

**THE APPLICATION OF ADMINISTRATIVE LAW
IN COMMUNITY SCHEMES IN SOUTH AFRICA**

by

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**submitted in accordance with the requirements for
the degree of**

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA (PRETORIA)

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(February 2024)

DECLARATION

By submitting this dissertation, I declare that the entirety of the work is my own original work that I am the authorship owner thereof unless expressly stated otherwise and I have not previous in its entirety or in portion submitted it for obtaining any qualification.

ACKNOWLEDGEMENTS

I would like to express my gratitude to the following people that helped me complete this dissertation. My research supervisor Prof. TA Manthwa for his professional guidance and support throughout this research study.

A special word of thanks to my family, my wife, Mabusha Dina Maja-Masilo for her support and love always, especially during the writing of this dissertation and my children, Reabetswe Masilo, Fanyana Mbhele, Thorisho Mamabolo, Duduzile Mkhabele for the understanding they have shown when I was working on this study.

I have had a great deal of help and feedback from my professional colleagues during the course of this study, they are too numerous to mention all by name and I'm indebted to all of you, for this achievement.

I acknowledge that it is through the divine guidance of the Almighty that I eventually completed this dissertation and to him be the glory and honour.

Abstract

This study examines the shortcomings in the Community Schemes Ombud Services Act's implementation in South Africa to eradicating lawlessness. This revolutionary legislation aims to close the wealth gap between South Africans, particularly that racially categorised as black and white. Given the history of apartheid, it was inevitable that the transformation agenda of the new democracy would prioritize protecting senior citizens' human rights, addressing racial inequality and discrimination in public services, and taking steps to ensure that the rights of the elderly are respected and upheld. This legislation, an initiative of the democratic South Africa, was impacted by a comparative study that led to the creation of a hybrid system that includes regulatory functions under the Ombud's control and a dispute resolution mechanism. However, the system's implementation has had several flaws.

This study employed a qualitative research design which included an examination of literature, particularly case law and recent developments in the development of the said legislation. Results include a thorough understanding of the administration and governance of schemes prior to the CSOS Act's promulgation, research conducted, new legislation and policy context post-CSOS, lessons learned about the implementation of ombud services in other nations, and the legal phenomenon of a 'community scheme within a community scheme', including its operational framework and legal basis, as well as regulatory decisions that adhere to administrative law. This study makes a contribution to literature that pertain to the less disadvantaged (black people) in especially rural communities in implementation of this law.

KEY TERMS

Administrative action

Administrative law

Community schemes

Constitutional conflict

ABBREVIATIONS

BCCM Act	Body Corporate and Community Management Act
CIPC	Companies and Intellectual Properties Commission
CSOS Act	Community Schemes Ombud Service Act
CSOS	Community Scheme Ombud Service
EAAB	Estate Agency Affairs Board
HOA	Homeowners Association
MOI	Memorandum of Incorporation
NPC	Non-Profit Company
PAJA	Promotion of Administrative Justice Act
PELJ	Potchefstroom Electronic Law Journal
SAPL	Southern African Public Law Journal
STA	Sectional Titles Act
STSM Act	Sectional Titles Schemes Management Act

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CHAPTER 1: INTRODUCTION

1.1 Background to study

The administration and management of community schemes, including homeowners' associations (HOAs), condominiums, and housing cooperatives, are influenced by administrative law.¹ Normally, an association or board of directors oversees a set of rules and regulations that govern these schemes. Administrative law makes sure that these associations' decision-making procedures and actions are just, open, and compliant with the law.² Some ways in which administrative law applies to community schemes: Making rules and enforcing them: Generally, homeowners or members of community schemes are required to abide by a set of rules and regulations. Fair and non-discriminatory rule-making and enforcement are guaranteed by administrative law. Regulations must be reasonable, unambiguous, and compliant with all relevant laws. Records and Transparency: Community associations are frequently required by administrative law to preserve specific records and make them available to homeowners or members. This comprises of financial statements, minutes from meetings, and other significant papers that support openness in the association's activities.³ Non-discrimination: Discrimination in the administration of community schemes is prohibited by administrative law. Associations may not discriminate on the basis of race, colour, religion, gender, sexual orientation, disability, familial status, or any other protected category under anti-discrimination laws, CSOS. Due Process: Administrative law provides homeowners and members of community schemes with certain procedural rights when they are subject to disciplinary actions or disputes.⁴ This includes the right to notice, a hearing, and the opportunity to appeal decisions made by the association or board. It is critical that homeowners and members of community schemes understand their rights and responsibilities under administrative law.

¹ Heidi Barter Property Law.

² Heidi 'Property Law'.

³ Heidi 'Property Law'.

⁴ Act 9 of 2011.

These laws are intended to protect their interests and ensure that these organisations operate fairly and legally.⁵ Hence, the Community Schemes Ombud Service (referred to herein as CSOS Act) established the Community Scheme Ombud Services (CSOS),⁶ to address and regulate community schemes, specifically sectional title developments, homeowners' associations (HOAs), and other shared property arrangements. The various reasons for the formation of CSOS was to handle disputes: One of the primary reasons for developing CSOS was to provide a formal dispute resolution mechanism for conflicts and disputes that frequently arise in community schemes.⁷ Rule violations, management issues, financial disputes, and conflicts between owners or between owners and the scheme's governing body are examples of such disputes. Encourage pleasant living by offering procedures for settling disagreements and conflicts in a fair and unbiased way, CSOS seeks to encourage harmonious living within community schemes. Residents' tensions are lessened, and a sense of community is preserved as a result. CSOS offers Instruction and Assistance by providing education and training to individual property owners as well as the governing bodies of community schemes.⁸ Ultimately, this promotes greater management and decision-making within these schemes by raising awareness of rights and responsibilities.

It preserves accountability by assisting within community schemes by supervising their operations and decision-making procedures. It guarantees that schemes adhere to due process and act in their members' best interests. Regulate Governance by supervising and controlling the administration and governance of these schemes, ensuring adherence to pertinent laws, regulations, and best practices is part of this. Enforce Compliance: CSOS ought to ensure that community schemes operate in accordance with all applicable laws and regulations.⁹ This entails making certain that schemes comply with legal mandates concerning rule-making, record-keeping, financial management, and other areas.

⁵ Act 9 of 2011.

⁶ Act 9 of 2011.

