Corporate a legal person in terms of the provisions of the Sectional Titles Schemes Management Act No.8 of 2011(the STSMA) which is situated at Melt Brink Street, Sasolburg, Free State.
3. This is an application for dispute resolution in terms of section 38 of the Community Schemes Ombud Service Act No. 9 of 2011 (the CSOS Act). The application was made in the prescribed form and lodged with the Community Schemes Ombud Service (the CSOS).
4. The application seeking relief in terms of section 39 of the CSOS Act, is in respect of-
Section 39(4) In respect of meetings
(a) an order requiring the association to call a general meeting of its members to deal with specified business.
5. This matter is adjudicated in terms of the CSOS Act and Practice Directive on Dispute Resolution, 2019 as amended and more specifically the amended Practice Directive dated 23 June 2020 which provides under paragraph 8.2: - “Adjudications will be conducted on the papers filed by the parties and any further written submissions, documents and information as requested by the appointed Adjudicator”. The parties were requested to make written submissions on 15 November 2021. The adjudication was conducted on 11 January 2022 and an order is now determined.

PRELIMINARY ISSUES

6. None.

RELEVANT STATUTORY PROVISIONS

7. Section 1 of the CSOS Act defines-

- "community scheme" as "any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional titles development scheme, a share block company, a home or property owner's association, however constituted, established to administer a property development, a housing scheme for retired persons, and a housing cooperative and "scheme" has the same meaning."
- "dispute" as "a dispute in regard to the administration of a community scheme between persons who have a material interest in that scheme, of which one of the parties is the association, occupier or owner, acting individually or jointly."

8. Section 38 of the CSOS Act provides-

"Any person may make an application if such person is a party to or affected materially by a dispute".

9. Section 45(1) provides-

"The Ombud has a discretion to grant or deny permission to amend the application or to grant permission subject to specified conditions at any time before the Ombud refers the application to an adjudicator."

10. Section 47 provides-

"On acceptance of an application and after receipt of any submissions from affected persons or responses from the applicant, if the Ombud considers that there is a reasonable prospect of a negotiated settlement of the disputes set out in the application, the Ombud must refer the matter to conciliation."

11. Section 48 (1) provides-

"If the conciliation contemplated in section 47 fails, the Ombud must refer the application together with any submissions and responses thereto to an adjudicator."

12. In terms of Section 50-

"The adjudicator must investigate an application to decide whether it would be appropriate to make an order."

13. Section 51 provides for the investigative powers of the Adjudicator:

- “(1) When considering the application, the adjudicator may-
- (a) require the applicant, managing agent or relevant person-
 - (i) to give to the adjudicator further information or documentation.
 - (ii) to give information in the form of an affidavit or statement; or
 - (iii) subject to reasonable notice being given of the time and place, to come to the office of the adjudicator for an interview.
 - (b) invite persons, whom the adjudicator considers able to assist in the resolution of issues raised in the application, to make written submissions to the adjudicator within a specified time; and
 - (c) enter and inspect-
 - (i) an association asset, record or other document.
 - (ii) any private area; and
 - (iii) any common area, including a common area subject to an exclusive use arrangement.”

14. The Respondent or affected person failed to provide a response to the CSOS notice in terms of section 43. Accordingly, the dispute is therefore referred directly to Adjudication in terms of section 48 of the CSOS Act read with Clause 21.5.7 of the Practice Directive on Dispute Resolution. The Ombud referred the application together with any submissions and responses thereto to an Adjudicator on 14 October 2021.

SUMMARY OF RELEVANT EVIDENCE

15. Applicants Submissions

- 15.1 The Applicant erected a braaier inside his yard. The Trustees of the Body Corporate then informed him that he was not allowed to erect a braaier inside his yard due to it being common property and that he had to obtain permission from the Body Corporate.
- 15.2 Due to many other units installing and erecting structures in their yards and never obtaining permission from the Body Corporate (proof hereof was requested but was not provided), he did not know that approval had to be obtained as he does not remember approving the installation of structures for the other units at general meetings or via round robins.

