

REPUBLIC OF SOUTH AFRICA

COMMUNITY SCHEMES OMBUD SERVICE BILL

*(As introduced in the National Assembly (proposed section 76); explanatory summary of
Bill published in Government Gazette No. 33366 of 9 July 2010)
(The English text is the official text of the Bill)*

(MINISTER OF HUMAN SETTLEMENTS)

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BILL

To provide for the establishment of the Community Schemes Ombud Service; to provide for its mandate and functions; and to provide for a dispute resolution mechanism in community schemes; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

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Chapter 1

Interpretation

Definitions

1. In this Act, unless the context indicates otherwise—
 - “**adjudicator**” means an adjudicator as contemplated in section 21(3); 5
 - “**association**” means any structure that is responsible for the administration of a community scheme;
 - “**Board**” means the Board of Service established by section 6;
 - “**chief financial officer**” means the chief financial officer appointed in terms of section 14; 10
 - “**chief ombud**” means the chief ombud appointed in terms of section 14;
 - “**common area**” means any part of land or building in a community scheme which is intended for common use by occupiers;
 - “**community scheme**” means 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, and a housing scheme for retired persons, and “**scheme**” has the same meaning; 15
 - “**Department**” means the national department responsible for human settlements; 20
 - “**Director-General**” means the Director-General of the national department;
 - “**dispute**” means 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;
 - “**executive committee**” means the executive body of a community scheme, including but not limited to the trustees of a sectional title body corporate, the board of directors of a share block company and the management association of any housing scheme for retired persons; 25
 - “**levies**” means the levies contemplated in section 59;
 - “**managing agent**” means any person who provides management services to a community scheme for reward; 30
 - “**mandate**” means the mandate of the Service as contemplated in section 5;
 - “**Minister**” means the Minister responsible for human settlements;
 - “**occupier**” means a person who occupies a private area;
 - “**ombud**” means an ombud contemplated in section 21(3); 35
 - “**owner**” means a person who has a legally secured right to possession and occupation of a private area, including but not limited to the owner of a sectional title unit, the holder of shares in a share block company and the holder of an occupation right in a housing scheme for retired persons;
 - “**person**” includes an association, partnership, trust, corporation, private or public entity and such person’s representatives, successors and assignees; 40
 - “**practice directive**” means a practice directive issued in terms of section 36;
 - “**private area**” means any area in a community scheme set aside for private occupation or ownership, excluding any common area;
 - “**prescribe**” means prescribe by regulation made under this Act; 45
 - “**Public Finance Management Act**” means the Public Finance Management Act, 1999 (Act No. 1 of 1999);
 - “**regulation**” means a regulation made in terms of section 29;
 - “**scheme governance documentation**” means any rules, regulations, articles, constitution, terms, conditions or other provisions that control the administration or occupation of private areas and common areas in a community scheme, and 50
 - “**scheme governance provision**” has a corresponding meaning; and
 - “**Service**” means the Community Schemes Ombud Service established by section 3;
 - “**this Act**” includes the regulations. 55

Chapter 2

Community Schemes Ombud Service

Purpose of Act

2. The purpose of this Act is to provide for—
- (a) the establishment of the Service; 5
 - (b) the functions and operations of the Service; and
 - (c) a dispute resolution mechanism in community schemes.

Establishment of Service

3. (1) There is hereby established a juristic person to be known as the Community Schemes Ombud Service. 10
- (2) The Service operates as a national public entity listed in terms of the Public Finance Management Act with its executive authority vested in the Minister.
- (3) The Service must establish a national head office and, where necessary, regional offices.
- (4) The provisions of the Public Finance Management Act apply to the Service. 15

Functions of Service

4. (1) The Service must—
- (a) develop and provide a dispute resolution service in terms of this Act;
 - (b) provide training for adjudicators and other employees of the Service;
 - (c) monitor and control the quality of all sectional titles scheme governance 20 documentation and such other scheme governance documentation as may be determined by the Minister by notice in the *Gazette*; and
 - (d) take custody of, preserve and provide public access to sectional title and such other scheme governance documents as may be determined by the Minister.
- (2) In performing its functions the Service may— 25
- (a) promote good governance of community schemes;
 - (b) provide education, information, documentation, and such services as may be required to raise awareness, to—
 - (i) owners, occupiers, executive committees and other persons or entities 30 who have rights and obligations in community schemes, as regards those rights and obligations; and
 - (ii) members of the public as regards the rights and obligations existing in community schemes;
 - (c) monitor community scheme governance; and
 - (d) generally, deal with any such matters as may be necessary to give effect to the 35 objectives of this Act.
- (3) The Service acts through its Board.

Mandate

5. (1) The Minister must conclude a written mandate with the Service as soon as possible, but not later than six months after the appointment of the Board. 40
- (2) The mandate must—
- (a) contain the operational and performance indicators against which the performance of the Service is measured;
 - (b) contain specific service delivery targets that the Service must attain; and
 - (c) contain directions regarding the utilisation of any surplus revenue. 45
- (3) The mandate may deal with any other matter that the Minister and the Service may agree on.
- (4) The mandate must be reviewed every five years.
- (5) The mandate must be consistent with this Act.

Board of Service 50

6. (1) There is hereby established a Board to be known as the Board of the Service.
- (2) The Board is responsible for the management and control of the Service.

(3) The Board consists of—

- (a) two executive members; and
- (b) seven non-executive members.

(4) The Minister must appoint the chairperson and deputy chairperson of the Board from the non-executive members of the Board. 5

(5) The Board may designate any other non-executive member of the Board to act as chairperson if both the chairperson and the deputy chairperson are absent or unable to perform their functions.

