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## **COMMUNITY SCHEME OMBUD SERVICE ACT NO 9 OF 2011**

On the 7th of October 2016 the Sectional Title Schemes Management Act (8 of 2011) (“the Schemes Management Act”) and the Community Schemes Ombud Service Act (9 of 2011) (“the Ombud Service Act”) were proclaimed.

The two Acts work in conjunction to improve the regulation of Sectional Title Schemes, Share Block Schemes and Home Owners Associations among others.

### Community Scheme Ombud Service Act No 9 of 2011

Many people in South Africa live in housing schemes where the use of and responsibility for land and buildings is shared.

Examples include sectional title development schemes, share block companies, home or property owners' associations, housing schemes for retired persons (including those involving life rights) and housing co-operatives

The Act establishes the Community Schemes Ombud Service (“the Ombud Service”) and the office of the Chief Ombud.

The Ombud Service exists to regulate, monitor and promote good governance in Community Schemes by codifying the standards of care expected of Scheme Executives and specifically by providing a complaints and dispute resolution service available to scheme members. The Ombud is empowered to grant relief not just to owners in a scheme but also to occupiers and consequently it will benefit owners/landlords as well as tenants

In terms of the regulations to the act the fee payable at application is R50 while the fee payable for adjudication is R100. The fees will have to be secured in advance. Copies of the scheme’s governance documents provided by the Ombud Service will be charged at R8 per copy. The regulations further provides that any person or category of person whose monthly net household income is below R5 500 are entitled to 100% waiver of application and adjudication fees and any person who may not qualify may lodge an application for a discount and or waiver for consideration by the Chief Ombud

Ombud services will be largely self-funded. Apart from the R40 million allocated by government to establish the body, the Ombud will be available at a minimal administrative fee and will be funded by a small percentage of the schemes’ levy payments.

The Levy formula as expressed in chapter three of the regulations to the Act, is such that each unit shall be liable for “the lesser of R40 or 2% of the amount by which the monthly levy charged by the scheme exceeds R500”

Units with monthly levies of R500 per unit or less are therefore entitled to 100% waiver. Once the levy payment exceeds R2 500 the fee will be capped at R40

These fees are payable by the scheme to the Ombud quarterly and shall be collected as of 7 January 2017, as per the regulations 90 days after proclamation

The administration of the scheme is run from offices in Sandton. There are three provincial offices established, being one in Gauteng for Gauteng, Limpopo and the North West, one in Kwazulu-Natal for matters in Kwazulu-Natal, the Free State and Mphumalanga and one in the Western Cape dealing with matters in the Western Cape, Eastern Cape and Northern Cape

1. The underlying rationale for the Ombud Service is to provide alternative dispute resolution services that are less costly than going to court. Chapter 3 of the Act deals with the mechanism for applying to the Ombud Service for relief regarding a prescribed list of matters namely;

- financial issues
- behavioural issues
- scheme governance issues
- meetings
- management services
- works pertaining to private areas and common areas, and
- other general issues.

Section 38 of the Act deals with the application process if you are a party to a dispute. Members with a gripe will however have to first exhaust all internal remedies that are available in terms of the their existing constitution or rules to which they are bound

The relief that the Ombud may grant, is set out above is limited to those set out section 39 of the Act

Examples relief sought in respect of financial issues

- the auditing of the association's accounts
- taking out insurance or increase existing insurance
- to determine whether levies imposed are reasonable or not or varying payment method
- to determine payment of contributions or other amounts
- an order for a tenant in a scheme to pay the scheme and not his landlord for a specified period until a specified amount due to the scheme by the landlord has been paid, provided that such payment by the tenant will discharge his liability to the landlord

Examples of relief sought in respect of behavioural issues

- an order refraining from behavior or actions which constitutes a nuisance whether by a person or an animal
- an order for the removal of articles placed or attached illegally to parts of a common or private area

Examples of relief sought in respect of scheme governance issues

- recording or approving new scheme governance provisions or declaring provisions invalid or unreasonable and removing such provision or amending the provision or substituting for a new provision

Examples of relief sought in respect of meetings

- calling a general meeting to deal with specified business

- calling a meeting not validly convened
- calling a resolution taken at a meeting void or invalid
- declaring the opposition to a motion not passed at a meeting unreasonable and giving effect to the motion or a variation thereof
- declaring a motion passed void on certain grounds

#### Examples of relief sought in respect of management services

- an order calling on managing agents to comply with terms of appointment or authorisations or code of conduct
- determining whether the scheme had the right to terminate or not the services of a managing agent

#### Examples of relief sought in respect of works to common or private areas

- an order requiring the scheme to have maintenance or repairs carried out and compensation for the works
- requiring the scheme to carry out specific works on the common areas for use, convenience or safety of the owners/ occupiers or not to carry out such specified works (see regulation 29 re alterations or improvements to the common property which are reasonably necessary versus not reasonably necessary)
- an order dealing with proposed improvements or alternations to the common areas
- an order requiring the scheme to acquire specified property or dispose of specified property
- an order granting exclusive use rights over certain parts of the common area

#### Examples of relief in respect of general issues

- an order declaring whether the applicant does or does not have access to information or documents and making such information or documents available
- in respect of general and other issues – any other order proposed by the Chief Ombud

The Ombud is required to provide notice to all persons affected by an application and is required to receive submissions and evidence from such parties in the course of considering an application

The Ombud is empowered to refer any matter before it for conciliation (where the parties are encouraged by a Conciliator to come to an agreement themselves) and if the conciliation fails, the Ombud is required to refer the matter for adjudication before an adjudicator appointed by the parties or the Ombud.

The process which the adjudicator will follow will be of an inquisitorial nature unlike the adversarial process in our courts where the judge or magistrate will sit back and allow the parties to present their case as they see fit. The adjudicators of the Ombud Service will play an active part in the adjudication process and the adjudicator may call on people to give evidence and call for other information or documentation and conducting inspections of assets, records, documents and places

Parties are not allowed legal representation during the adjudication process unless everyone agrees otherwise or the adjudicator allows it after consideration of the specific circumstances (questions of law, complexity and importance of dispute). A party can still have their initial submissions to a dispute prepared by their legal representatives

An adjudicator can dismiss an application if it is frivolous, vexatious, misconceived or without substance

An adjudicator can make costs awards against the losing party to compensate the successful party for losses relating to the application

A person may only appeal on points of law and the appeal must be made with the High Court within 30 days after delivery of the order. Therefore the findings of fact will not be permitted to be overturned on appeal and only where the adjudicator has incorrectly applied the law to the fact (as found by him) that there will be a right of appeal

An order made by the Ombud Service carries the same weight and enforceability as an order of the Magistrates Court or High Court (Section 56 and Section 57 the Ombud Service Act) and there is no jurisdictional limit to the size of the award the adjudicator can make

See attached hereto annexure a dealing the registration with CSOS, filing of annual returns and documents and governance documents

2. The Community Scheme Ombud Service Act provides that the Service must regulate monitor and control the quality of all sectional title scheme's governance documents and such other scheme governance documents as may be permitted by the Minister and to take custody of, preserve and provide public access to the sectional title scheme governance documents and such other scheme's governance documents as may be permitted by the Minister
3. The Ombud Service Act requires community schemes to ensure that fidelity insurance is in place to mitigate possible fraud committed by a person controlling the finances of the scheme. The scheme will not have to take out specific fidelity insurance if it can be proven that alternate cover that meets the necessary requirements is in place.

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