STBB

Understanding the Community Schemes Ombud Service Act

In South Africa, a substantial number of homes are situated either in sectional title schemes, homeowners' association developments, or other forms of community schemes. The Community Schemes Ombud Service Act ('the CSOS Act'), which establishes the Community Schemes Ombud Service ('CSOS'), is an important piece of legislation for property owners, occupiers, and those involved in managing community schemes.

What is the purpose of the CSOS Act?

The CSOS Act establishes a dispute resolution mechanism for owners, occupiers, community schemes, and scheme executives (i.e. persons who exercise executive control over a community scheme, such as trustees or directors). The CSOS Act imposes certain compliance obligations on community schemes, and grants valuable rights to owners, occupiers, and those involved in the management of schemes. CSOS also has broader functions relating to the regulation, monitoring, and promotion of good governance in community schemes.

What is covered by the CSOS Act?

The CSOS Act applies to all community schemes as defined in the Act. This means that persons involved in the management of a homeowners' association, share block scheme, housing scheme for retired persons, sectional title scheme, or another development falling within the statutory definition of a 'community scheme', as well as owners or occupiers in such a scheme, are impacted by the CSOS Act. A golf or residential estate will similarly fall within the Act where the structure of that estate meets the statutory definition of a community scheme.

It is also important to understand that rights granted in terms of the CSOS Act cannot be waived or limited. A community scheme therefore cannot validly use its rules, constitution, or other governance documentation to contract out of the provisions of the CSOS Act or prevent a person from exercising any rights granted by the Act.

CSOS and dispute resolution

CSOS's dispute resolution jurisdiction is defined by the legislature. A dispute referred to CSOS must concern the administration of a community scheme and meet the requirements of the CSOS Act, including that the relief sought falls within one or more of the categories provided for.

In addition, under the current CSOS Practice Directive, an applicant is generally required to first attempt to resolve the dispute through the internal dispute resolution mechanisms of the community scheme before approaching CSOS. There are limited exceptions, including where the respondent refuses or fails to participate in the internal process or where there is no functioning scheme executive committee.

Is there different treatment for sectional title schemes?

The answer is yes and no.

When the Sectional Titles Schemes Management Act ('the STSMA') became operational at the same time as the CSOS Act in 2016, some confusion arose as to which of the new provisions applied to all community schemes under the CSOS Act and which applied only to sectional title schemes under the STSMA.

Generally, the dispute resolution mechanisms under the CSOS Act apply in respect of all community schemes falling within the definition in that Act. The provisions of the STSMA apply, in addition, to sectional title schemes and regulate the management of those schemes. The STSMA does not apply generally to community schemes that have not been established as sectional title schemes.

Accordingly, a sectional title scheme is subject to the CSOS Act and the additional requirements of the STSMA, whereas other forms of community schemes are subject to the legislation and governance documentation applicable to their particular legal structure.

Rights granted to owners, occupiers, and other affected persons under the CSOS Act

Application for dispute resolution

A person who is a party to, or materially affected by, a dispute regarding the administration of a community scheme may apply to CSOS for resolution of that dispute, provided that the relief sought falls within the scope of the Act.

An adjudication order is binding and is enforceable as if it were a judgment of the Magistrates' Court or High Court, depending upon the nature and value of the relief. Where applicable, a copy of the adjudication order may be lodged and registered with the appropriate court for enforcement.

Notice and access to documents

Persons materially affected by a dispute are entitled to notice in accordance with the Act. A person notified as an affected person may, on application to CSOS and subject to the prescribed fee, inspect and obtain copies of the application, submissions made in response, the applicant's reply, and the Ombud's current list of adjudicators.

Access to adjudication orders

CSOS must publish its adjudication orders and the reasons for those orders and make them available for public inspection. On application and subject to the prescribed fee, one may obtain copies of all orders made in respect of a community scheme. This right is not restricted to owners or prospective owners.