Appointment of members of Board

7. (1) The Minister must by notice in the *Gazette* and two national newspapers circulating in the Republic invite all interested persons to submit, within the period and in the manner mentioned in the notice, the names of persons fit to be appointed as non-executive members of the Board. 10

(2) The Minister must appoint a nomination committee to make recommendations to the Minister for the appointment of the non-executive members of the Board. 15

(3) In establishing a nomination committee, the Minister must ensure that the committee is broadly representative of the population and geographic areas of the Republic and that both males and females are represented.

(4) The nomination committee, in making a recommendation to the Minister, must consider— 20

- (a) the skills, knowledge and experience of a candidate in areas of—
 - (i) risk management;
 - (ii) financial management;
 - (iii) dispute resolution in community schemes;
 - (iv) public education and training; 25
 - (v) management of community schemes;
 - (vi) community scheme governance documentation; or
 - (vii) development of community schemes; and
- (b) the need for representation of historically disadvantaged persons.

(5) If the recommendation of the nomination committee does not contain a suitable person or the required number of suitable persons, the Minister may call for further nominations in the manner set out in subsection (1). 30

(6) The Minister appoints the non-executive members of the Board.

(7) The Minister must, within 30 days after such appointment, publish the names of the members so appointed and the date of commencement of their terms of office in the *Gazette*. 35

(8) A non-executive member of the Board—

- (a) holds office for a period not exceeding three years and may be reappointed on expiry of his or her term;
- (b) may not serve for more than two consecutive terms of office; 40
- (c) is appointed according to the terms and conditions determined by the Minister;
- (d) must be paid from the revenue of the Service such remuneration and allowances as may be determined by the Minister in consultation with the Minister of Finance, taking into consideration regulations and guidelines issued by the Minister for the Public Service and Administration and the National Treasury; and 45
- (e) is appointed on a part-time basis.

(9) Any vacancy occurring in the Board must be filled in the same manner as a member is appointed in terms of this section. 50

Functions of Board

8. The Board must—

- (a) implement the mandate contemplated in section 5 and any strategic plan of the Service in order to achieve the objectives of the Service;
- (b) make decisions on behalf of the Service and ensure that these decisions are carried out; 55
- (c) provide guidance to the chief ombud in the performance of his or her functions in terms of this Act;

- (d) notify the Minister immediately of any matter that may prevent or materially affect the achievement of the objects or financial targets of the Service; and
- (e) refer to the Minister any matter concerning the adverse functioning of the Service.

Disqualification from membership of Board 5

9. A person may not be appointed as or remain as a member of the Board, as the case may be, if that person—

- (a) is an unrehabilitated insolvent or becomes insolvent and the insolvency results in the sequestration of that person's estate; 10
- (b) has been declared by a competent court to be mentally ill; 10
- (c) has been convicted, in the Republic or elsewhere, of theft, fraud, forgery, perjury or any other offence involving dishonesty;
- (d) has been convicted of any other offence, whether in the Republic or elsewhere, committed after the Constitution of the Republic of South Africa, 1993, took effect, and sentenced to imprisonment without the option of a fine; 15
- (e) has been, or is, removed from an office of trust on account of misconduct in respect of fraud or the misappropriation of money;
- (f) is otherwise disqualified from serving as a member of a board in terms of the Companies Act, 2008 (Act No. 71 of 2008); or
- (g) has or acquires an interest in a business or enterprise which may conflict or interfere with the proper performance of his or her functions as a member of the Board. 20

Resignation and removal from office

10. (1) A member of the Board may resign by giving to the Minister—

- (a) one month's written notice; or 25
- (b) less than one month's written notice, with the approval of the Minister.

(2) The Minister may, subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), remove a member of the Board from office—

- (a) if such member becomes disqualified in terms of section 9;
- (b) if such member acted contrary to this Act; 30
- (c) if such member failed to disclose an interest or withdraw from a meeting as required;
- (d) if such member has failed to perform the functions of his or her office efficiently and effectively; or
- (e) on the ground of misconduct, incapacity or incompetence. 35

Fiduciary duty and disclosure

11. (1) A member of the Board must, upon appointment, submit to the Minister and the Board a written statement in which it is declared whether or not that member has any direct or indirect financial interest in community schemes which could reasonably be expected to compromise the Board in the performance of its functions. 40

(2) A member of the Board may not be present, or take part in, the discussion of or the taking of a decision on any matter before the Board in which that member or his or her family member, business partner or associate has a direct or indirect financial interest.

(3) If a member of the Board acquires an interest that could reasonably be expected to be an interest contemplated in this section, he or she must immediately in writing declare that fact to the Minister and the Board. 45

(4) If an organisation or enterprise in which a member of the Board has an interest contemplated in this section is requested to offer its services to the Service, or is in the process of concluding any agreement with the Service, including an agreement in respect of the alienation of land to the Service, the organisation or enterprise must immediately, in writing, declare the interest of such member to the Minister and the Board. 50

(5) A member of the Board must at all times exercise the utmost good faith, honesty and integrity, care and diligence in performing his or her functions as a member of the Board, and, in furtherance of these functions and without limiting their scope, must— 55

- (a) take reasonable steps to inform himself or herself about the Service, its business and activities and the circumstances in which it operates;

- (b) take reasonable steps, through the processes of the Board, to obtain sufficient information and advice about all matters to be decided by the Board to enable him or her to make conscientious and informed decisions;
 - (c) attend all meetings of the Board;
 - (d) exercise an active and independent opinion with respect to all matters to be decided by the Board; 5
 - (e) exercise due diligence in relation to any business of, and necessary preparation for and attendance at meetings of, the Board or any committee to which such member of the Board is appointed;
 - (f) comply with any internal code of conduct that the Service may establish for members of the Board; 10
 - (g) not engage in any activity that may undermine the integrity of the Service;
 - (h) not make improper use of his or her position as a member or of information acquired by virtue of his or her position as a member of the Board; and
 - (i) treat any confidential matters relating to the Service, that is obtained in his or her capacity as a member of the Board, as strictly confidential and not divulge them to anyone without the authority of the Service or as required as part of that member's official functions as a member of the Board. 15
- (6) This section must be interpreted as adding to, and not deviating from, any law relating to the criminal or civil liability of a member of a governing body, and criminal or civil proceedings that may be instituted in respect of such a liability. 20
- (7) A member who contravenes or fails to comply with this section may be charged with misconduct.

