

**NOTICE 1448 OF 2009**  
**DEPARTMENT OF HUMAN SETTLEMENTS**

**COMMUNITY SCHEME OMBUD SERVICE BILL, 2009**

I, Tokyo Mosima Gabriel Sexwale, Minister of Human Settlements hereby publishes the Community Scheme Ombud Service Bill, 2009 for public comment. A draft Bill together with a Memorandum on the Objects of the Bill is attached.

Interested persons and institutions are invited to submit written comments on the draft Bill on or before 30 November 2009 to the Director-General, Department of Human Settlements, for the attention of the following person:

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# COMMUNITY SCHEME OMBUD SERVICE BILL

To establish the Community Scheme Ombud Service; to provide for its functions and powers; and to provide for matters connected therewith.

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

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## ARRANGEMENT OF BILL

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## Interpretation

### Definitions

1. In this Act, unless the context indicates otherwise the following words and expressions and their derivatives shall have the specified meanings:

**“adjudicator”** means a person appointed to adjudicate over disputes in terms of section 49 of this Act;

**“association”** means any body which is responsible for the administration of a community scheme;

**“Board”** means the Governing Board contemplated in section 6 of this Act;

**“chief executive officer”** means the chief executive officer appointed in terms of section 14 of this Act;

**“chief financial officer”** means the chief financial officer appointed in terms of section 14 of this Act;

**“common area”** means any part of land and a building in a community scheme which is intended for common use;

**“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 and a housing scheme for retired persons and **scheme** has the same meaning;

**“Department”** means the Department of Human Settlements;

**“Director-General”** means the Director-General in the National Department responsible for human settlements;

**“dispute”** means a dispute in regard to the administration of a community scheme between persons who have a material interest in that scheme, provided that one of the parties to the dispute must be the association, an occupier or an 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;

**“managing agent”** means any person who provides management services to a community scheme for reward;

**“mandate”** means the mandate of the Service established in terms of section 3 of this Act;

**“Minister”** means the Minister responsible for human settlements;

**“occupier”** means a person who occupies a private area;

**“ombud”** means an ombud appointed by the Service to manage one of its regional offices;

**“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 a natural person, association, partnership, trust, corporation, private or public entity and includes a person's representatives, successors and assignees;

**“practice directive”** means a practice directive made in terms of section 36 of this Act;

**“private area”** means any area in a community scheme set aside for separate occupation or ownership, excluding any common area;

**“prescribe”** means to prescribe by regulation made under this Act;

**“Public Finance Management Act”** means the Public Finance Management Act, 1999 (Act No. 1 of 1999);

**“regulation”** means a regulation made in terms of this Act;

**“Service”** means the Community Scheme Ombud Service established by section 3 of this Act.

**“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

**“this Act”** includes the regulations made under this Act.

## **PART I**

### **COMMUNITY SCHEME OMBUD SERVICE**

#### **Purpose of Act**

1. The purpose of this Act is to provide for the—
  - (a) establishment of the Service; and
  - (b) functions and operations of the Service.

#### **Establishment of Service**

2. (1) The Community Scheme Ombud Service is hereby established as a juristic person.

(2) The Service operates as a national public entity with its executive authority vested in the Minister.

#### **Functions of Service**

3. (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 scheme governance documentation submitted to it in terms of the Sectional Titles Schemes Management Act, 2009; 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 from time to time.
- (2) In performing its functions the Service may—
- (a) promote good governance of community schemes;
  - (b) provide education, information, documentation and services to assist—
    - (i) owners, occupiers, executive committees and other persons or entities who have rights and obligations in community schemes to become aware of those rights and obligations; and
    - (ii) members of the public to become aware of the rights and obligations existing in community schemes;
  - (c) monitor community scheme governance; and
  - (d) do all such other things as may be necessary to give effect to the provisions of this Act.

#### **Mandate**

5. (1) The Minister must, after consultation with MINMEC, conclude a written mandate with the Service as soon as possible, but not later than six months after the appointment of the Board.