⁷ Act 9 of 2011.

⁸ Act 9 of 2011.

⁹ Act 9 of 2011.

The CSOS Act governs the operations, functions, and governance of the service, as published in the Government Gazette of 2011.¹⁰ Until the CSOS was established, aggrieved parties had two options: they could go to court or consult a professional arbitrator. An investigation into the appropriate procedures for resolving disputes in sectional title schemes started in 2004 and culminated with the introduction of the CSOS.¹¹ Twenty percent of all residential properties in South Africa is thought to consist of sectional title units.¹² Because of increased security, affordability, and a more communal lifestyle, sectional title schemes are the type of housing that is expanding the fastest in South Africa.¹³

The Community Scheme Ombud Service's mandate was quickly expanded to include a home or property owner's association, a share blocks company, a housing scheme for retired people, and a housing co-operative. Consultations with local stakeholders were supplemented by extensive global research, resulting in the CSOS Act, which was influenced by similar legislation in Australia.¹⁴ The Body Corporate and Community Management Act (hereinafter BCCM Act) governs schemes in Queensland, Australia.¹⁵ With regard to the secondary objects, the primary purpose of this Act is to provide for flexible and contemporary communally based arrangements for the use of freehold land. This primary goal is accomplished through the setting up of community title schemes, as well as its operation and management.

In relation to the Australian experience in the management of housing schemes, Mehana (2015) claims that the CSOS ought to play a major role in the regulation of managing agents and ensure that there are adequate and structured training programs available so that the industry can become more professional and accountable.¹⁶ In this regard, the Community Scheme Ombud Service closely monitor Strata Community's proposals for revised training standards for Australian

¹⁰ CSOS Act (n 1), section 2.

¹¹ National Department of Human Settlements 'Business Case for the Community Schemes Ombud Service', 10 February 2012.

¹² Swart L, '*Future Prospects of the Sectional Title Industry in South Africa*' (27 March, 2014).

¹³ Goslett A, '*Sectional Titles versus Freehold Ownership*' (9 September 2010).

¹⁴ Community Title Act, 2001 (Australian law).

¹⁵ Body Corporate and Community Management Act, 1997 (Australian law).

¹⁶ Rev Dr Vukile Mehana, 2 September 2015, STRATA and other community schemes.

managing agents in Australia.¹⁷ In the context of the stakeholder dynamics that CSOS is dealing with, the emphasis on training agents could provide South Africa with interesting models for training not only property agents and developers, but also judicial officers involved in dispute resolution in such housing sectors.

The BCCM's goal is to establish administrative and management rules for community schemes in Australia.¹⁸ The CSOS was established for similar reasons. To assist communities in this type of tenure, a simpler, structured, and comprehensive model of rules outside of the court process was required. The BCCM exists to establish administrative and management arrangements for community schemes, and the salient and yet significant features of similarities between such administrative and management arrangements would entail legislation.¹⁹ Court processes have proven to be time-consuming and costly, whereas the alternative dispute resolution mechanisms introduced by these two laws are quicker and less expensive. The other similarity is the lack of legal representation, which allows unit owners to litigate any issues within the jurisdiction of these laws on their own.²⁰

Most individual owners could not afford this type of litigation or arbitration.²¹ As a result of an increase in disputes within community schemes, the CSOS was established to regulate and provide a cost-effective dispute resolution mechanism. The CSOS is mandated to regulate community schemes in addition to providing a dispute resolution mechanism.²² This necessitated the creation of a hybrid system that includes a dispute resolution mechanism as well as regulatory functions overseen by the Ombud.

The Sectional Titles Schemes Management Act (hereinafter the STSM Act) must be read in conjunction with the CSOS Act.²³

¹⁷ STSM Act (n 6), section 18.

¹⁸ Section 18.

¹⁹ Act 8 of 2011.

²⁰ Act 8 of 2011.

²¹ Schindlers 2019, News, Property Law.

²² CSOS Act (n 1), section 59.

²³ Act 8 of 2011.

According to STSM Act section 18, the Chief Ombud preside over the Advisory Council.²⁴ 'The Advisory Council is composed of no more than seven but no fewer than five members, one of whom must be the Chief Ombud, who serves as chairperson at Advisory Council meetings'. According to Section 18(13), CSOS staff members are required to carry out the Advisory Council's administrative duties.²⁵ "The administrative functions of the Advisory Council must be carried out by employees of the Community Schemes Ombud Service, as defined in section 3 of the CSOS Act, as designated by the Chief Ombud". If an owner or body corporate is unable to get a special or unanimous resolution, they may seek relief from the chief ombud under section 6(9) of the STSM Act.²⁶

Section 21 of the CSOS Act mandates that the Ombud designate adjudicators to render decisions on cases that the Ombud refers for adjudication.²⁷ "For each regional office that is established, the chief ombud is required to appoint adjudicators on a full-time and part-time basis who possess the appropriate training and background in community scheme governance as well as the necessary credentials and background to hear disagreements under the supervision of an Ombud or deputy Ombud". Therefore, it would be assumed that all decisions made by the adjudicators, who were chosen by the Ombud and acting at his or her request, are administrative actions for the purposes of section 33 of the Constitution of the Republic of South Africa,²⁸ (hereinafter the Constitution) and the Promotion of Administrative Justice Act, 2000 (hereinafter PAJA).²⁹ Section 33 of PAJA provides; that: Everyone has the right to lawful, reasonable, right to reason for the decision and procedurally fair administrative action. Every person whose rights are contravened by administrative action is entitled to written reasons why such a decision was made. To promote efficient administration, the Constitution ensures that all the elements of Just administration are complied with, and it must provide for judicial or, where appropriate, an independent and impartial tribunal to review administrative action; apply a responsibility on the state to give

²⁴ STSM Act (n 6), section 18(2).

²⁵ STSM Act (n 11), section 18(13).

²⁶ STSM Act (n 11), section 6(9).

²⁷ CSOS Act (n 1), section 21(2)(b).

²⁸ Constitution of the Republic of South Africa, 1996.

²⁹ Promotion of Administrative Justice Act 3 of 2000, section 33.

effect to the rights stated in subsections (1) and (2); and foster efficient administration.