Committees

- 12.** (1) The Board may establish one or more committees to perform such functions as the Board may determine. 25
- (2) The Board must—
- (a) assign members of the Board to serve on a committee, based on their knowledge and skills; and
 - (b) determine the— 30
 - (i) terms of reference of a committee;
 - (ii) composition of a committee;
 - (iii) tenure of members on a committee;
 - (iv) reporting mechanisms of a committee; and
 - (v) methods and reasons for removal of a member from a committee. 35
- (3) Non-executive members of the Board must make up the majority of the members of a committee.
- (4) The Board may appoint specialists to a committee for their technical support.
- (5) Unless specially delegated by the Board, a committee has no decision-making powers and can only make recommendations to the Board. 40
- (6) A committee must meet as often as is necessary in order to carry out its functions and may determine its own procedures.
- (7) Each committee must be chaired by a non-executive member of the Board.

Delegation and assignment of functions by Board

- 13.** (1) The Board may, by a resolution passed by 75 per cent of its members— 45
- (a) delegate any of its powers and assign any of its functions to—
 - (i) any member of the Board;
 - (ii) any committee established in terms of section 12;
 - (iii) the chief ombud;
 - (iv) the chief financial officer; or 50
 - (v) any employee of the Service; and
 - (b) amend or revoke such delegation or assignment.
- (2) Notwithstanding a delegation or assignment contemplated in subsection (1), the Board is not divested of any power or duty so delegated or assigned.
- (3) (a) Any delegation or assignment contemplated in subsection (1)— 55
- (i) may be made subject to such conditions as the Board may determine; and
 - (ii) must be communicated to the delegatee or assignee in writing.

(b) The written communication contemplated in paragraph (a)(ii) must contain full particulars of the matters being delegated or assigned and of the conditions subject to which the power may be exercised or the function must be performed.

(4) The Board may not delegate—

- (a) the power to appoint the chief ombud; and 5
- (b) its role on—
 - (i) the appointment of the chief financial officer;
 - (ii) the implementation of the mandate; and
 - (iii) the implementation of any strategic plan of the Service.

Appointment of chief ombud and chief financial officer 10

14. (1) The Board must, with the approval of the Minister, appoint a chief ombud and a chief financial officer to assist the Service in meeting its objectives.

(2) The Board must invite applications for the posts of chief ombud and chief financial officer by publishing advertisements in the media.

(3) The appointment must be made after following a transparent and competitive 15 process.

(4) A person appointed as chief ombud or chief financial officer must—

- (a) have suitable qualifications and experience relevant to the functions of the Service;
- (b) have suitable expertise in and understanding of community scheme gover- 20 nance; and
- (c) not be disqualified as contemplated in section 9.

Conditions of appointment of chief ombud and chief financial officer

15. (1) The appointment of the chief ombud and the chief financial officer is subject to the conclusion of an annual performance contract with the Service. 25

(2) The chief ombud and the chief financial officer are appointed for a term of five years and may be reappointed for one additional term of five years.

(3) (a) The chief ombud holds office on such terms and conditions as the Board may determine, in consultation with the Minister, the Minister of Finance and the Minister for the Public Service and Administration. 30

(b) The chief financial officer holds office on terms and conditions determined by the chief ombud within the limits determined by the Board.

(4) The chief ombud and the chief financial officer are executive members of the Board.

(5) The chief ombud and the chief financial officer are entitled to a remuneration 35 package determined by the Board in consultation with the Minister.

(6) The chief ombud and the chief financial officer are accountable to the Board.

Removal of chief ombud and chief financial officer from office

16. (1) The Board must, in consultation with the Minister and subject to applicable labour legislation, remove the chief ombud and chief financial officer from office— 40

- (a) on account of misconduct;
- (b) for failing to perform the duties connected with that office diligently; or
- (c) if the chief ombud or the chief financial officer becomes subject to any disqualification contemplated in section 9.

(2) The chief ombud and the chief financial officer may resign on written notice of at least 30 days to the chairperson. 45

(3) The Board may suspend the chief ombud or the chief financial officer during misconduct proceedings against him or her.

Acting chief ombud and chief financial officer

17. (1) The Board may in writing appoint any senior employee of the Service to act as chief ombud or chief financial officer if the chief ombud or chief financial officer— 50

- (a) is temporarily unable to perform his or her duties in terms of this Act; or
- (b) has vacated or been removed from office and a new chief executive officer or chief financial officer, as the case may be, has not yet been appointed.

(2) An acting chief ombud or acting chief financial officer may exercise all the powers and must perform all the duties of the chief ombud or chief financial officer, as the case may be.

Functions of chief ombud

- 18.** (1) The chief ombud is head of the administration of the Service. 5
 (2) Subject to directives from the Board, the functions of the chief ombud are to—
 (a) manage the affairs of the Service;
 (b) implement the policies and decisions of the Board;
 (c) manage and recruit employees; and
 (d) develop efficient, transparent and cost-effective administrative systems. 10

Functions of chief financial officer

- 19.** The functions of the chief financial officer are to—
 (a) manage risk of the Service's projects;
 (b) assist the Board with regard to compliance with its duties in terms of the Public Finance Management Act; 15
 (c) ensure that the Service has adequate income and liquidity to perform its functions;
 (d) ensure that money payable to the Service is properly collected;
 (e) ensure that there is adequate control over the assets acquired, managed or controlled by the Service; 20
 (f) ensure that the liabilities incurred on behalf of the Service are properly authorised;
 (g) ensure efficiency and economy of operations and avoidance of fruitless and wasteful expenditure;
 (h) ensure that the financial system is in line with generally accepted accounting practices and procedures; 25
 (i) ensure an adequate budgeting and financial system; and
 (j) provide sound financial control systems for the Service.