- (2) The mandate must—
- (a) contain the operational and performance indicators against which the performance of the Service is measured;

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- (b) contain specific service delivery targets that the Service must attain; and
  - (c) contain directions regarding the utilisation of any surplus revenue.
- (3) The mandate may deal with any other matter that the Minister and the Service agree on.
  - (4) The mandate must be reviewed every five years.
  - (5) The mandate must be consistent with this Act.

**Governing Board**

- 6. (1) The Board is responsible for governing the Service.
- (2) The Board consists of—
  - (a) two executive members; and
  - (b) seven non-executive members.
- (3) The executive members may not be the Chairperson or Deputy Chairperson of the Board or members of any committee of the Board.
- (4) The Chairperson and Deputy Chairperson must be appointed by the Minister from the non-executive members of the Board.
- (5) The Board may designate any other non-executive member to act as Chairperson if both the Chairperson and Deputy Chairperson are absent or unable to perform any function.

**Functions of Board**

- 7. (1) The Board—
  - (a) must give effect to the mandate contemplated in section 5 and to the strategy of the Service in order to achieve the objectives of the Service;
  - (b) is the accounting authority of the Service;

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- (c) takes decisions on behalf of the Service and gives effect to those decisions;
- (d) provides guidance to the chief executive officer concerning the exercise of the functions of the Service;
- (e) must 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
- (f) must refer to the Minister any matter concerning the adverse functioning of the Service.

#### **Persons disqualified from membership of Board**

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

- (a) is an unrehabilitated insolvent or becomes insolvent and the insolvency results in the sequestration of that person's estate;
- (b) has been declared by a court to be mentally unfit;
- (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;
- (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, 1973 (Act No. 61 of 1973); or
- (g) has or acquires an interest in a business or enterprise, which may conflict or interfere with the proper performance of the duties of a member of the Board.

**Appointment and removal of members of Board**

9. (1) For the appointment of non-executive members, other than those to be designated by any other Minister, the Minister must by notice in two newspapers and the *Gazette* 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 members of the Board.

(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.

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

(4) The nomination committee, in making a recommendation for appointment to the Board by the Minister, must consider—

- (a) the proven 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;
  - (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 a suitable person or the required number of suitable persons are not nominated as contemplated in subsection (4), the Minister may call for further nominations in the manner set out in subsection (1).

(6) The Minister must appoint the non-executive members of the board and, by notice in the Gazette, within 30 days thereafter, publish the names of the members so appointed and the date of commencement of their terms of office.

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

- (a) holds office for a period not exceeding three years;
- (b) may be reappointed but may not serve for more than two terms consecutively;
- (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 from time to time, taking into consideration regulations and guidelines issued by the Minister for the Public Service and Administration and the National Treasury; and
- (e) is appointed on a part-time basis.

(8) If, after due process, it is found that a member of the Board has become disqualified from membership of the Board in terms of section 8, the Minister must remove the member from the Board by written notice to the member.

(9) Any vacancy occurring in the Board in terms of section 10, must be filled in the same way as the departing member was appointed to the Board.

#### **Resignation, removal from office and vacancies**

10. (1) A member of the Board may resign by giving to the Minister—
- (a) one month's written notice; or

- (b) less than one month's written notice, with the approval of the Minister.
- (2) The Minister may remove a member of the Board if that member has—
- (a) become disqualified;
  - (b) acted contrary to this Act;
  - (c) failed to disclose an interest or withdraw from a meeting as required; or
  - (d) neglected to properly perform the functions of his or her office.

#### **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 which could reasonably be expected to compromise the Board in the performance of its functions.

(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.

(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 member's interest to the Minister and the Board.

(5) A Board member must perform his or her functions of office and at all times exercise utmost good faith, honesty and integrity, care and diligence in

performing a member's functions, and in furtherance of this duty, without limiting its scope, must—

- (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) regularly attend all meetings;
- (d) exercise an active and independent discretion with respect to all matters to be decided by the Board;
- (e) exercise due diligence in relation to the business of, and necessary preparation for and attendance at meetings of, the Board and any committee to which the Board member is appointed;
- (f) comply with any internal code of conduct that the Service may establish for Board members;
- (g) not engage in any activity that may undermine the integrity of the Service;
- (h) not make improper use of their position as a member or of information acquired by virtue of his or her position as a member; and
- (i) treat any confidential matters relating to the Service, obtained in the capacity as a Board member, as strictly confidential and not divulge them to anyone without the authority of the Service or as required as part of that person's official functions as a member of the Board.