PAJA is a key piece of administrative law legislation. It is intended to ensure that administrative actions taken by public authorities are done fairly, legally, and transparently. This study refers to important aspects of PAJA in part or entirely. A broad range of government actions are covered by its broad definition. "Public Power" and "Public function", making it evident that any administrative actions made by people or organisations using these powers or functions are covered by PAJA. PAJA covers a broad spectrum of government bodies and agencies by defining "organ of state" as any department, municipality, or other government institution.³⁰ "Interested or Affected Party" refers to a person whose rights have been adversely affected by an administrative action or who has a reasonable expectation that one will be taken. Lawful, reasonable, and procedural fair actions are referred to as "fair administrative action".³¹ For the purposes of PAJA, "review" refers to a court, tribunal, or other body or authority having the authority to examine an administrative action. Clarification of the procedures for contesting administrative actions under the Act is provided by this definition.

PAJA can be applied to non-governmental organisations or private citizens serving in public roles since "person" is defined as any natural or juristic person. Establishing the boundaries of what qualifies as administrative action, who can contest it, and the fairness, legality, and reasonableness standards that govern the Act's execution, the above are essential to comprehending and implementing the PAJA Act.

PAJA defines decision in Section 1(v): if an administrative action has materially and adversely affected someone's rights and they have not been given reasons for the action, they can request written reasons for the action from the concerned administrator within ninety days of learning about it or could have reasonably been expected to learn about it. The Registrar may have decided by appointing the

³⁰ Section 1 PAJA.

³¹ Section 1 PAJA.

appeal tribunal, which would be equivalent to issuing authority. This decision, though, needs to be administrative in nature. The court noted in *Permanent Secretary, Department of Education, Eastern Cape and Others v Ed-U-College (PE) Inc*,³² ("Ed-U-College") that administrative decisions typically deal with acting under provisions of empowerment, On the other hand, formulating policy, which is an executive function, would be an executive action and outside the purview of the statutory framework.³³

1.2 Problem statement

The problem that CSOS seeks to address is the lack of effective governance and dispute resolution mechanisms in South African community schemes.³⁴ Sectional title developments and homeowners' associations, for example, frequently face issues with management, rule enforcement, financial transparency, and resident conflicts.³⁵ Prior to the formation of CSOS, homeowners and residents had few options for resolving disputes within their community schemes. There were no standardised procedures in place to resolve these disputes and ensure fair and accountable governance, resulting in tensions, mistrust, and a detrimental effect on the standard of communal living, whereas the issue that PAJA seeks to address is the lack of accountability, transparency, and fairness in administrative actions taken by South African public authorities.³⁶ Prior to the implementation of PAJA, individuals affected by government decisions had few options for contesting potentially arbitrary, irrational, or unjust administrative actions. The lack of clear administrative review procedures and access to decision-making reasons resulted in a power imbalance that harmed individuals' rights and interests. Inadequate dispute resolution and procedural fairness mechanisms created a significant gap in the South African legal system.³⁷

³² *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College(PE)(Section21)* 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC) (29 November 2000).

³³ *Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) BCLR 118 (CC) [18].

³⁴ Abrahams and Gross *Body Corporate Disputes*.

³⁵ Abraham and Gross *'Body Corporates'*.

³⁶ Abraham and Gross *'Body Corporates'*.

³⁷ *Business case for the Community Schemes Ombud Services (CSOS)* [2.4].

The CSOS problem statement is broken down into multiple important elements that it aims to solve disputes between homeowners, between homeowners and governing bodies, and within the governing bodies themselves are common in community schemes.³⁸ These conflicts have the potential to disrupt the schemes' harmonious living and efficient management. Insufficient regulatory oversight in many community schemes can lead to a variety of problems, such as irregular governance, financial mismanagement, and non-compliance with applicable laws. Community schemes are subject to a multitude of laws, rules, and regulations.³⁹ Operational difficulties, financial penalties, and legal problems may arise from a lack of clarity and compliance.

Community schemes may have complicated governance, with multiple governing bodies in charge of decision-making and property management. Sustaining the community's well-being requires effective governance. Homeowners and governing bodies may not fully understand their rights and responsibilities, which can lead to misunderstandings and disagreements over issues like rule enforcement, levies, and property maintenance. A specialized Ombud service is the most appropriate option for a system to provide monitoring, informational, training, education, and dispute avoidance functions in addition to community scheme dispute resolution services, the Department is satisfied after carefully weighing the options.

In addition to managing and running a dispute resolution service, the Community Scheme Ombud Service should be created with the specific requirements of community schemes across South Africa in mind. It should also have several secondary roles in addition to their primary and main.⁴⁰ The PAJA problem statement is broken down into multiple important elements that it aims to solve. Several fundamental rights such as the right to fair administrative action and the right to reasons behind decisions, are guaranteed by the South African Constitution.⁴¹ In order to guarantee that these rights are adequately safeguarded

³⁸ Heidi, 'Property Law'.

³⁹ Heidi, 'Property Law'.

⁴⁰ Business case for the Community Schemes Ombud Services (CSOS) [2.5].

⁴¹ Compliance with PAJA.

and maintained in administrative proceedings, PAJA was introduced. The procedural justice of administrative actions made by government authorities was inconsistent before PAJA was passed. Many people believed that when decisions affected their rights or interests, they were not given the chance to be heard or to offer their opinions.⁴² A lack of confidence in the administrative justice system resulted from this issue. Prior to PAJA, there were inconsistencies in how different courts and authorities interpreted administrative law and principles. Confusion and uncertainty resulted from the lack of a unified framework for understanding and applying administrative law.⁴³ Individuals faced difficulties in seeking redress when their rights were violated due to the lack of clear procedures for reviewing administrative actions.

PAJA established a framework for the review of administrative actions, allowing individuals to challenge decisions in a structured manner.⁴⁴ Some administrative actions lacked transparency and accountability, particularly in terms of providing reasons for decisions.⁴⁵ PAJA emphasises the importance of providing clear and understandable reasons for decisions to increase transparency. The Act clarifies the definition and scope of "public power" and "public function" to clarify when and how PAJA should apply, which was previously unclear.⁴⁶

A comprehensive set of fundamental rights is, in fact, guaranteed by the 1996 South African Constitution. To this end, PAJA is essential for ensuring that these rights are upheld, especially regarding administrative actions. The right to fair administrative action is guaranteed by Section 33 of the Constitution. To guarantee that people have access to remedies in situations where administrative actions are unjust or unfair, PAJA lays out the guidelines and processes by which such actions can be contested and reviewed.