Delegation by chief ombud and chief financial officer

- 20.** (1) The chief ombud and the chief financial officer may delegate to an employee of the Service any of their powers and assign any of their duties. 30
 (2) Any delegation contemplated in subsection (1)—
 (a) may be made subject to such conditions as the Board may determine;
 (b) must be communicated to the delegatee in writing;
 (c) may be amended or withdrawn in writing by the chief ombud or the chief financial officer, as the case may be; and 35
 (d) does not prohibit the holder of the office that made the delegation from exercising that power or performing that duty.
 (3) Notwithstanding a delegation or assignment contemplated in subsection (1), the chief ombud or the chief financial officer, as the case may be, is not divested of any power or duty so delegated or assigned. 40

Staff of Service

- 21.** (1) The Board must determine the staff establishment necessary to enable the Service to perform its functions.
 (2) The chief ombud appoints employees of the Service. 45
 (3) The Board must, for each regional office established, appoint—
 (a) an ombud and a deputy ombud with—
 (i) suitable qualifications and experience necessary to administer that office under the supervision of the chief ombud; and
 (ii) suitable expertise in and understanding of community scheme governance and disputes; and 50
 (b) full-time and part-time adjudicators with—
 (i) suitable qualifications and experience necessary to adjudicate disputes under the supervision of an ombud or deputy-ombud; and
 (ii) suitable qualifications and experience in community scheme governance. 55

- (4) The employees contemplated in subsection (2) are appointed subject to the terms and conditions determined by the chief ombud within the financial limits determined in accordance with a human resource policy approved by the Minister, which policy may make provision for non-pensionable allowances for employees.
- (5) The chief ombud must determine and supply each employee with a copy of the code of conduct, applicable to all members of staff of the Service and justiciable for purposes of disciplinary proceedings, to ensure—
- (a) compliance with any applicable law;
 - (b) the effective, efficient and economical use of the resources of the Service; and
 - (c) the promotion and maintenance of a high standard of professional ethics.
- (6) A person in the employ of the Service becomes a member of the Government Employees' Pension Fund contemplated in section 2 of the Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996), and is entitled to pension and retirement benefits as if that person were in service in a post classified in a division of the public service.
- (7) Staff from public entities reporting to the Minister may be employed by the Service subject to the provisions of the Labour Relations Act, 1995 (Act No. 66 of 1995), and the human resource policy referred to in subsection (2).
- (8) Staff may also be transferred or seconded to the Service from the public service subject to the provisions of the Public Service Act, 1994 (Proclamation No. 103 of 1994), and the human resource policy referred to in subsection (3).

Funds of Service

- 22.** (1) The funds of the Service consist of—
- (a) money appropriated by Parliament;
 - (b) levies collected from community schemes with the approval of the Minister;
 - (c) fees for services rendered based on cost recovery;
 - (d) interest derived from investments of the Service;
 - (e) loans raised by the Service, subject to section 23;
 - (f) donations or contributions received by the Service with the approval of the Minister; and
 - (g) subsidies and grants from organs of state.
- (2) The Service must, subject to section 23, utilise the funds to defray expenses incurred by it in the performance of its functions.

Application of Public Finance Management Act

- 23.** The Service is subject to the Public Finance Management Act and its financial management, preparation and submission of budgets, preparation of financial statements, audits and annual reports, and reporting must be done in accordance with the Public Finance Management Act.

Tabling in Parliament

- 24.** The Minister must table in Parliament the annual report of the Service—
- (a) within 14 days after receiving the report, if Parliament is in session; or
 - (b) if Parliament is not in session, within 14 days after the commencement of the next parliamentary session.

Delegation by Minister

- 25.** (1) The Minister may delegate to the Director-General any of his or her powers or assign any of his or her functions conferred or imposed on him or her by this Act.
- (2) Any delegation contemplated in subsection (1)—
- (a) may be made subject to such conditions as the Minister may determine;
 - (b) must be in writing;
 - (c) may be amended or withdrawn by the Minister in writing; and
 - (d) does not prohibit the Minister from exercising that power or performing that duty.
- (3) The Minister may not delegate the power to—
- (a) make regulations; or
 - (b) appoint a member of the Board.

(4) (a) The Minister may issue a directive to the Director-General regarding the delegation contemplated in subsection (1).

(b) The Director-General must comply with the directive contemplated in paragraph (a).

Additional functions 5

26. (1) The Minister may, in consultation with the Board, authorise the Service to perform any additional function not inconsistent with this Act.

(2) The authorisation contemplated in subsection (1) must be in writing, detailing the funding arrangements as well as the terms and conditions relating to such additional function. 10

Provision of information

27. (1) (a) The Minister may direct the Board to submit to him or her specific information.

(b) The Board must comply with any directive contemplated in paragraph (a).

(2) The Service must provide the Minister or a person authorised by the Minister with access to such books, accounts, documents and assets of the Service as the Minister may require. 15

(3) The Minister may appoint a person to investigate the affairs or financial position of the Service and compliance by the Service with this Act, and may recover from the Service the fees and disbursements incurred by that person during the investigation. 20

(4) An individual member of the Board and an employee of the Service, if requested by the Minister, must comply with subsections (1) and (2) to the extent that they are able to do so.