- 15.3 He then wanted to prevent a dispute with the Trustees of the Body Corporate and requested permission to continue with the installation of the braaier. The Trustees refused to provide him with permission to proceed.
- 15.4 He then visited AV Theron & Swanepoel Attorneys for advice on the way forward as he felt that it is unfair to not approve the installation of the braaier, but many other units have installed swimming pools, carports etc.
- 15.5 The Trustees of Lakeview Body Corporate then sent him an email dated 8 July 2019 which has been submitted into evidence to break down and remove the braaier.
- 15.6 AV Theron & Swanepoel Attorneys then drafted a letter dated 16 July 2019 which has been submitted into evidence to the Trustees of Lakeview Body Corporate.
- 15.7 The Trustees of Lakeview Body Corporate then sent out a circular dated 18 July 2019 which has been submitted into evidence to all owners only providing owner with 7 days to complete and send back. According to the STSM Act, a Special Resolution is required for this approval, having to provide all owners with 30 days to complete and send back. This was not handled in line with the STSM Act by the Trustees of Lakeview Body Corporate.
- 15.8 The Trustees of Lakeview Body Corporate also replied to the letter from AV Theron & Swanepoel Attorneys dated 18 July 2019 which has been submitted into evidence . The Trustees requested 60 days to meet and discuss the matter.
- 15.9 AV Theron & Swanepoel Attorneys then replied in a letter dated 6 August 2019 which has been submitted into evidence. The Trustees of Lakeview Body Corporate then replied in a letter dated 19 August 2019 which has been submitted into evidence.
- 15.10 It was requested that he submits his application to erect a braaier in a letter dated 27 August 2019 which has been submitted into evidence. The Trustees then discussed this application at a trustee meeting held on 12 September 2019.
- 15.11 The Trustees then provided him with a letter signed after the trustee meeting held on 12 September 2019 which has been submitted into evidence to inform him that the installation of the braaier is rejected by the Trustees. The Trustees do not have

the authority to approved or reject any common property improvements of installations, this must be taken to the owners to be voted on at a Special General Meeting. The correct Resolution wording must be done and provided to all owners, the correct days' notice must be given.

- 15.12 AV Theron & Swanepoel Attorneys then requested a round table meeting with the Trustees Lakeview Body Corporate on 3 October 2019 and followed up on 14 October 2019 which has been submitted into evidence. The Trustees of Lakeview Body Corporate arranged a general meeting with all owners dated 17 October 2019 which has been submitted into evidence. Again, the required notice as per the STSM Act for Special Resolutions were not given.
- 15.13 A round table meeting was held between AV Theron & Swanepoel Attorneys and the Trustees of Lakeview Body Corporate. AV Theron & Swanepoel Inc again referred to their letter dated 16 July 2019. The Trustees of Lakeview Body Corporate did not follow the correct procedures on the mentioned items. AV Theron & Swanepoel Attorneys suggested that due to other structures already being installed on common property, that exclusive use be considered or that all structures must be remove (if the correct procedures as per the STSM Act were not followed). The Trustees of Lakeview Body Corporate mentioned that the braaier is an insurance risk and that the owner must submit proof that it isn't an insurance risk.
- 15.14 The Trustees sent a letter to AV Theron & Swanepoel Attorneys dated 1 November 2019. Once again, the Trustees rejected the installation and not the owners. This cannot be a trustee decision. AV Theron & Swanepoel Attorneys requested the braaier specifications from the Trustees of Lakeview Body Corporate. The Trustees of Lakeview Body Corporate provided the braaier specifications 5 December 2019.
- 15.15 AV Theron & Swanepoel Attorneys send an email to the Trustees of Lakeview Body Corporate dated 6 December 2019. The Trustees of Lakeview Body Corporate replied to the letter dated 12 December 2021 on 9 December 2019.
- 15.16 AV Theron & Swanepoel Attorneys a letter to the Body Corporate on 11 December 2019. The Trustees requested that this matter be further discussed in January 2020.

The Trustees of Lakeview Body Corporate only replied to the email of AV Theron & Swanepoel Attorneys on 28 January 2021.

16. Relief sought by the Applicant

- 16.1 That a Special General Meeting in terms of the STSMA be held to approve or disapprove the application to instal the braaier. If not approved, then, the Applicant requests the Body Corporate to provide him with proof of all structures including pools approved in terms of the STSMA by the body corporate not the trustees.
- 16.2 A Managing Agent be appointed by the Body Corporate, as Body Corporate is not being managed in terms of the STSMA.
- 16.3 The Body Corporate to consider converting all yards to exclusive use areas, otherwise the Body Corporate has to attend to the upkeep of all yards.

17. Respondents Submissions

- 17.1 Lakeview Body Corporate, Sasolburg consists of 33 units. The Trustee board members (5) is managing since 2018 and one member moved out and resigned 04 August 2020. A new person was nominated to assist technical to one of the trustee members on gate electronics, electric fence, and intercom system.
- 17.2 The Applicant is demanding to have their block painted before the one at the entrance. He procured a dog born 1 November 2017 without application and approval until it was brought under the trustees' attention and the documentation was submitted to the trustees on 11 July 2019 after 2 years of bridging the rule.
- 17.3 He installed surveillance cameras during 2019 without application and approval which invaded occupant's privacy on the common property.