⁴² Section 1.

⁴³ Compliance with PAJA.

⁴⁴ Section 5.

⁴⁵ Okpaloba, 'The Constitutional Principle of Accountability' 2.

⁴⁶ Section 1.

The right to fair administrative action is intimately related to the right to reasons for decisions. Administrative decisions must be made with clear and understandable justifications given to individuals if they are to be deemed just. PAJA requires administrative decisions to have justification, assuring accountability and openness. The Constitution's Section 33(3) mandates that national legislation must be passed to implement the rights outlined in Section 33. Because PAJA required national legislation, it was enacted. It is an essential tool for the efficient execution of the right to fair administrative action as well as other relevant rights. Four substantive rights specified in Section 33 of the Constitution are covered by PAJA, including:

The fundamental element in guaranteeing the fairness and accountability of administrative actions is the entitlement to justifications for such actions. People have a right to know the reasoning behind decisions and the process used to make them.

The PAJA establishes legal guidelines and standards for administrative actions to guarantee their compliance with the law, thereby safeguarding the right to lawful administrative action. The right to reasonable administrative action prohibits arbitrary or irrational administrative actions by establishing standards for their reasonableness.

The entitlement to just and equitable administrative procedures: The PAJA establishes protocols to guarantee that administrative actions are conducted equitably and in compliance with due process.⁴⁷ In conclusion, PAJA is an essential part of South Africa's legal system because it makes sure that the constitutionally guaranteed rights are effectively protected and upheld, especially when it comes to administrative actions. It encourages accountability, transparency, and the rule of law in government operations and gives people a way to contest unfair or unjust administrative decisions.

⁴⁷ [143].

It is unclear if the service fulfils its regulatory obligations, which would generally include overseeing, policing, and guaranteeing the quality of scheme governance. A state organ or a natural or legal person with state authorization must make the decision.

When issuing Section 6(9) certificates, the Chief Ombud must exercise public power or function in accordance with PAJA. The minority judgment in *Chirwa v Transnet Ltd and others*⁴⁸ outlined the following elements to take into account when determining whether a power or function is public: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the source of power; and (c) whether the decision must be used for the benefit of the public.

The Ombud's decision has an impact on the public because it affects all members of the scheme and determines the outcome of disputes between members of the scheme. PAJA and CSOS were both created to address these issues by creating legal frameworks that promote transparency, fairness, and effective dispute resolution in administrative actions and community schemes, respectively.

The CSOS legislation currently does not address all the abovementioned elements. According to Section 57 of the CSOS Act, any person who is dissatisfied with the adjudication order may only appeal on a point of law. This compromised the right to a fair trial guaranteed by Section 34 of the Constitution and is inconsistent with Section 39(2) of the Bill of Rights. According to a literal reading of Section 57 of the CSOS Act, an appeal is only available to an aggrieved party. According to the section, an applicant, association, or affected party may only Appeal on a question of law. Section 34 of the Constitution states that everyone has the right to appeal, and this provision need to be read in tandem with Section 165 of the Constitution, which grants judges the authority to rule on the constitutionality of legislative provisions. In *Lesapo v Northwest Agricultural Bank*,⁴⁹ the court held that a trial or hearing before a court or tribunal is a means of exercising one's rights and institutionalizing dispute resolution. As a result,

⁴⁸ 2008 4 SA 367 (CC) [135-136].

⁴⁹ *Lesapo v Northwest Agricultural Bank* 2000 1 SA 409 (CC) para 11 citing Currie I and De Waal J Bill of Rights Handbook (2000) 711-722.

Section 34 of the Constitution guarantees that everyone has access to the judicial system.

PAJA provides individuals with the ability to challenge unjust administrative actions, whereas CSOS provides mechanisms for resolving disputes and regulating the governance of community schemes to promote harmonious living.

1.3 Research question

This study will consequently answer the following research questions:

- 1 Is the approval of the special and unanimous decisions in accordance with administrative action provided for in Section 1 of PAJA?
- 2 Is section 57 of the CSOS Act's limitation consistent with section 34 of the Constitution and interpreted in such a way that the adjudicators perform administrative rather than judicial functions?
- 3 Are the restrictions outlined in Section 57 of the CSOS Act interpreted in line with the spirit, purport and object of the Constitution?

1.4 Significance of the study

The study is focused on a topic that is relatively new in property law, making it difficult to find extensive literature. The evolution of jurisprudence about the research made determining the finality of issues of rules, policies, and legislation an insurmountable task because there are developments that could change the subject's legislative framework.

This new legislation have gaps which could not be cured through regulations as the primary legislation could not clearly articulate the powers of the Ombud to include that all disputes that arise out of community schemes must firstly be dealt with by the Ombud and not court. This issue was left to the court as more fully explained below. This legislation also limited the dissatisfied parties to the outcome of the adjudication order to only appeal in high court and only on a point of law thereby eroding the powers of review in terms of section 34 as enshrined in the

constitution. In addition to the gaps indicated above the seems to be conflicting powers between the regulatory framework and dispute resolution functions.

Accordingly, legislation must be drafted in a clearest way to give effect to the purpose and object of the legislature in accordance with the Constitution.

The formation of CSOS was prompted by an increase in the number of disputes within community schemes. All disputes were resolved using various pieces of legislation, with no guiding legal framework to interpret and apply such legislation. The CSOS Act established guidelines for the interpretation and application of legislation governing community schemes.⁵⁰ Disputes are to be litigated at the CSOS first,⁵¹ without removing the fundamental right to approach court under Section 33 of the Constitution. Disputes within community schemes are to be litigated first at the CSOS, and this should not jeopardize the aggrieved parties' fundamental right to approach the court under Section 33 of the Constitution.

In the case of *Coral Island Body Corporate v Hoge*,⁵² the body corporate used the services of advocates and attorneys in a High Court action against an owner, when the dispute could have been resolved by the Community Schemes Ombud Service for R150. According to the judgment, about two weeks before the hearing in May 2019, Ms. Hoge backed down and agreed to all of the trustees' demands. She had calculated that the cost of compliance would be less than R10,000. In this case, she could not afford to go to the High Court.