Important compliance obligations under the CSOS Act and Regulations

Payment of CSOS levies

Every community scheme must pay the prescribed CSOS levy on a quarterly basis, subject to applicable discounts or waivers. Interest is payable on amounts that remain overdue. These amounts are generally collected by the community scheme and paid over to CSOS quarterly.

Registration and annual returns

All community schemes must register with CSOS. A newly incorporated community scheme must file its registration in the prescribed form within 30 days of its incorporation in terms of the applicable law.

Annual returns and the annual financial statements of the community scheme must be filed with CSOS within four months after the end of the scheme's financial year, together with the prescribed supporting documentation.

Offences

The CSOS Act provides that it is an offence, amongst other things, for a person to:

- Fail to provide access to books, accounts, documents, or assets when required to do so under the Act;
- Fail to comply with a directive issued under the Act;
- Fail or refuse to provide data or information when required to do so, or provide false or misleading data or information; or
- Intentionally refuse to perform a duty, or obstruct another person in the exercise of a power or performance of a duty, under the Act.

A person convicted of an offence may be liable to a fine or imprisonment for a period not exceeding five years, or both. A second or subsequent conviction may attract a fine or imprisonment for a period not exceeding ten years, or both.

Compliance with adjudication orders

Parties affected by an adjudication order are required to comply with it. As noted above, an adjudication order is enforceable as if it were a judgment of the Magistrates' Court or High Court, as applicable.

Duties of scheme executives

The CSOS Regulations provide that scheme executives (i.e. trustees, directors, or other persons exercising executive control of a community scheme) must:

- Take reasonable steps to inform and educate themselves about the community scheme, its affairs and activities, and the legislation and governance documentation under which it operates;
- Take reasonable steps to obtain sufficient information and advice about matters to be decided by the scheme executives so that they can make conscientious and informed decisions;
- Exercise an active and independent opinion in respect of matters to be decided;
- Exercise due diligence in relation to the business of the scheme and preparation for and attendance at meetings; and
- Unless excused by the chairperson of the scheme executives on reasonable grounds, attend meetings of the scheme executives and the annual general meeting, where the scheme holds an AGM.

Community schemes must also have the prescribed fidelity insurance against the risk of loss of scheme money caused by fraud or dishonesty by an insurable person, subject to the provisions of the CSOS Regulations. The obligation to maintain this insurance is imposed on the community scheme.

The duties of scheme executives are additional to any fiduciary duties imposed by common law or other applicable legislation.

For further information or legal assistance, contact our team at **info@stbb.co.za.**

Let us connect you.
STBB offers access to a dynamic team of attorneys, conveyancers and notaries, who are specialists in numerous fields of the law.

Cape Town
8th Floor, 5 St Georges Mall,
Cape Town
021 406 9100

Blouberg
24 Blaauwberg Road,
Table View
021 521 4000

Claremont
2nd Floor, Buchanan's Chambers,
Cnr Warwick Street & Pearce Road,
Claremont
021 673 4700

Helderberg
1st Floor, Titanium House,
19 Gardner Williams Avenue,
Paardevlei, Somerset West
021 850 6400

Noordhoek
4 Carlton Close,
Sunnydale, Noordhoek
021 784 1580

Tyger Valley
5 High Street, Rosenpark,
Tyger Valley
021 943 3800

Hermanus
Unit 3-4, 7 Village Lane,
Hemel and Aarde Village,
Hermanus
028 753 0033

Fourways
Ground Floor, Block A, The Pivot,
Montecasino Boulevard,
Fourways
010 001 2632

Bedfordview
105 Boeing Road East,
Bedfordview
011 453 0577

Sandton
112, 4th Street, Parkmore,
Sandton
011 219 6200

Centurion
F&S House,
c/o John Vorster Drive
& Lenchen Avenue North,
Centurion
012 001 1546

Durban
Unit 3, 1st Floor,
21 Richefond Circle,
Ridgeside Office Park,
Umhlanga Ridge
031 583 8060

East London
1st Floor, Block B,
Chesswood Office Park,
8 Winkley Street, Berea,
East London
043 721 1234

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