Intervention by Minister

28. (1) The Minister may direct the Service to take any action specified by the Minister if the Service— 25

(a) is in financial difficulty or is otherwise being mismanaged;

(b) is unable to perform its functions effectively due to dissension among Board members;

(c) has acted unfairly or in a discriminatory or inequitable manner; 30

(d) has failed to comply with any law;

(e) has failed to comply with any directive issued by the Minister under this Act; or

(f) has obstructed the Minister, or a person authorised by the Minister, in performing a function in terms of this Act. 35

(2) A directive contemplated in subsection (1) must state—

(a) the nature of the deficiency;

(b) the steps which must be taken to remedy the situation; and

(c) a reasonable period within which the steps contemplated in paragraph (b) must be taken. 40

(3) If the Service fails to remedy the situation within the stated period, the Minister may, after having—

(a) given the Service a reasonable opportunity to be heard; and

(b) afforded the Service a hearing on any submissions received,

replace one or more members of the Board and where circumstances so require, appoint an administrator to take over the relevant function of the Service until the member or members of the Board has or have been replaced. 45

(4) If the Minister appoints an administrator to take over a function of the Service in terms of subsection (3)—

(a) the administrator may do anything which the Service might otherwise be empowered or required to do in terms of this Act; 50

(b) the Board may not, while the administrator is responsible for that function, exercise any of its powers or perform any of its duties relating to that function; and

(c) an employee or a contractor of the Service must comply with any lawful directive issued by administrator in terms of this Act. 55

(5) Once the Minister is satisfied that the Service is once more able to perform its functions effectively, the Minister must terminate the appointment of the administrator.

(6) The costs associated with the appointment of an administrator must be borne by the Service.

Regulations 5

29. (1) The Minister must, after consultation with the Service, make regulations regarding—

- (a) (i) meetings to be held by the Board;
- (ii) regularity of meetings;
- (iii) special meetings; 10
- (iv) the taking of decisions at meetings;
- (v) convening of meetings and notices of meetings;
- (vi) meetings by telephone or video conference or other means of communication;
- (vii) quorums at meetings; 15
- (viii) adjournment of meetings;
- (ix) the person presiding at meetings;
- (x) minutes;
- (xi) resolutions signed by members of the Board;
- (xii) execution of documents; and 20
- (xiii) the proceedings of the Board;
- (b) levies payable by schemes to the Service and at what intervals such levies are payable;
- (c) schemes which may be entitled to discounts or waivers of fees;
- (d) application, adjudication and fees payable by persons who make use of the 25
Service;
- (e) persons who may be entitled to discounts or waivers of fees;
- (f) rates of interest payable on overdue levies and fees;
- (g) any matter that this Act requires or permits to be prescribed; and
- (h) generally, any ancillary or incidental, administrative or procedural matter that 30
it is necessary to prescribe for the proper implementation or administration of this Act.

Judicial management and liquidation

30. The Service may not be placed under judicial management or liquidation except on the authority of an Act of Parliament. 35

Security of information

- 31.** A person may not disclose any information kept by the Service unless—
- (a) it is done in terms of and subject to any applicable law that compels or authorises the disclosure;
 - (b) it is necessary for the proper functioning of the Service; or 40
 - (c) it is legally required for the purpose of monitoring, evaluating, investigating or considering any activity relating to the Service.

Documents relating to litigation

32. The Service must provide the Minister with copies of all pleadings, affidavits and other documents in its possession relating to any legal proceedings brought by or against the Service. 45

Limitation of liability

33. Neither the Service nor any employee of the Service is liable for any damage or loss caused by—

- (a) the exercise of a power or the performance of a duty under this Act; or 50
 - (b) the failure to exercise a power, or perform a duty under this Act,
- unless the exercise of or failure to exercise the power, or performance or failure to perform the duty was unlawful, grossly negligent or in bad faith.

Offences and penalties

- 34.** (1) Any person who—
- (a) fails to provide access to any books, accounts, documents or assets when required to do so under this Act;
 - (b) fails to comply with a directive issued under this Act; 5
 - (c) fails or refuses to give data or information, or gives false or misleading data or information when required to give information under this Act;
 - (d) intentionally refuses to perform a duty or obstructs any person in the exercise of a power or performance of a duty in terms of this Act;
 - (e) accepts any unauthorised fees or reward, either directly or indirectly as a result of a person's position with the Service; 10
 - (f) uses the name, logo or design of the Service without authority; or
 - (g) contravenes or fails to comply with section 31,
- is guilty of an offence is liable, on conviction, to a fine or imprisonment for a period not exceeding five years or to both a fine and such imprisonment. 15
- (2) Where a person is convicted for a second or subsequent conviction for an offence contemplated in subsection (1), he or she is liable to a fine or imprisonment for a period not exceeding ten years or to both a fine and such imprisonment.

Independence of Service

- 35.** (1) All Service employees must act independently and impartially in making 20 decisions with regard to the resolution of disputes.
- (2) Once an application is referred to an adjudicator, an ombud plays no role in relation to the substance of the dispute or the outcome sought by the applicant.

Practice directives

- 36.** (1) The chief ombud must issue practice directives with regard to any matter 25 pertaining to the operation of the Service.
- (2) Practice directives must, subject to this Act and the regulations, direct the performance of any act in the operation of the Service.

Privileges, immunities and non-waiver

- 37.** (1) In performing their functions in terms of this Act, the chief ombud, an ombud, 30 a deputy ombud and an adjudicator have the same privileges and immunities from liability as a judge of the High Court.
- (2) The privilege in respect of defamation that applies to any proceeding before the High Court and to the documents and statements in such proceedings, must apply to adjudication in terms of this Act. 35
- (3) A person may not waive or limit the exercise of rights in terms of this Act or act contrary to any provision of this Act.