Justice Binns-Ward J issued an order reflecting the parties' settlement of a "simple and uncomplicated" dispute.⁵³ He went on to say that "it was undoubtedly inappropriate for the trustees to have proceeded for the relief that they sought in the current matter in the High Court rather than through the Community Schemes Ombud Service". He stated that such actions should be discouraged through cost orders, so he made no cost order.⁵⁴ This means that the Coral Island owners were required to pay the body corporate's High Court legal fees and disbursements The

⁵⁰ CSOS Act (n 1)

⁵¹ Constitution of the Republic of South Africa, 1996.

⁵² 2019 (5) SA 158 (WCC) (23 May 2019).

⁵³ *C.M.S.C v N.C* (16742/2021) [2021] ZAWCHC 227 (9 November 2021)

⁵⁴ *C.M.S.C v N.C* (16742/2021) [2021] ZAWCHC 227 [4].

trustees were subject to a spending limit, according to the judgment.⁵⁵ They had been told not to incur any unplanned expenses exceeding R25 000 without first obtaining owner approval. This was not done prior to filing the High Court action. They also appear to have violated prescribed management rule 9 (c), which requires trustees to effectively use funds of the body corporate in accordance with approved budget by members at properly constituted meeting.

To summarize, the significance of this study lies in shedding light on the function of administrative law in community schemes to many different groups of people, including tenants, landlords, management companies, and governmental organisations, and how it supports adherence to the law, safeguarding individual rights, strengthening governance, and, crucially, promoting equity, responsibility, and openness in these types of schemes. CSOS's role in improving governance, conflict resolution, consumer protection, and overall well-being within community schemes. How it informs policy changes and improves community functioning, benefiting all stakeholders and the community at large.

1.5 METHODOLOGICAL PARADIGM

1.1.5 Comparative Research Method

Given that the Ombud's functions include internal remedies and administrative action, this study determined whether such functions are encompassed by the narrow provision of Section 57 of the CSOS Act. The study also examined how the courts have dealt with Ombudsman functions and the interpretation of the narrow appeal procedure under Section 57 of the CSOS Act. This study employed a qualitative research design that included an examination of the literature, particularly case law and recent developments in the development of relevant legislation. This seeks to provide an in-depth understanding of social phenomena dealing with behaviours and actions and or events that happens within schemes due to migration of society from rural to urban areas for better economic opportunities. Communities living within schemes are faced with governance and management of such schemes and this leads to potential for disputes.

⁵⁵ *C.M.S.C v N.C* (16742/2021) [2021] ZAWCHC 227 [5].

1.6 FRAMEWORK OF THE STUDY

Chapter one explains the problem statement, research questions and significance of the study. It discusses the concept of Community schemes prior to the promulgation of Community Schemes and that they were self-regulating, and they operated in accordance with different laws. It further shows that the position changed with the promulgation of the Community Schemes Ombud Service Act 9 of 2011 (CSOS Act) to regulate Community Schemes including but not limited to shortcomings of this new legislation. On the other hand, chapter two show the challenges of self-regulatory schemes before the CSOS Act was passed. Some community schemes were run without following proper governance procedures, which resulted in the breakdown of administrative operations and the accumulation of administrative and municipal debt. Chapter three argue that several pieces of legislation came into being, including the Sectional Titles Act, the Share Blocks Control Act, the Housing Development Schemes for Retired Persons Act, the Communal Land Rights Act and the Co-operatives Act,⁵⁶ make provisions for the shared use of common property, mandatory membership in an obligatory governance structure, and various degrees of financial interdependence to ensure that there is structured and regulated governance of schemes. Chapter four analyses the role of the Ombudsman including issuance of practice directives dealing with unanimous and special resolutions, as well as one dealing with dispute resolution. It further shows that given the hybrid system, the question of how administrative law applies in community schemes, including the right of appeal under Section 57 of the CSOS Act, culminated to confusion and unintended consequences. Chapter five consists of the recommendations and conclusion of the study.

1.7 CONCLUSION

The study shows that combining the Ombud's regulatory functions and providing a dispute resolution function for the Ombud caused uncertainty in the application

⁵⁶ STA (n 35).

of administrative law in the community. The regulatory functions necessitate strict adherence to PAJA and the Bill of Rights, as well as impartiality. The dispute resolution mechanism, on the other hand, necessitates a strict interpretation of the applicable framework, including the application of Section 28(2) of the Bill of Rights, consideration of previous case law, and the creation of common law. To ensure independence of each function from the other and to avoid a conflict of competing rights, the regulatory functions must be separated from the dispute resolution mechanism. The division would also help to guarantee that the framework and laws that are drafted are free of ambiguity and eliminate any that are currently obvious.

The goal, intent, and spirit of the CSOS laws are to provide quick and inexpensive resolution; therefore, section 57's restriction runs counter to that goal and, moreover, is unconstitutional. The dispute resolution model needs to include an appeals process. Even though the CSOS Act's section 36 allows for Directives, the primary legislation's empowering provision must come before any Directives. The study also draw attention to the restrictions imposed by Section 57, which is at odds with the Constitution's Section 33. It appears that considerable improvements and changes are required to ensure consistency in administrative law when approving unanimous decisions and to remove the limitations imposed by section 57. It also appears to be crucial that the Ombud Service's system contain an appeals process as part of the dispute resolution model.

The following chapter examines the legal framework in South Africa prior to the implementation of sectional title schemes and the Ombudsman Service Act 9 of 2011.

CHAPTER 2: AN OVERVIEW OF THE LEGAL POSITION IN SOUTH AFRICA PRE-PROMULGATION OF COMMUNITY SCHEMES OMBUD SERVICE ACT

2.1 Introduction

Community schemes were self-governing before the CSOS Act was passed. Some community schemes were run without following proper governance procedures, which resulted in the breakdown of administrative operations and the accumulation of administrative and municipal debt.⁵⁷ As a result, this caused buildings to deteriorate, to be hijacked, and the loss of property by owners.⁵⁸ People migrated to different South African cities due to economic needs, which resulted in a housing shortage both inside and outside the cities.⁵⁹ The real estate industry in South Africa was one of the major drivers of the country's 2.1% GDP growth in 2012.⁶⁰ This was made worse by crime, which prompted the government to choose high-rise structures as an alternative to freestanding homes for habitation. This resulted in a sharp rise in the number of community schemes being established.⁶¹

Prior to the establishment of CSOS Act, aggrieved parties had to consult a professional arbitrator or approach the court of law.⁶² The Registrar of Deeds had the authority to appoint an Arbitrator in accordance with Management Rule 71 of the Sectional Titles Act (hereinafter the STA), which was declared in accordance with Section 55 of the STA.⁶³ The property owners were forced to go to court to resolve their disputes, or to refer their disputes to arbitration in accordance with Rule 71(1) of the Management Rules issued in accordance with the STA.⁶⁴ This provided them with a low-cost and faster method of resolving disputes within community schemes.