- 17.4 After the paint project on 01 April 2019, he erected a stoop roof to replace the unsafe neglect roof in a different size and was stopped to submitted drawings and to apply for approval to proceed and was issued a power of attorney to proceed.
- 17.5 He mentioned to the draftsman that they want to close-in part of the front stoop and require drawings in April 2019, and he was advised that he is not allowed to make changes to the outside of the building he also wanted to install a firewood burner or a gas burner on the stoop in May 2019 and the Lakeview trustees consulted with a draftsman to visit the unit with regard to chimneys.
- 17.6 He applied to install precast walls on 11 April 2019 to enclose part of the common property as most of the units do and approval was granted.
- 17.7 He informed Lakeview trustees that he is going to close in part of the stoop on 6 June 2019 and add a fireplace and was directed to the Municipality or a draftsman. Drawings were received and handled by the trustees and changes were required and the necessary application and approvals was handed over in writing with the power of attorney on 12 Sept 2019.
- 17.8 Parking in front of garages is not allowed due to the fact that there are parking spaces for vehicles. He installed flood lights without application and approval on outside buildings in early 2021.
- 17.9 The Applicant had the removeable Precast braai on the common area which was not a fixed feature, and his front garden consists of cement blocks and stones and some shrubs on the side. Each owner is responsible to maintain his own front and back yard as per the Lakeview Rule 5.
- 17.10 On 2 July 2019, it was noticed that a builder was cleaning around a build-in braai on common property and immediately the owner was called to find out what was going on because no application was received (Unauthorised installation of permanent build-in braai on common property without a written document to apply for approval or disapproval by Lakeview trustees). Lakeview rules 5 and 15 stated that no changes to be done without written application to body corporate. The owner is bridging the rules and it should take it down.

- 17.11 To manage the common property successfully, owners and occupants need to adhere to the rules. The owner on Unit 3 is bridging the rules most of the time and this building of the braai was not just something small to overlook. The matter was forwarded to the trustees and a decision was made to go to each person to indicate if they would want a braai in their front common spaces. Most of the people use portable braai and were not in favour of a build-in braai. Some owners have a master braai installed on their stoop with chimney and other have them in their court yards. The Applicant was given the opportunity to go to each owner to get their consent but chose not to do so. The other owners in 1999 build on common ground with signature from all owners.
- 17.12 The Respondent submits that the Applicant did not apply in writing to make changes to his building but also not to do changes to the common property. The Trustee did go out to owners to get their decision on to have a braai built in or not. The majority votes were to remove the braai. The draftsmen's name was used as if he gave permission to build on Lakeview common property which is not acceptable. Enough time was granted to the Applicant to take down the braai.
- 17.13 The Respondent understands that no municipal drawing is required to erect a braai of that size, but Lakeview Body Corporate have rules that need to be adhered to. The Applicant was informed by another owner that if he takes long enough with this matter, Lakeview will give in. This is not the way forward. Lakeview wish to resolve this in the correct way.
- 17.14 From the lawyer's letter they mentioned the maintenance of a garden, there is no garden only stones the front garden is enclosed and the maintenance is for the owner, or he can have the wall removed. Lakeview will not convert common property to exclusive use. The owner can do so by applying in writing to inform Lakeview that they consider doing so for their own cost.
- 17.15 Lakeview's trustees are capable to manage the complex very well and there is no need to spend additional money on a managing agent. The Body corporate never received complaints that it is not managed properly. It is those bridging the rules that

find fault with management. Sectional Title Scheme Management rules is consulted when necessary.

- 17.16 Lakeview have clean audits and the upgrade of neglected building is moving as per budget which is proof enough that the complex is operating extremely good. The Applicant want proof of structure and swimming pools, long before the trustees time and not on the filing available in the office. He is welcome as a trustee member to investigate to get the proof.
- 17.17 No complaints were received in the past 3 years against the trustee members. Their money is paid, they adhere to the rules and go out of their way to save money for the complex in putting their time in fixing what is broken.
- 17.18 The only complaint is that the Applicant is using his appointment as member of the trustees to get away with not following the rules. Everybody must adhere to the rules, there is no exception. It is a major concern if trustee members not adhering to the rules. The Applicant is making promises to owners that he will take care of their application even if their levies are not up to date, and the issue is not discuss with all the trustees.

18. Relief sought by the Respondent.

- 18.1 Lakeview only wants respect and adherence of Conduct Rules by all owners and occupants.
- 18.2 The only remedy Lakeview can see is if the outcome will be to have the braaier removed, as the owner did not adhere to the rules, and he tried to misuse his position as Trustee to do what he wants to do without prior application and approval.
- 18.3 Lakeview Trustee members would like to see a firm and definite decision to have the braai removed because of the uncalled-for route the owner followed to have a built-in braai without obeying the rules to apply to the trustees and knowing for all the years he lives at the complex that it is not going to be approved.

- 18.4 Should it be so important for owners to have built-in braai areas for each block, suggestions could be made to the Trustees to add to the 10-year plan to build braais in the common area that could be used by all.

