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DISPUTE RESOLUTION ALERT

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CLIFFE DEKKER HOFMEYR

Community Schemes Ombud: Who can they help?

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The landscape for owners on the one hand, and body corporates on the other hand, of sectional title schemes in exercising their respective rights and obligations changed significantly on 7 October 2016, when two pieces of legislation came into force - being the Sectional Titles Schemes Management Act No 8 of 2011 and the Community Schemes Ombud Service Act No 9 of 2011 (the CSOS).

Prior to the commencement of these two pieces of legislation, owners in particular, were limited to approaching the courts should they become embroiled in any dispute with either one of the other owners and members of the body corporate or the body corporate themselves.

The CSOS creates what is intended to be a more inexpensive and speedy process and method to have these types of disputes adjudicated.

Section 38(1) of the CSOS provides that *"(a)ny person may make an application [for adjudication of a dispute] if such person is a party to or affected materially by a dispute"*.

The seemingly wide meaning of *"(a)ny person"* in section 38 has opened the flood gates for disputes being referred to the Community Schemes Ombud (Ombud), often by parties not having the necessary standing to do so.

The recent judgment of *Durdoc Centre Body Corporate v Singh 2019 (6) SA 45 (KZP)* provides some clarity of exactly who is entitled to make use of the dispute resolution process created in section 38 of the CSOS.

In this matter, the respondent (Singh) was the manager of the company Ashdin Holdings (Pty) Ltd (the company), which owns a number of units at Durdoc Centre. The appellant (Durdoc Centre Body Corporate) manages the centre on behalf of the various owners, and the trustees serving on the body corporate are responsible for raising the levies, which include the amounts charged for the consumption of electricity. It was common cause that the units owned by the company were not supplied with electricity.

In the period of the complaint, Singh (and not the company, duly represented by Singh) lodged an application for dispute resolution with the Ombud on behalf of the company in which he claimed reimbursements for *"the electricity portion of my levy as I have not received electricity"*.

The dispute was opposed by the appellant and the dispute was referred for adjudication in terms of section 38 of the CSOS.

The dispute was adjudicated, and the adjudicator delivered her order and found that the appellant had been enriched by the respondent's contribution towards the electricity consumed by the units. The adjudicator directed the appellant to reimburse the respondent.

It is against this adjudication order that the appellant approached the court. One of the grounds of appeal raised by the appellant was that the adjudicator erred in finding that the defendant before the tribunal (Singh) had the necessary *locus standi* to bring the dispute.

Community Schemes Ombud: Who can they help?...continued

The difficulty with this finding is found in the error by the adjudicator by equating authority with legal capacity to litigate, as the application to the Ombud was lodged by Singh in his own name and personal capacity.

In essence the court was called upon to determine whether the adjudicator erred in allowing Singh to lodge the dispute with the Ombud. i.e. did Singh have sufficient standing to lodge a dispute?

The appellant argued that Singh was not the owner of the units nor was he an affected party or a party who could lodge a dispute, as the company was the registered owner of the units in question.

The adjudicator when the matter was heard was of the view that it was merely the applicant's authority to act for the company which owns the units that were challenged and she was satisfied that Singh was duly authorised by resolution to act on behalf of the company.

The difficulty with this finding is found in the error by the adjudicator by equating authority with legal capacity to litigate, as the application to the Ombud was lodged by Singh in his own name and personal capacity.

The court in deciding this issue emphasised the difference by confirming that the standing of a person to commence litigation does not depend on authority to act, it depends on whether the litigant is regarded by the court as having a sufficiently close interest in the litigation and its outcome.

Considering that Singh was only a manager of the company, although authorised by the company to act on its behalf, the court held that the right to lodge a dispute was prescribed by legislation as a right that accrued to owners of units who were materially affected by a community scheme related matter. The applicant before the tribunal, Singh, was neither the owner of these units nor did he have a material interest in the existing scheme. He therefore lacked the necessary standing to institute the dispute, and it was accordingly decided that the appeal by the appellant be upheld.

The court confirmed that a party's right of appeal against a decision by the Ombud is limited to questions of law only. Section 57(1) of the CSOS provides:

"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".

Although the purpose and intent of CSOS is to provide a more cost effective and expedient manner in which disputes in regard to community schemes can be resolved, it is important to ensure that the correct party, with the necessary standing, approaches the Ombud as applicant in any CSOS adjudication proceedings.

Lucinde Rhodie

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Groundbreaking judgment redefines the role of Commissions of Inquiry and civil society – Part 2

The new guard which President Ramaphosa has put in place, is coming to grips with the challenges within the NPA and other investigating and prosecutorial bodies and, given a little more time, one will be observing some roosting chickens being roasted.

The people of South Africa have been chomping at the bit to see anti-corruption action and prosecutions following on the expectations raised by President Ramaphosa when he took office with "thuma mina" (send me) from the famous Hugh Masekela song.

Starting with pushback against the e-toll system in 2013, South African Society decisively and publicly rejected corruption in 2016, as reported in the annual Corruption Watch Report Card, evidence of a turnaround in the fight against corruption that had become systemic to a point where state capture caused economic growth to plummet from 4.9% in 2006 to 0.7% in 2018, wiping out one third of SA's R4.9 trillion GDP. The chickens of corruption clearly came home to roost.