There was a need for a regulator to address disputes in community schemes. Arbitration and judicial review (both in the Magistrate's Court and the High Court)

⁵⁷ Goslett, A '*Sectional Titles versus Freehold Ownership*' (9 September 2010).

⁵⁸ Goslett, 'Sectional titles'.

⁵⁹ Goslett, 'Sectional titles'.

⁶⁰ Statistics SA, in Property Finance, Real Estate Sector Contributes to South Africa's GDP growth in Q 4, 2012, 2013.

⁶¹ Statistics SA, 'Property Finance'.

⁶² Statistics SA, 'Property Finance'.

⁶³ Act 35 of 1986.

⁶⁴ 35 of 1986.

were the settlement of disputes mechanisms accessible to those who are involved in the governance of community schemes, but they were both expensive and time-consuming, and thus ineffective in practice.⁶⁵ The primary function of the Community Scheme Ombud Service is to resolve disputes between stakeholders in community schemes. Such a function should be performed in an efficient and effective manner. The function includes training conciliators, adjudicators, and employees, as well as regulating, monitoring, and controlling governance documentation within community schemes. Finally, to take custody of, preserve, and make available to the public governance documentation.

2.2 Analysis of legal position in South Africa

2.2.1 *National Association of Managing Agents (NAMA)*

The National Association of Managing Agents (NAMA) is a voluntary non-profit organisation in South Africa.⁶⁶ Its goal is to further the interests of community scheme management and managing agents across South Africa. The goal of NAMA is to uplift and assist managing agents, who are essential to the management and administration of community schemes like sectional title and homeowners' associations.⁶⁷ NAMA offers a range of resources and services to its members, such as networking opportunities, education and training, advocacy on matters pertaining to community scheme management and managing agents, and promotion of industry best practices.⁶⁸ Homeowners and residents of these communities gain from these efforts since they contribute to the effective and efficient administration of community schemes.

NAMA has over 500 members divided into three categories and is represented in seven regions with its headquarters in Pretoria.⁶⁹ Professionals and organisations involved in property management—particularly when it comes to multi-unit residential and commercial properties—are represented by NAMA. NAMA represents companies and professionals in property management. To advance the

⁶⁵ Heidi Barter, Property Law, Barter Mckellar.

⁶⁶ Nama.org.za.

⁶⁷ Nama.org.za.

⁶⁸ Nama.org.za.

⁶⁹ Nama.org.za.

interests of property managers and the clients they assist, they seek to influence laws, rules, and industry standards.⁷⁰

For the purpose of keeping property managers abreast of industry developments, legal requirements, and best practices, NAMA offers training courses, certifications, and educational materials. Property managers can network, work together, and exchange knowledge with their peers through NAMA. Online forums, conferences, seminars, and other networking events can be used to accomplish this.⁷¹ Research pertaining to the property management sector is conducted by NAMA or is supported by it. Industry benchmarks, consumer preferences, and market trends may all be included in this study. NAMA promotes honesty and excellent service in the sector by establishing and enforcing a code of ethics and professional standards for its members. Members of NAMA who are facing legal questions, regulatory compliance, or property management-related disputes can receive legal advice and support from the organisation. NAMA publishes journals, newsletters, and other materials that offer property managers useful data, case studies, and best practices.⁷²

South Africa is said to have the highest concentration of community schemes.⁷³ The community schemes were self-regulating and operated in accordance with various laws.⁷⁴ Many community schemes hired managing agents to help them with their administrative responsibilities.⁷⁵ Despite the fact that under the Estate Agency Affairs Act, managing agents were needing to be registered with the Estate Agency Affairs Board (EAAB).⁷⁶ The Estate Agency Affairs Act makes no mention of managing agents' duties and responsibilities. The Managing Agents banded together to form NAMA. The National Association of Managing Agents, or NAMA, is a voluntary non-profit organisation in South Africa.⁷⁷ It has two goals namely to further the interests of community scheme management and managing

⁷⁰ Nama.org.za.

⁷¹ Nama.org.za.

⁷² Nama.org.za.

⁷³ Hartleb T, '*Rapid urbanisation 'a serious problem'*' (14 October 2005).

⁷⁴ National Department of Human Settlements 'Business Case for the Community Schemes Ombud Service', 10 February 2012.

⁷⁵ Act 112 of 1976.

⁷⁶ 112 of 1976.

⁷⁷ 112 of 1976.

agents across the nation. Also, they uplift and assist managing agents, who are essential to the management and administration of community schemes like sectional title and homeowners' associations.⁷⁸

NAMA is and will continue to be a voluntary organisation with no regulatory authority.⁷⁹ NAMA is not a government agency, but a non-profit organisation composed of property management professionals and managing agents who work in the property management industry. The primary goal of NAMA is to provide assistance, networking opportunities, and resources to its members, who are either property management companies or individuals involved in property management.

NAMA does not have regulatory authority in the sense of being able to enforce property management laws or regulations.⁸⁰ Instead, it is frequently used as a forum for members to exchange information, discuss best practices, and stay up to date on industry trends and developments.⁸¹

2.2.2 Association of Residential Communities (ARC)

The "Association of Residential Communities (ARC)" was established in 2008 as a non-profit organisation dedicated to assisting the needs and interests of residential communities, body corporate and their management teams. They contribute to their vision of establishing, maintaining, and improving the value of their properties as well as their lifestyles. Homeowners' associations (HOAs) are affiliated with ARC. They oversee ensuring that residents follow the rules and regulations outlined in the Residential Communities Council (RCC) This can include architectural guidelines, landscaping requirements, and other regulations designed to preserve the community's aesthetics and quality. ARC oversees the community's finances, including collecting homeowner dues and budgeting for expenses like maintenance and improvements.

⁷⁸ 112 of 1976.

⁷⁹ NAMA website (10 September 2022).

⁸⁰ NAMA website (10 September 2022).

⁸¹ See (n 56).