(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.

(7) A member who contravenes or fails to comply with these provisions is guilty of misconduct and commits an offence.

### **Committees**

12. (1) The Board may from time to time appoint one or more committees.
- (2) The Board must—
- (a) assign members of the Board to serve on a committee, based on their knowledge and skills;
  - (b) determine the—
    - (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.
- (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.
- (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,—

- (a) delegate any of its powers and assign any of its duties to any member of the Board or any committee established in terms of section 12, the chief executive officer, the chief financial officer or 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)—
  - (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 duty must be performed.

(4) The Board may not delegate—

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

**Appointment of chief executive officer and chief financial officer**

14. (1) The Board must, with the approval of the Minister, appoint a chief executive officer and a chief financial officer to ensure that the Service meets its objects.

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

(3) A person appointed as chief executive officer or chief financial officer must—

- (a) have the qualifications or experience relevant to the functions of the Service;
- (b) have extensive knowledge of community schemes; and
- (c) not be disqualified as contemplated in section 8.

**Conditions of appointment of chief executive officer and chief financial officer**

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

(2) The chief executive officer 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 executive officer holds office on terms and conditions determined by the Board, in consultation with the Minister of Finance and the Minister for the Public Service and Administration.
- (b) The chief financial officer holds office on terms and conditions determined by the chief executive officer within the limits determined by the Board.

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

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

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

**Vacating of and removal from office of chief executive officer and chief financial officer**

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

- (a) for misconduct;
- (b) for failing to perform the duties connected with that office diligently;  
or
- (c) if the chief executive officer or the chief financial officer becomes subject to any disqualification contemplated in section 8.

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

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

**Acting chief executive officer and chief financial officer**

17. (1) The Board may in writing appoint any senior employee of the Service to act as chief executive officer or chief financial officer when the holder of that office—

- (a) is temporarily unable to perform the duties connected with that office; or
- (b) has vacated or been removed from that 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 executive officer or acting chief financial officer may exercise all the powers and must perform all the duties of the chief executive officer or chief financial officer, as the case may be.

#### **Functions of chief executive officer**

18. (1) The chief executive officer is head of the Service's administration.

(2) Subject to directives from the Board, the functions of the chief executive officer 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.

#### **Functions of chief financial officer**

19. The functions of the chief financial officer include—

- (a) risk management of the Service's projects;
- (b) assisting the Board with regard to compliance with its duties in terms of the Public Finance Management Act;
- (c) ensuring that money payable to the Service is properly collected;
- (d) ensuring that there is adequate control over the assets acquired, managed or controlled by the Service;
- (e) ensuring that the liabilities incurred on behalf of the Service are properly authorised;
- (f) ensuring efficiency and economy of operations and avoidance of fruitless and wasteful expenditure;

- (g) ensuring that the financial system is in line with generally accepted accounting practices and procedures;
- (h) ensuring an adequate budgeting and financial system; and
- (i) to provide sound financial control systems for the Service.

**Delegation by chief executive officer and chief financial officer**

20. (1) The chief executive officer and the chief financial officer may delegate to an employee of the Service any of his or her powers and assign any of his or her duties.

(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 executive officer or chief financial officer, as the case may be; and
- (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 executive officer or the chief financial officer, as the case may be, is not divested of any power or duty so delegated or assigned.

**Staff of Service**

21. (1) The Board must determine the staff establishment necessary to enable the Service to perform its functions, including an ombud and deputy-ombud for each regional Service office.

(2) An employee is appointed subject to the terms and conditions determined by the chief executive officer in accordance with the policy and within the financial limits determined in accordance with a human resource policy approved by the Minister, which may make provision for non-pensionable allowances for employees.