Chapter 3***Applications*****Applications** 40

- 38.** (1) Any person may make an application if such person is a party to or affected materially by a dispute.
- (2) An application must be—
- (a) made in the prescribed manner and as may be required by practice directives;
 - (b) lodged with an ombud; and 45
 - (c) accompanied by the prescribed application fee.
- (3) The application must include statements setting out—
- (a) the relief sought by the applicant, which relief must be within the scope of one or more of the prayers for the relief contemplated in section 39;
 - (b) the name and address of each person the applicant considers to be affected 50 materially by the application; and
 - (c) the grounds on which the relief is sought.

(4) If the applicant considers that the application qualifies for a discount or a waiver of adjudication fees, the application must include a request for such discount or waiver.

Prayers for relief

- 39.** An application made in terms of section 38 must include one or more of the following orders: 5
- (1) In respect of financial issues—
 - (a) an order requiring the association to take out insurance or to increase the amount of insurance;
 - (b) an order requiring the association to take action under an insurance policy to recover an amount; 10
 - (c) an order declaring that a contribution levied on owners or occupiers, or the way it is to be paid, is incorrectly determined or unreasonable, and an order for the adjustment of the contribution to a correct or reasonable amount or an order for its payment in a different way; or
 - (d) an order requiring the association to have its accounts, or accounts for a specified period, audited by an auditor specified in the order. 15
 - (2) In respect of behavioural issues—
 - (a) an order that particular behaviour or default constitutes a nuisance and requiring the relevant person to act, or refrain from acting, in a specified way;
 - (b) if satisfied that an animal kept in a private area or on common areas is causing a nuisance or a hazard or is unduly interfering with someone else's peaceful use and enjoyment of his or her private area or common area, an order requiring the owner or occupier in charge of the animal— 20
 - (i) to take specified action to remedy the nuisance, hazard or interference; or
 - (ii) to remove the animal; 25
 - (c) an order declaring that an animal is being kept in a community scheme contrary to the scheme governance documentation, and requiring the owner or occupier in charge of the animal to remove it; or
 - (d) an order for the removal of all articles placed on or attached illegally to parts of a common area or a private area. 30
 - (3) In respect of scheme governance issues—
 - (a) an order requiring the association to record a new scheme governance provision consistent with a provision approved by the association;
 - (b) an order requiring the association to approve and record a new scheme governance provision; 35
 - (c) an order declaring that a scheme governance provision is invalid and requiring the association to approve and record a new scheme governance provision to remove the invalid provision; or
 - (d) an order declaring that a scheme governance provision, having regard to the interests of all owners and occupiers in the community scheme, is unreasonable, and requiring the association to approve and record a new scheme governance provision— 40
 - (i) to remove the provision;
 - (ii) if appropriate, to restore an earlier provision;
 - (iii) to amend the provision; or 45
 - (iv) to substitute a new provision.
 - (4) In respect of meetings—
 - (a) an order requiring the association to call a general meeting of its members to deal with specified business;
 - (b) an order declaring that a purported meeting of the executive committee, or a purported general meeting of the association, was not validly convened; 50
 - (c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association—
 - (i) was void; or
 - (ii) is invalid; 55
 - (d) an order declaring that a motion for resolution considered by a general meeting of the association was not passed because the opposition to the motion was unreasonable under the circumstances, and giving effect to the motion as was originally proposed, or a variation of the motion proposed; or

- (e) an order declaring that a particular resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of owners or occupiers.
- (5) In respect of management services—
 - (a) an order requiring a managing agent to comply with the terms of a person’s contract of appointment and any applicable code of conduct or authorisation; or 5
 - (b) an order declaring that the association does or does not have the right to terminate the appointment of a managing agent, and that the appointment is or is not terminated. 10
- (6) In respect of works pertaining to private areas and common areas—
 - (a) an order requiring the association to have repairs and maintenance carried out;
 - (b) an order requiring the relevant person—
 - (i) to carry out specified repairs, or have specified repairs made; or
 - (ii) to pay the applicant an amount fixed by the adjudicator as reimbursement for repairs carried out or to be carried out in respect of the property by the applicant; 15
 - (c) an order requiring the association—
 - (i) to carry out, within a specified time, specified works to or on the common areas for the use, convenience or safety of owners or occupiers; or 20
 - (ii) not to carry out specified works;
 - (d) an order declaring that the association’s decision to reject a proposal to make improvements on or alterations to common areas is unreasonable, and requiring the association—
 - (i) to agree to the proposal; or 25
 - (ii) to ratify the proposal on specified terms;
 - (e) an order requiring the association—
 - (i) to acquire, within a specified time, specified property for the use, convenience or safety of owners or occupiers;
 - (ii) not to acquire specified property; or 30
 - (iii) to dispose of specified property, within a specified time;
 - (f) an order declaring that an owner or occupier reasonably requires exclusive use rights over a certain part of a common area, that the association has unreasonably refused to grant such rights and requiring the association to give exclusive use rights to the owner or occupier, on terms that may require a payment or periodic payments to the association, over a specified part of a common area; or 35
 - (g) an order obliging an owner or occupier to accept obligations in respect of a defined part of a common area. 40
- (7) In respect of general and other issues—
 - (a) an order declaring that the applicant has been wrongfully denied access to information or documents, and requiring the association to make such information or documents available within a specified time; or
 - (b) any other order proposed by the chief ombud. 45

Further information or material for applications 45

- 40. After receiving an application, an ombud may require—
 - (a) the applicant to submit further information or documentation in regard to the application;
 - (b) information to be verified; and
 - (c) the applicant to provide evidence that mediation of the dispute has been unsuccessful. 50

Time limit on certain applications

- 41. An application for an order declaring any decision of an association or an executive committee to be void, may not be made later than 60 days after such a decision has been taken. 55