To maintain a consistent and aesthetically pleasing appearance, ARC can have authority over changes to the exterior of homes within the community. ARC is a unique organisation that surpasses the typical 'association', which is usually limited to a member directory and information clearinghouse.⁸² Instead, it engages members in real-world activities and offers an extensive range of support services, vibrant networking opportunities, access to best practices, and the dissemination of guidelines, protocols, tools, and models for the effective management and direction of the communities it serves.⁸³

According to ARC, since 80% of HOAs deal with much alike issues and challenges, there is a big chance to increase efficiency through group networking and information sharing.⁸⁴ To ensure effective management and sound governance,⁸⁵ hence ARC was created. ARC is committed to identifying trends in residential community living, conducting research, and locating best practices, in addition to being the driving force behind common interest community research and development.⁸⁶ By providing their members with information, ARC hopes to act as a catalyst for improvement in the community association sector. Priorities, services, and structure are constantly being reviewed by ARC to adapt to change. In addition to benchmarking South African best practices, ARC is committed to benchmarking globally. ARC works to satisfy the requirements of members and the industry as ONE organisation.⁸⁷

From Sectional Titles to Homeowners Associations (HOA), community schemes vary. The ARC is a group founded specifically for HOAs.⁸⁸ In addition to managing and leading the communities they serve, the effective ARC offers an extensive range of support services, vibrant networking opportunities, accessibility to best practices, and policies, procedures, tools, and templates.⁸⁹ ARC has observed the difficulties in managing community schemes, and in particular, the HOAs help the schemes by offering support services, such as

⁸² Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ ARC website (10 September 2022).

⁸⁹ Ibid.

policies, procedures, and best practices, among other things.⁹⁰ The administration and maintenance of the plan would typically be attended by the HOA board of directors. When there are disagreements, the BODY would attempt to settle them through the scheme; however, if they are unable to do so, they ought to appoint lawyers to represent them in court.⁹¹ The HOA's members pay astronomical legal costs if they choose this course of action. The CSOS was established in part because of this.

2.2.3 Arbitrators and Courts

The only options in the absence of an Ombuds service have been professional arbitrators or the courts, which are required even for minor disputes.⁹² While the adversarial nature of the court process also served as a deterrent in the context of dispute resolution in these schemes, most individual owners were unable to afford litigation or arbitration.

A process for the arbitration of disputes in sectional title schemes is outlined in Management Rule 71 of the Sectional Titles Act.⁹³ Arbitration may be used to resolve any conflict relating to the Sectional Titles Act, the Management Rules, or the Conduct Rules between the body corporate and an owner or between owners.⁹⁴ There has always been a disagreement over whether parties in a sectional title scheme are required to submit their disagreements to arbitration or whether they can seek redress from the courts.

In *Body Corporate of Greenacres v. Greenacres Unit 17 CC*,⁹⁵ involved a property owner who either disregarded a demand for levies to be paid or flat-out refused to do so; as a result, there was no dispute. This dispute would have been appropriate to refer to the ombudsman if the owner had been able to demonstrate why the levy

⁹⁰ See (n 58).

⁹¹ Ibid.

⁹² National Department of Human Settlements 'Business Case for the Community Schemes Ombud Service', 10 February 2012

⁹³ Sectional Titles Act 95 of 1986

⁹⁴ Gillian and Veldhuizen inc, resolving dispute in sectional titles, <https://www.gvinc.law.za/tag/sectional>

title Archives - Gillan and Veldhuizen Inc (gvinc.law.za) accessed 24 February 2024.

⁹⁵ 2008 (3) SA 167 (SCA).

amount was incorrect. For example, it would be preferable to contact the Ombudsman's office if there is a dispute over levies that have not been paid because they were calculated incorrectly. The ombud "may make an order for the payment or re-payment of a contribution or any other amount", according to Section 39(e) of the CSOSA. This could cause confusion if it is taken to mean that the ombuds office can be used as a platform for collecting uncontested levies, when in reality, the proper course of action in this case would have been to go to court. Only after a case has been referred to court for judicial interpretation and testing would it be possible to determine the true impact of the STSMA and CSOSA.

To determine precisely when it is necessary to refer, for instance, a case where the owner defaults on levy payments to a court or to the ombudsman, it is necessary for the courts to interpret the provisions of the aforementioned acts. In these circumstances, the Supreme Court of Appeal (the "SCA") decided that only a dispute could be the basis for referring a matter to arbitration.⁹⁶ There was no requirement that the matter be submitted to arbitration if there was no disagreement because the arbitrator would have no decisions to make.⁹⁷ The SCA in the *Greenacres* judgment left open the issue of whether arbitration is required in cases of disputes.

The case of *Pinewood Park Scheme No. 202 v Dellis (Pty) Limited*,⁹⁸ was heard by the SCA on June 1, 2012. The Appeal concerned the arbitration provisions found in the Prescribed Management Rule 71 of Schedule 8 to the Sectional Titles Act. The case involved the *Body Corporate of the Pinewood Park Scheme No. 202 v Dellis (Pty) Ltd*. Whether the arbitration process outlined in Rule 71 of the FAA violates Section 6 of the Arbitration Act was in question.⁹⁹ The Management and Conduct Rules were decided to be of a consensual or contractual nature by the Court after finding that it is not the case. The "compulsory arbitration clause" described by Rule 71 is not one that is mandated by law. Since Rule 71 of the Body Corporate is a consensual clause and the Management Rules are a contract

⁹⁶ Ibid.

⁹⁷ See (n 57) para 11.

⁹⁸ (498/2011) [2012] ZASCA 105.

⁹⁹ 95 of 1986.

between each owner and the Body Corporate as well as between each owner and the owners individually.

Below is a summary of Section 6 of the Arbitration Act¹⁰⁰: Where parties have entered into an arbitration agreement, any party thereto may, where the other party initiates legal proceedings in contravention of the arbitration provisions, after entering appearance to defend raise a point in *Limine* prior to filing additional pleadings requesting the court to stay the proceedings.¹⁰¹ If the court after hearing the arguments of both parties is satisfied that the arbitration agreement is valid, the court may stay the proceedings and refer the matter to arbitration, subject to the terms and conditions as it deems equitable.¹⁰² The significance of this case is that it confirms:

If a body corporate files a lawsuit in court to recover past-due levies, the owner in question appears in court to defend the action and makes a statement.¹⁰³ If the body corporate does not consent to a stay of the lawsuit and referral to arbitration, the case should proceed in court.¹⁰⁴ The Court has the option to proceed with the action it has been given or to stay the proceedings pending the outcome of an arbitration if the Owner declares a dispute arbitrable prior to filing a complaint.