EVALUATION & FINDING

19. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.
20. The general rule is that only evidence, which is relevant, should be considered. Relevance is determined with reference to the issues in dispute. The degree or extent of proof required is a balance of probabilities. This means that once all the evidence has been tendered, it must be weighted up and determined whether the applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities.
21. The evidence reflects that it is common cause that the built-in braai has been constructed on common property. It is further common cause that the area is not an exclusive use area hence the relief sought by the Applicant and further that the built-in braai was constructed without approval hence the post construction application dated 27 August 2019.
22. There are rules that are applicable in terms of the STSMA when an owner wishes to construct on a common property. The evidence is that the Respondent sought advice from Paddocks on how to handle the current situation. The Respondent elected to vote on creating and conferring rights of exclusive use by conduct rule for unit 3 and whether the Applicant can keep the built-in braai as per the correspondence dated .
23. Section 10 (7) of the STSMA states, **“A developer or a body corporate may make management or conduct rules which confer rights of exclusive use and enjoyment of parts of the common property upon members of the body corporate.”** Section 10 (8) further states, **“The rules contemplated in subsection (7) must—(a) include a layout plan to scale on which is clearly indicated—(i) the locality of the distinctively numbered exclusive use and enjoyment**

parts; and (ii) the purposes for which such parts may be used; and (b) include a schedule indicating to which owner each such part is allocated.”

24. The evidence reflects that on 18 July 2019 owners were required to vote on a Special Resolution by round robin on the two issues to keep the built -in braai and register the exclusive area registration and deduct the area from the common grounds via the municipality and deeds office and all cost will be for the owner or remove the braai in enclosed common area remove. The owners rejected the proposal to keep the built-in braai, and he did not accept the outcome. The Applicant was instructed to remove the built- in braai but he has not done this.
25. Section 6(9)of the STSMA provides “**A body corporate or an owner who is unable to obtain a special or unanimous resolution may approach the chief ombud for relief.**” The owners voted on the issue that the Applicant had raised, and it was not in the Applicant’s favour the recourse available to the Applicant is to invoke section 6(9) of the STSMA in regard to the exclusive use area.
26. Regulation 4(1) of the STSMA under Annexure 2 provides, “**The owner or occupier of a section must not, without the trustees’ written consent, mark, paint, drive nails, screws or other objects into, or otherwise damage or deface a structure that forms part of the common property.**” As mentioned previously the built- in braai was constructed on a common property. It is for this reason that I believe that the Applicant sought approval from the Trustees after advice from his Attorney to do so , the request submitted is dated 27 August 2019. An outcome was communicated to the Applicant which he does not accept. The Trustees provided a reason for the rejection in their rejection letter dated 12 September 2019 which was non -compliance with the process.
27. It is not clear to me in the rejection letter dated 12 September 2019 if the “consent of the body corporate” referred to is meant to be trustees as the application was made to trustees and it is signed off by the trustees and it is only the trustees who are empowered in terms of Regulation 4(1) of the STSMA to decide and not the members of the Body Corporate on the issue.

28. The Applicant is in my view mistaken if he is of the opinion that the owners must decide if he should keep the built -in braai or not because consent should have been obtained from the trustees first and if they reject that application as it appears in this case than he has to remove it if so instructed, again as is the case here. I cannot rule on what the Applicant wants as alternative if the first relief is not sought as he will have to follow the process of requesting information available at the scheme, but I did note the Respondent state that some of the information that the Applicant seeks was before their time and does not exist.
29. The Applicant further wants a managing agent to be appointed to , the Adjudicator does not have powers instruct the body corporate to appoint a managing agent. Regulation 28(5) of the STSMA provides **“The body corporate may, if trustees so resolve, and must if required by — (a) a registered mortgagee of 25 per cent in number of the primary sections; or (b) a resolution of members, appoint a managing agent to perform specified financial, secretarial, administrative or other management services under the supervision of the trustees.”** It is clear that such a decision can only be made either by the trustees or by ordinary resolution of the body corporate.
30. Since the developer did not create exclusive use area it is the body corporate who may make management or conduct rules which confer rights of exclusive use and enjoyment of parts of the common property upon members of the body corporate and this can be achieved by taking a special resolution, an Adjudicator cannot direct members of the body corporate to do this as has financial implications for members .
31. It is my view that the Applicant has not proven his case on a balance on probabilities and the application is accordingly refused.

ADJUDICATION ORDER

32. In the circumstances, the following order is made:
- 32.1 The application accordingly is refused.
- 32.2 No order as to costs.

RIGHT OF APPEAL

33. Section 57 of the CSOS Act, provides for the right of appeal-

- (1) An applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law.
- (2) An appeal against an order must be lodged within 30 days after the date of delivery of the order of the adjudicator.
- (3) A person who appeals against an order, may also apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal.

DATED AT DURBAN ON 28 JANUARY 2022.



T.P QWABE
ADJUDICATOR