(3) The chief executive officer 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 applicable law;
- (b) the effective, efficient and economical use of the Service's resources; and
- (c) the promotion and maintenance of a high standard of professional ethics.

(4) 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.

(5) 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).

(6) 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 (2).

#### **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 on 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 granted by the organs of State.

(2) The Service, subject to section 23, must utilise the funds to defray expenses incurred by it in the performance of its functions.

#### **Application of Public Finance Management Act**

23. (1) 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.

(2) The powers of the Service must be exercised subject to the provisions of the Public Finance Management Act.

#### **Tabling in Parliament**

24. The Minister must table in Parliament the Service's annual report—
- (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 duties 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 communicated to the delegatee 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 give effect to the directive contemplated in paragraph (a).

**Additional functions**

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 the additional function.

**Provision of information**

27. (1) (a) Subject to Chapter 2 of the Constitution of the Republic of South Africa, 1996, the Minister may direct the Board to submit to him or her specific information.
- (b) The Board must comply within a 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.

(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.

(4) An individual member of the Board and an employee of the Service, if requested, 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—

- (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 way towards a person to whom it owes a duty under this Act;
- (d) has failed to comply with any law;
- (e) has failed to comply with any directive given 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.

(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.

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

- (a) after having given the Service a reasonable opportunity to be heard; and
- (b) after having afforded the Service a hearing on any submissions received,

replace the members of the Board or, where circumstances so require, appoint a person as an administrator who shall take over the relevant function of the Service until the members of the Board have been replaced.

(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 by or under this Act, to the exclusion of the Service;
- (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 a directive given by administrator.

(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 shall be for the account of the Service.

### **Regulations**

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

- (a) meetings to be held by the Board;
- (b) regularity of meetings;
- (c) special meetings;
- (d) the taking of decisions at meetings;
- (e) convening of meetings and notices of meetings;
- (f) meetings by telephone or video conference or other means of communication;
- (g) quorums at meetings;
- (h) adjournment of meetings;
- (i) the person presiding at meetings;
- (j) minutes;
- (k) resolutions signed by members of the Board;
- (l) execution of documents, and
- (m) the proceedings of the Board.

(2) The Minister must, after consultation with the service and Parliament, make regulations regarding—

- (a) levies payable by schemes to the service and at what intervals such levies shall be payable;
- (b) which schemes shall be entitled to discounts or waivers of levies;
- (c) application, adjudication and other fees payable by persons who make use of the service;
- (d) which persons shall be entitled to discounts or waivers of fees, and
- (e) rates of interest payable on overdue levies and fees.

(3) The Minister may, after consultation with the Service and Parliament, make regulations regarding—

- (a) any matter that this Act requires or permits to be prescribed; and
- (b) generally, any ancillary or incidental, administrative or procedural matter that it is necessary to prescribe for the proper implementation or administration of this Act.

### **Dissolution**

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

### **Security of information**

31. A person may not disclose any information kept by the Service except—

- (a) in terms of and subject to any law that compels or authorises the disclosure;
- (b) if it is necessary for the proper functioning of the Service; or
- (c) if 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.

**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
- (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) It is an offence to—
- (a) fail to provide access to any books, accounts, documents or assets when required to do so under this Act;
  - (b) fail to comply with a directive issued under this Act;
  - (c) fail or refuse to give data or information, or give false or misleading data or information when required to give information under this Act;
  - (d) intentionally refuse to perform a duty or obstruct any person in the exercise of a power or performance of a duty in terms of this Act;
  - (e) accept any unauthorised fees or reward, either directly or indirectly as a result of a person's position with the Service;
  - (f) use the Service's name, logo or design without authority; or

(g) contravene or fail to comply with section 31.

(2) Any person who contravenes subsection (1) and has been found guilty, is liable, on conviction, to a fine or imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

(3) 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 shall act independently and impartially in making decisions with regard to the resolution of disputes.

(2) Once an application is referred to an adjudicator, an ombud shall have no role in relation to the substance of the dispute or the outcome sought by the applicant.

### **Practice directives**

36. (1) The chief executive officer may issue practice directives in regard to any matter pertaining to the operation of the Service.