Last week, in [Part 1](#) of this 2-part article, we explained that, given the depth of grand corruption in our country, acknowledged as "state capture" it would be unrealistic to expect an instant

turnaround. The new guard which President Ramaphosa has put in place, is coming to grips with the challenges within the NPA and other investigating and prosecutorial bodies and, given a little more time, one will be observing some roosting chickens being roasted.

South Africa now has a Commission into State Capture, Ms Shamila Batohi as the new Head of the NPA, assisted by Ms Hermione Cronje as in-house head of the Investigative Directorate, a Special Tribunal with eight High Court judges focusing especially on anti-corruption, and a new budget to boot. The structural framework to combat corruption has been put in place. There is a light at the end of the tunnel for ABAC, and it certainly isn't an approaching train.

But, just reading the headlines in the media and, to actually quote Ms Shamila Batohi herself: "The people of South Africa are impatient, understandably so." - The Economist, 12 Dec 2019.

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Groundbreaking judgment redefines the role of Commissions of Inquiry and civil society – Part 2...continued

The Mlambo judgment setting aside the Seriti Report in August last year also serve as clear evidence that civil society has grown impatient and intolerant and that the judiciary will not baulk at upholding constitutional values.

To kick off the new year, a community whose patience ran out, applied to the Makhanda High Court for relief and obtained a court order that the Makana Municipality be dissolved and placed under administration for violating its constitutional mandate by failing to provide basic services to the community. The message has now become clear: if government fails to act, civil society will obtain relief from a judiciary which has ostensibly remained untainted by corruption and ready and able to ensure that constitutional mandates are discharged.

The Mlambo judgment setting aside the Seriti Report in August last year also serve as clear evidence that civil society has grown impatient and intolerant and that the judiciary will not baulk at upholding constitutional values.

Our *Judiciary*, through all these state capture years of things falling apart, held its own culminating, from an ABAC perspective, in the High Court Gauteng Division, Pretoria handing down a full bench decision in the second half of last year, by three very senior judges decisively setting aside the Report of the Seriti Commission of Inquiry regarding Arms Procurement. The case was cited as *Corruption watch and Another v The Arms Procurement Commission and Others* and has become a pivotal focus point in ABAC, setting the standard for commissions of enquiry.

This is a truly groundbreaking judgment – a first in our country's legal history and a first for the African continent. In finding international precedent, the full bench went to New Zealand and Canada and, having found significant comparative case law, decided that the principles set out in those cases are applicable to the South African legal system sourced as it is in the values of our own constitution.

The court found that the Seriti Commission failed to conduct the task assigned to it through its terms of reference and the Constitution in line with principle of legality and that it failed to admit relevant evidence, that there was a failure to interrogate critical persons. It further stated that:

- Commissions exercise public power
- Decisions must be rationally related to the purpose for which the power was given
- The Principle of legality is applicable to Commissions who have to maintain an open and enquiring mind.

This case is of significant importance for ABAC because:

1. Firstly, this judgment brings power to the people: the applicants were non-profit organisations, Corruption watch and Right2KnowCampaign.
2. Secondly, it is now clear that a court of law has the power to review and set aside the findings of a judicial commission of inquiry. No white-wash cover-ups allowed.

Groundbreaking judgment redefines the role of Commissions of Inquiry and civil society – Part 2...continued

Given a proper mandate by the SA constituency, who will not allow any infringement of their constitutional rights, human or property, South Africa can become the ABAC leader on the African continent.

3. Thirdly it redefines the role, function and obligations of a commissioner of an inquiry tasked with uncovering the truth.
4. Fourthly it reaffirms the role of the Fourth Estate, the media, in confronting and uncovering grand corruption and state capture. In the judgment reference is made to the three books which were published on the arms deal controversy and it is noted that "...none of these texts appear to have been examined carefully by the commission...". A fresh sense of hope infused our brave journalists. All their hard vanguard work is now recognised and their factfinding may not be disregarded by the Commissions of Inquiry.
5. Fifthly, this judgment establishes a clear standard for the other commissioners, affirming their duty to inquire fully into the matters they have to investigate and to test the veracity of the evidence before them in terms of documents, reports and records which might be readily available, no stone unturned.
6. Sixthly, this judgment goes a long way to show the outside world that South Africa's Rule of Law is alive and well and protected by an independent judiciary willing to hold itself accountable.
7. Lastly, it is hoped that the Financial Action Task Force, the global AML Regulator, will take cognisance of the extent to which this judgment, and the precedent it has set, introduces a dynamic new level of effectiveness into our justice system albeit in the absence of impressive results emanating from the rest of the Justice system.

Given a proper mandate by the SA constituency, who will not allow any infringement of their constitutional rights, human or property, South Africa can become the ABAC leader on the African continent. We have a new legal framework which will deal with corruption and, even if that process takes longer than initially anticipated, civil society can depend on our steadfast judiciary to protect the democratic and constitutional values of our country.

Willem Janse van Rensburg

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