Rejection of applications

- 42. An ombud must reject an application by written notice to the applicant if—

- (a) the relief sought is not within the jurisdiction of the Service;
- (b) the applicant fails to comply with a requirement of the ombud in terms of section 40;
- (c) within 14 days after delivery of a notice contemplated in section 44, the ombud does not receive written confirmation from the applicant that the applicant wishes to proceed with the application; 5
- (d) the ombud is satisfied that the dispute should be dealt with in a court of law or other tribunal of competent jurisdiction; or
- (e) the application does not, in the opinion of the ombud, qualify for the discount or waiver of adjudication fees applied for. 10

Notice to affected persons and association

- 43.** (1) Unless an application is rejected, the ombud must serve notice on—
- (a) the association; and
 - (b) each person the ombud considers to be affected materially by the application. 15
- (2) The notice contemplated in subsection (1) must—
- (a) include details of the parties to the dispute and the relief sought in terms of the application;
 - (b) include details of the place and times where the documentation relating to the application can be inspected;
 - (c) confirm whether or not the application qualifies for a discount or waiver of adjudication fees; 20
 - (d) invite written submissions with regard to the application; and
 - (e) draw attention in the prescribed form to the right to legal representation.
- (3) If the application affects owners or occupiers generally, or a particular class of the owners or occupiers, the ombud need not serve a copy of the notice on each affected person individually, but may instead serve notice in a way that ensures, as far as is reasonably practicable, that the notice comes to the attention of all owners or occupiers or all members of the class. 25

Notice to applicant

- 44.** The ombud must give an applicant notice of any submissions received and give the applicant an opportunity to— 30
- (a) inspect the submissions; and
 - (b) make a written response relating only to issues raised in the submissions.

Amendment or withdrawal of application

- 45.** (1) 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. 35
- (2) The applicant may withdraw the application at any time before the ombud refers the application to an adjudicator.

Inspection of documentation 40

- 46.** (1) The ombud must, on application by an affected person, allow such person to inspect and obtain copies of—
- (a) the application;
 - (b) submissions made in regard to the application;
 - (c) the applicant's response to the submissions; and 45
 - (d) the ombud's current list of adjudicators.
- (2) An application in terms of this section must be accompanied by the prescribed fee.

Attempt to negotiate settlement of disputes

- 47.** 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 may contact the parties to the dispute and any of the affected persons with a view to facilitating a settlement of such disputes. 50

Referral to adjudicator

48. (1) The ombud must refer the application together with any submissions and responses thereto to an adjudicator, if the ombud does not facilitate a negotiated settlement in terms of section 47, or if the ombud is of the view that a negotiated settlement is unlikely to succeed. 5

(2) The ombud must refer the application to an adjudicator chosen by the ombud if the applicant qualifies for a waiver or discount on adjudication fees.

(3) If the application does not qualify for a waiver of adjudication fees, the ombud must give the applicant and the affected parties an opportunity to choose an adjudicator from the ombud's list and, if a specific adjudicator is agreed upon by the parties to the dispute, the ombud must refer the application to the agreed adjudicator: Provided that if a specific adjudicator is not agreed upon, the ombud must refer the application to an adjudicator chosen by the ombud. 10

(4) The ombud must give the applicant and all affected parties notice of the referral, and in the case of an application to which no waiver of adjudication fees applies, such notice shall include details of the costs of the adjudicator's services and the manner in which payment may be made and secured. 15

Chapter 4

Investigation and representation

Adjudication fees 20

49. An adjudicator must not proceed to investigate an application until the prescribed adjudication fees have been paid or secured to the ombud's satisfaction.

Investigation by adjudicator

50. The adjudicator must investigate an application to decide whether it would be appropriate to make an order, and in this process the adjudicator— 25

- (a) must observe the principles of due process of law; and
- (b) must act quickly, and with as little formality and technicality as is consistent with a proper consideration of the application; and
- (c) must consider the relevance of all evidence, but is not obliged to apply the exclusionary rules of evidence as they are applied in civil courts. 30

Investigative powers of adjudicator

51. (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; and 35
 - (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 40
- (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. 45

(2) The adjudicator must give reasonable notice to the executive committee or occupier of any private area or common area to be entered in terms of subsection (1)(c).

(3) The association or any other person who is in possession of an association's records must, if required by an adjudicator and without payment of a fee—

- (a) allow the adjudicator access to the records within 24 hours after being notified of the adjudicator's requirement; and 50
- (b) provide the adjudicator with copies of the records.

Legal representation

- 52.** The applicant and any other relevant person are not entitled to legal representation during the adjudication process unless—
- (a) the adjudicator and all other parties consent; or
 - (b) the adjudicator, after considering—
 - (i) the nature of the questions of law raised by the dispute;
 - (ii) the relative complexity and importance of the dispute; and
 - (iii) the comparative ability of the parties to represent themselves in the adjudication,
- concludes that it would be unreasonable to expect the party to deal with the adjudication without legal representation.

Chapter 5

Adjudicator's orders

Order dismissing application

- 53.** (1) The adjudicator must make an order dismissing the application if, after investigation —
- (a) the adjudicator considers that the application is frivolous, vexatious, misconceived or without substance; or
 - (b) the applicant fails to comply with a requirement in terms of section 51.
- (2) If the adjudicator makes an order in terms of subsection (1)(a), the adjudicator—
- (a) may order costs against the applicant to compensate the affected person for loss resulting from the application; and
 - (b) in considering the costs, must have regard to any previous applications made by the applicant.
- (3) The amount of costs ordered in terms of subsection (2) must not be more than the maximum amount prescribed.