(2) Practice directives shall, subject to the provisions of 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 functions in terms of this Act, the chief executive office, an ombud, a deputy ombud and an adjudicator shall 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 shall apply to adjudication in terms of this Act.

(3) A person can not waive or limit the exercise of rights in terms of this Act or contract out of the provisions of this Act.

## PART II

### APPLICATIONS

#### **Who may make an application**

38. A person, including an association, may make an application if such person is a party to or affected materially by a dispute.

#### **How an application is to be made**

39. (1) An application shall be—
- (a) made as may be prescribed and required by practice directives;
  - (b) lodged with an ombud; and
  - (c) accompanied by the prescribed application fee.
- (2) The application shall include statements setting out —
- (a) the relief sought by the applicant, which shall be within the scope of one or more of the prayers for relief in section 40;
  - (b) the name and address of each person the applicant considers is affected materially by the application; and
  - (c) the grounds on which the relief is sought.
- (3) If the applicant considers that the application qualifies for a discount or a waiver of adjudication fees, the application shall include a request for such discount or waiver.

#### **Prayers for relief**

40. An application made in terms of section 39 shall be for one or more of the following orders:

- (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.
  - (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.
  - (d) An order requiring the association to have its accounts, or accounts for a specified period, audited by an auditor specified in the order.
- (2) In respect of behavioural issues:
- (a) An order that particular behaviour or default constitutes a nuisance and requiring an affected person to act, or refrain from acting in a specified way.
  - (b) If satisfied that an animal kept in a private area or on shared areas is causing a nuisance or a hazard or is unduly interfering with someone else's peaceful use and enjoyment of another private area or shared areas, an order requiring the owner or occupier in charge of the animal—
    - (i) to take specified action to remedy the nuisance, hazard or interference, or
    - (ii) to remove the animal.
  - (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.

- (d) An order for the removal of all articles placed on or attached illegally to parts of the common areas.
- (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.
  - (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.
  - (d) An order declaring that a scheme governance provision is, having regard to the interests of all owners and occupiers in the community scheme, unreasonable, and requiring the association to approve and record a new scheme governance provision—
    - (i) to remove the provision;
    - (ii) if appropriate, to restore an earlier provision;
    - (iii) to amend the provision; or
    - (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.

- (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 valid.
  - (d) An order declaring that a motion considered by a general meeting of the association for a resolution was not passed because of opposition that in the circumstances is unreasonable, and giving effect to the motion as proposed, or a variation of the motion as proposed.
  - (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 the person's contract of appointment and any applicable code of conduct or authorization.
  - (b) An order declaring that the association does or does not have the right to terminate an appointment as a managing agent, and that the appointment is or is not terminated.
- (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 an affected 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 to the property by the applicant.
- (c) An order requiring the association—
  - (i) to carry out, within a specified time, specified works to or on the shared areas for the use, convenience or safety of owners or occupiers; or
  - (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 shared areas is an unreasonable decision, and requiring the association—
  - (i) to agree to the proposal; or
  - (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
  - (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 the shared areas, 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 the shared areas.
- (g) An order obliging an owner or occupier to accept obligations in respect of a defined part of a common area.

- (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;
  - (b) Any other order approved by the chief executive officer.

#### **Further information or material for applications**

41. After receiving the application, an ombud may—

- (1) require the applicant to submit further information or documentation in regard to the application;
- (2) require information to be verified; and
- (3) require the applicant to provide evidence that attempts to mediate the dispute have proved unsuccessful.

#### **Time limit on certain applications**

42. 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 the relevant act.

#### **Rejection of applications**

43. An ombud shall reject an application by written notice to the applicant if—

- (1) the relief sought is not within the jurisdiction of the service;
- (2) the applicant fails to comply with a requirement of the ombud in terms of section 11;
- (3) within 14 days after delivery of a notice by the ombud, the ombud does not receive written confirmation from the applicant that the applicant wishes to proceed with the application;

(4) the ombud is satisfied that the dispute should be dealt with in a Court or other tribunal of competent jurisdiction; or

(5) the application does not, in the opinion of the ombud, qualify for the discount or waiver of adjudication fees applied for.

