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CORPORATE AND COMMERCIAL ALERT

IN THIS ISSUE

COMMUNITY SCHEMES OMBUD SERVICE ACT, NO 9 OF 2011

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COMMUNITY SCHEMES OMBUD SERVICE ACT, NO 9 OF 2011

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On 7 October 2016, the Community Schemes Ombud Service Act, No 9 of 2011 (Act) was brought into force. The Act was drafted with a three-fold purpose: (i) to provide a dispute resolution mechanism in respect of community schemes of the kind described above; (ii) to promote good governance of community schemes and monitoring that governance; and (iii) to provide education, information, documentation and services to raise awareness of persons who have rights and obligations in community schemes.

The Act applies to the resolution of disputes relating to "community schemes", which are defined to include (but are not limited to) the types of shared land use arrangements referred to above.

Overview of the Act

One of the purposes of the Act is to provide for a dispute resolution mechanism in the context of community schemes that is cost effective and efficient, and which does not require consumers to engage legal representation, or draw on scarce judicial resources.

In short, it provides for the establishment of a body to be known as the "Community Schemes Ombud Service" (Ombud). The Ombud is responsible for receiving and processing "applications" by members of community schemes seeking relief pertaining to their particular scheme. Importantly, the Ombud is empowered to grant relief in relation to occupiers in a scheme, not just owners, and will therefore also be of benefit to both tenants and landlords.

The types of relief that may be applied for are divided into seven categories, namely, (1) financial issues; (2) behavioural issues; (3) scheme governance issues; (4) meetings; (5) management services; (6) works pertaining to private areas and common areas; and (7) general and other issues.

Examples of the kinds of relief that may be sought include, among other things:

(1) in respect of financial issues, an order calling for the auditing of the association's accounts; (2) in respect of behavioural issues, an order for the removal of illegally attached parts of a common or a private area; (3) in respect of scheme governance issues, an order requiring the association to approve and record a new scheme governance provision; (4) in respect of meetings, an order requiring the association to call a members' meeting to deal with specified business; (5) in respect of management services, 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; (6) in respect of works pertaining to private areas and common areas, an order requiring the association to have repairs and maintenance carried out; and (7) in respect of general and other issues, 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.

COMMUNITY SCHEMES OMBUD SERVICE ACT, NO 9 OF 2011

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The introduction of the Ombud has the potential to reduce the costs associated with enforcing rights and obligations under a community scheme, making access to justice more accessible for many South Africans.



The types of relief that the Ombud may grant are set out in s39 of the Act, which appears to be a closed list. In other words, the Ombud will not have powers to order relief which is not contemplated in s39.

The Ombud is required to provide notice to all persons affected by an application, and is required to receive submissions and evidence from such parties in the course of considering any application. It is also empowered to refer any matter before it for conciliation. If conciliation fails, the Ombud is required to refer the matter for adjudication before an adjudicator appointed by the Ombud or the parties. The adjudicator is in turn empowered to call for further evidence or submissions, and must then determine the application.

In addition to providing a dispute resolution service, the Ombud will be responsible for monitoring the quality of the documentation that regulates how community schemes are governed, and what owners and residents can and cannot do – for example, the management rules and conduct rules in a sectional title scheme. This should notionally improve the governance of community schemes. The Ombud will also be required to perform an educational function,

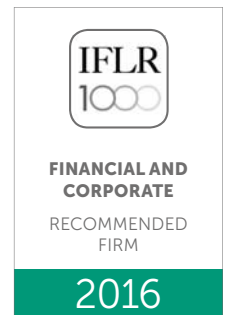
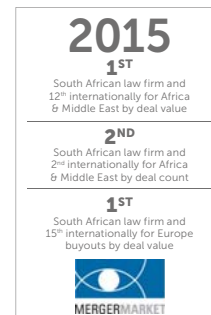
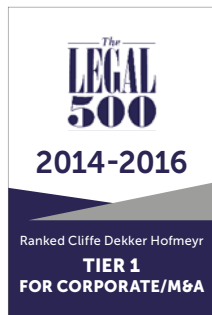
informing owners, occupiers and executives of community schemes of their rights and obligations.

Conclusion

The Act provides a welcome forum for the resolution of disputes relating, among other things, to sectional title development schemes, share block companies, home owners' associations and housing schemes for retired persons, particularly as these schemes have very specific rules that give rise to different types of disputes. The introduction of the Ombud has the potential to reduce the costs associated with enforcing rights and obligations under a community scheme, making access to justice more accessible for many South Africans.

Moreover, the promotion of good governance will also be a significant benefit, particularly to those community schemes that suffer from mismanagement. Educating owners, occupiers and executives about their rights and obligations will also go a long way in ensuring the observance of good governance within community schemes.

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