Order dealing with application

- 54.** (1) If the application is not dismissed, the adjudicator must make an order—
- (a) granting or refusing each part of the relief sought by the applicant;
 - (b) in the case of an application which does not qualify for a waiver of adjudication fees, apportioning liability for costs;
 - (c) including a statement of the adjudicator's reasons for the order; and
 - (d) drawing attention in the prescribed form to the right of appeal.
- (2) An order may require a person to act, or refrain from acting, in a specified way.
- (3) The order may contain such ancillary and ensuing provisions as the adjudicator considers necessary or appropriate.
- (4) The order must set the time—
- (a) when the order takes effect; or
 - (b) within which the order must be complied with.
- (5) The adjudicator's order may provide that the order has the effect of any type of resolution or decision provided for in the scheme governance documentation.

Notice of order

- 55.** (1) An adjudicator must cause a copy of an order made in terms of this Act to be delivered to—
- (a) the applicant;
 - (b) the association;
 - (c) the ombud; and
 - (d) any other affected person.
- (2) If the order affects owners or occupiers generally, or a particular class of the owners or occupiers, the adjudicator need not serve a copy of the order on each affected person individually, but may instead serve notice in a way that ensures, as far as reasonably practicable, that the order comes to the attention of all owners or occupiers or class of owners or occupiers.

Enforcement of orders

56. (1) If an adjudicator's order is for the payment of an amount of money or any other relief which is within the jurisdiction of a magistrate's court, the order may be enforced as if it were a judgment of such Court and a clerk of such a Court must, on lodgment of a copy of the order, register it as an order in such Court. 5

(2) If an adjudicator's order is for the payment of an amount of money or any other relief which is beyond the jurisdiction of the magistrate's court, the order may be enforced as if it were a judgment of the High Court, and a registrar of such a Court must, on lodgment of a copy of the order, register it as an order in such Court.

Right of appeal 10

57. (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 15 the operation of the order appealed against to secure the effectiveness of the appeal.

Chapter 6*General***Public access to information in regard to orders**

58. (1) On receiving an application accompanied by the prescribed fee, the ombud 20 must make available to the applicant—

(a) a statement indicating whether an order has been made within the previous six years in terms of this Act with regard to a community scheme identified in the application and, if so, a copy of the order; and

(b) a copy of every order made in respect of the community schemes specified in 25 the application.

(2) The Service must publish and make available for inspection by the public—

(a) a copy of an order made at any time in terms of this Act; and

(b) the reasons for such order.

Levies and annual returns 30

59. Every community scheme must, with effect from the commencement date of this Act, in each calendar year and at such times as may be prescribed—

(a) pay to the Service a levy in an amount calculated as prescribed, subject to such discounts or waivers as may be prescribed; and

(b) file with the Service— 35

(i) an annual return in the prescribed form;

(ii) a copy of its annual financial statements; and

(iii) any other prescribed document or information.

Short title and commencement

60. This Act is called the Community Schemes Ombud Service Act, 2010, and comes 40 into operation on a date to be determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE COMMUNITY SCHEMES OMBUD SERVICE BILL, 2010

1. BACKGROUND AND PURPOSE

1.1 There is currently no legal structure to monitor and control the administration of private and common areas in community schemes, which includes sectional titles schemes, share block companies, homeowners associations and housing schemes for retired persons in which there is governance by the community involved, shared financial responsibility and land and facilities used in common, whatever the particular title or tenure arrangements. The establishment of the Community Schemes Ombud Service (Service) seeks to address these shortcomings.

1.2 An ever-increasing proportion of housing is being developed in the form of community schemes. Because they involve control and administration of finances, facilities and behaviour, community schemes give rise to problems and disputes amongst participants which require effective resolution. Currently there is no effective and affordable dispute resolution mechanism available to parties involved in community schemes.

1.3 The Department of Rural Development and Land Reform, in addition to its core land survey and deeds registration functions, is currently responsible for the custody and administration of sectional title governance documentation. The governance of schemes falls outside the Department of Rural Development and Reform's mandate and the Bill provides for these functions to be taken over by the Service established by the Bill.

2. OBJECTS OF BILL

2.1 The Bill seeks to establish the Service as a national public entity listed in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999). The main objective of the Service is to monitor and control the administration and occupation of private and common areas in community schemes, and be involved in issues of governance in community schemes.

2.2 The Service will develop and provide a framework for the avoidance and resolution of disputes in community schemes and the custody of community scheme governance documentation determined by the Minister of Human Settlements.

3. CHAPTER BY CHAPTER ANALYSIS

3.1 The first chapter of the Bill contains definitions. The remainder of the Bill is divided into various chapters.

3.2 Chapter 2 provides for the establishment of the Community Schemes Ombud Service, detailing its mandate and functions, the constitution and operations of its governing board, the offices of chief ombud and chief financial officer of the Service, its staff and funding, and ancillary matters.

3.3 Chapter 3 contains the procedure and scope of applications for relief made to the Service.

3.4 Chapter 4 regulates investigation of issues arising from applications for relief and the rights of parties to representation.

3.5 Chapter 5 details the orders adjudicators may make in resolving community scheme disputes and the right of parties to appeal against orders.

3.6 Chapter 6 deals with public access to information with regard to orders, levies payable by community schemes and miscellaneous matters.

4. BODIES/PERSONS CONSULTED

4.1 The Bill was published in the *Gazette* for public comment and simultaneously distributed to relevant stakeholders, institutions and government departments.

4.2 The Bill has been drafted in close consultation with the Department of Rural Development and Land Reform.

5. FINANCIAL IMPLICATIONS

5.1 The only cost incurred at this stage was the cost of publication of the Bill in the *Gazette* for public comments, which was defrayed from the Department's budget.

5.2 The Department will also, later during the process, incur the costs of the establishment of the Community Schemes Ombud Service. Thereafter it is envisaged that the Community Schemes Ombud Service will be self-funding.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Human Settlements are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution of the Republic of South Africa, 1996, since it falls within a functional area listed in Schedule 4 to the said Constitution, namely "Housing".

6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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