**Notice to affected persons and association**

44. (1) Unless an application is rejected, the ombud shall serve notice on—

(a) the association; and

(b) each person the ombud considers is affected materially by the application,

which notice shall—

(i) include details of the relief sought in terms of the application;

(ii) include details of the place and times where the documentation relating to the application can be inspected;

(iii) confirm whether or not the application qualifies for a discount or waiver of adjudication fees;

(iv) invite written submissions in regard to the application, and

(v) draw attention in the prescribed form to the right of representation.

(2) 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 reasonably practicable, that the notice comes to the attention of all owners or occupiers or all members of the class.

**Notice to applicant**

45. The ombud shall give an applicant notice of any submissions received and give the applicant an opportunity to—

- (1) inspect the submissions; and
- (2) make a written response relating only to issues raised in the submissions.

**Amendment or withdrawal of application**

46. (1) The ombud shall have 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.

(2) The applicant may withdraw the application at any time before the ombud refers that application to an adjudicator.

**Inspection of documentation**

47. (1) The ombud shall, on application by an affected person, allow the 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
- (d) the ombud's current list of adjudicators.

(2) An application in terms of this section shall be accompanied by the prescribed fee.

**Attempt to negotiate settlement of disputes**

48. 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 applicant and any of the affected persons with a view to facilitating a settlement of such disputes.

**Referral to adjudicator**

49. (1) After acceptance of an application and receipt of any submissions from affected persons or responses from the applicant the ombud may attempt to facilitate a settlement in terms of section 48, but if the ombud does not do so or at any stage considers that such process is unlikely to succeed, the ombud shall refer the application together with any submissions and responses thereto to an adjudicator.

(2) If the application qualifies for a waiver or discount of service fees, the ombud shall refer the application to an adjudicator chosen by the ombud.

(3) If the application does not qualify for a waiver of service fees, the ombud shall 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, the ombud shall refer the application to the agreed adjudicator: Provided that if a specific adjudicator is not agreed upon the ombud shall refer the application to an adjudicator chosen by the ombud.

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

### **PART III**

## **INVESTIGATION AND REPRESENTATION**

**Adjudication fees**

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

**Investigation by adjudicator**

51. The adjudicator shall investigate an application to decide whether it would be appropriate to make an order and in this process—

- (1) shall observe the principles of due process of law; and
- (2) shall act as quickly, and with as little formality and technicality as is consistent with a proper consideration of the application, and shall not be obliged to apply the rules of evidence.

#### **Investigative powers of adjudicator**

52. (1) When considering the application, the adjudicator may—
- (a) require the applicant or an affected person—
    - (i) to give to the adjudicator further information or documentation;
    - (ii) to give information in the form of an affidavit or affirmation; and
    - (iii) subject to reasonable notice being given of the time and place, to come to the office of the adjudicator for an interview;
  - (b) require a managing agent to surrender any documentation relating to the application;
  - (c) invite persons which the adjudicator considers may be able to help resolve issues raised by the application to make written submissions to the adjudicator within a specified time; and
  - (d) enter and inspect—
    - (i) an association asset, record or other document;
    - (ii) any private area; and
    - (iii) any shared area (including a shared area subject to an exclusive use arrangement).

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

(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
- (b) provide the adjudicator with copies of the records.

(4) Any person who fails to comply with a requirement in terms of subsection (1) or (3), or unreasonably obstructs an adjudicator in the conduct of an investigation, commits an offence.

#### **Legal representation**

53. In the process carried out by an adjudicator, the applicant and any affected person shall be entitled to legal representation.

## **PART IV – ADJUDICATOR'S ORDERS**

#### **Order dismissing an application**

54. (1) The adjudicator shall 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 52.

(2) If the adjudicator makes an order in terms of subsection (1)(a), the adjudicator—

- (a) may order costs against the applicant to compensate an affected person for loss resulting from the application; and
- (b) in ordering the costs, shall have regard to any previous applications made by the applicant.

(3) The amount of costs ordered in terms of subsection (2) shall not be more than the maximum amount prescribed.

#### **Order dealing with application**

55. (1) If the application is not dismissed, the adjudicator shall 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; 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 shall fix 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 shall have the effect of any type of resolution or decision provided for in the scheme governance documentation.

**Notice of order to be given**

56. (1) An adjudicator shall deliver a copy of an order made in terms of this Act to—

- (a) the applicant;
- (b) the association;
- (c) any other affected person; and
- (d) the ombud.

(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 all members of the class.

**Enforcement of orders**

57. (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 the Magistrates Court, the order may be enforced as if it were a judgment of such court and a clerk of such a Court shall, on lodgment of a copy of the order, register it as an order in such Court.

(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 Magistrates Court, the order may be enforced as if it were a judgment of the High Court and a registrar of such a Court shall, on lodgment of a copy of the order, register it as an order in such Court.

**Right of appeal**

58. (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 may not be initiated later than 30 days after the date of delivery of the adjudicator's order and shall be made in accordance with prescribed provisions.

(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.

## **PART V**

### **LEVIES AND MISCELLANEOUS**

#### **Public access to information in regard to orders**

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

- (a) a statement indicating whether an order has been made within the previous 6 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 the application.

(2) The Service shall publish and make any of the following 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 the order.

#### **Levies**

60. Subject to such discounts and waivers as may be prescribed, every community scheme shall pay to the service the levy prescribed from time to time in accordance with practice directives.

#### **Short title and commencement**

61. This Act is called the Community Schemes Ombud Service Act, 2009 and shall come into operation on a date to be determined by the President by proclamation in the *Gazette*.

## DEPARTMENT OF HUMAN SETTLEMENTS

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### MEMORANDUM ON THE OBJECTS OF THE COMMUNITY SCHEME OMBUD SERVICE BILL, 2009

#### 1. OBJECTS

- 1.1 The Community Scheme Ombud Service Bill establishes a dispute resolution service for all 'community schemes', being those property developments (including 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.
- 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 Land Reform's mandate and the Bill provides for these functions to be taken over by the Community Scheme Ombud Service.

1.4 The Bill will:

1.4.1 establish the Community Scheme Ombud Service as a national public entity with executive authority vested in the Minister of Human Settlements;

1.4.2 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.

1.5 The first section of the Bill contains definitions. The remainder of the Bill is divided into Parts, arranged as follows:

1.5.1 Part I - dealing with the establishment of the Community Scheme Ombud Service, detailing its mandate and functions, the constitution and operations of its governing board, the offices of chief executive officer and chief financial officer of the Service, its staff and funding, and ancillary matters;

1.5.2 Part II - covering the procedure and scope of applications for relief made to the Service;

1.5.3 Part III - regulating investigation of issues arising from applications for relief and the rights of parties to representation;

1.5.4 Part IV - details the orders adjudicators may make in resolving community scheme disputes and the right of parties to appeal against orders; and

- 1.5.5 Part V - dealing with public access to information in regard to orders, levies payable by community schemes and miscellaneous matters.

## **2. PERSONS CONSULTED**

- 2.1 The Bill is to be published in the *Gazette* for public comment and will simultaneously be distributed to relevant stakeholders, institutions and government departments.
- 2.2 The Bill has been drafted in close consultation with the Department of Rural Development and Land Reform.

## **3. FINANCIAL IMPLICATIONS**

- 3.1 The only cost that will be incurred at this stage is the cost of publication of the Bill in the *Government Gazette* for public comments, which costs will be defrayed from the Departments budget.
- 3.2 The Department will also, later during the process, incur the costs of the establishment of the Community Scheme Ombud Service. Thereafter it is envisaged that the Community Scheme Ombud Service will be self funding. Once the Bill has been published for comment and the engagements with Treasury has been completed, the Bill together with the Business Case will be re-submitted to Cabinet for approval for introduction into Parliament.

## **4. PARLIAMENTARY PROCEDURE**

- 4.1 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(1) or (2) of the Constitution of the Republic of South Africa, 1996, since it

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falls within functional area listed in Schedule 4 to the said Constitution, namely "Housing".

- 4.2 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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