In conclusion, Management Rule 71 of the Sectional Titles Act mandated that the SCA take into account whether arbitration is required. Dellis (Pty) Ltd, the owner of a unit in the scheme, was sued by the Body Corporate for unpaid levies.¹⁰⁵ Dellis opposed the case, asserting that it was not responsible for the amount claimed and that because there was a disagreement between the parties, the case had to be referred to arbitration in accordance with Management Rule 71 of the Act and that the court was not authorized to hear it.¹⁰⁶ The Body Corporate's claim was

¹⁰⁰ 42 of 1965.

¹⁰¹ See no 89.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Body Corporate of the Pinewood Park Scheme* para 20.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

rejected by the High Court on the grounds that arbitration was required in accordance with the Greenacres Case, which the court agreed with.¹⁰⁷

The SCA heard the case after the Body Corporate filed an appeal. Given that the Body Corporate had the ability to modify the Management Rules in whole or in part, the SCA determined that they were mutually agreed upon and therefore constituted a binding agreement. So, it could not be said that Management Rule 71, prescribed under the Act, provided for mandatory arbitration unless a Body Corporate amended its Management Rules to make that provision. The SCA determined that the original case shouldn't have been dismissed by the High Court.¹⁰⁸

2.2.4 Community Schemes Ombud Services (CSOS)

The CSOS Act and judicial authority; As of October 7, 2016, the CSOS Act came into effect. One of its stated goals is to offer a method for resolving disputes in community schemes, which include, among other things, share blocks, sectional title schemes, homeowners' associations, and senior housing programs.¹⁰⁹ The CSOS Act applies to disputes involving the management of community schemes between parties having a material interest in the scheme, such as the association, occupier, or owner.¹¹⁰ After receiving an application, the Ombud assess whether there is a reasonable possibility of a negotiated settlement.¹¹¹ In that case, they would suggest conciliation.

If conciliation is unsuccessful, the Ombudsman must refer the case to an adjudicator for resolution instead of being adversarial, the adjudication process is inquisitorial, and the ombud's authority far exceeds that of the courts.¹¹² An adjudicator is free to award equitable relief, unlike a court, which must adhere to strict legal guidelines. The adjudicator must adhere to the due process of law guidelines.¹¹³ In order to give the application the proper consideration, the

¹⁰⁷ See (n 64) 21.

¹⁰⁸ Community Schemes Ombud Service Act: Regulations.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Ibid.*

adjudicator is expected to render a decision as soon as possible with the least amount of formality and technicality. The adjudicator must also consider the relevance of all evidence, but they are not required to follow the same exclusionary rules of evidence as civil courts.¹¹⁴ The CSOS Act Section 50; *Linton Park Body Corporate and Others v. Stenersen & Tulleken Administration CC*,¹¹⁵ Only in exceptional cases or in agreements among all parties is legal representation allowed. According to section 57 of the CSOS Act, "Only on a question of law" may an appeal be made to the High Court by anyone who is "dissatisfied with an adjudicator's order".

2.2.5 The Heathrow Property judgment

The owner of three apartments in a sectional title scheme in Heathrow Property requested that the court rule that a conduct rule prohibiting short-term rentals was irrational and unconstitutional.¹¹⁶ Additionally, they contested a trustees' resolution to install a biometric access system, arguing that it was an ostentatious addition that needed approval from every owner. The court found that the matters brought up in the application were clearly within the CSOS Act adjudicator's purview.¹¹⁷ The court distinguished this case from those in which several courts acting in tandem with one another were involved. Sher J noted that an adjudicator has the equitable power to decide what is reasonable in respect to a community scheme's rules or resolutions and to prescribe what ought to be done in lieu of any contested rule or resolution.

Contrarily, a court "is confined to reviewing the legality or rationality of a decision-making body's conduct and not the fairness thereof, and generally does not have the power to substitute its own decision" for the ruling of the body in charge.¹¹⁸ Sher J claims that given that the adjudicator has more power than the court, their jurisdiction is often not concurrent with the courts'.¹¹⁹ The judge came to the following determination: By applying a deliberate and rational reading of the Act, it

¹¹⁴ Ibid.

¹¹⁵ 2020 (1) SA 651 (GJ).

¹¹⁶ (*Heathrow Property Holdings NO 3* [53]).

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

becomes clear that the legislature meant for CSOS to be the principal venue for resolving Act-related disputes and that the High Court's authority ought to be restricted to review and appeal.¹²⁰

2.3 Is there an ouster of the courts' jurisdiction in CSOS?

The inquiry pertains to the overriding jurisdiction of the court in circumstances where the relief sought by the parties is within the court's jurisdiction, despite the Ombud's ability to provide relief that the court is unable to provide. The subject under discussion is the jurisdictional dispute between the court and the Ombud. Regarding *Makhanya v. Zululand University*,¹²¹ the (SCA) clarified the idea of concurrent jurisdiction. A statute that grants judicial authority to a special court may do so either concurrently with the exclusion of the High Court's regular authority (exclusive jurisdiction) or simultaneously with the grant of authority to the special court and the retention of regular authority without exclusion (concurrent jurisdiction). In the second scenario, the claimant has a choice of which court to file the lawsuit in.

The Court of Appeal in *Richards Bay Bulk Storage (Pty) Ltd v. Minister of Public Enterprises* outlined the correct process for figuring out whether an ouster of jurisdiction can be presumed.¹²² The court determined that if "the Act does not so specifically, and the issue at hand then is whether it includes an implication to that effect, there is an overwhelming presumption against such an implication."¹²³ In *Commissioner, South African Revenue Service v Metcash Trading Ltd. and Others*,¹²⁴ Kriegler J observed that since the relevant statutory provision did not explicitly abolish the court's inherent jurisdiction, the question arose as to whether such an obliteration was necessarily implicit in its terms, while it is trite that there is a substantial presumption against such an implication'.¹²⁵

¹²⁰ Ibid.

¹²¹ 2010 (1) SA 62 (SCA) [25].

¹²² 1996 (4) SA 490 (A).

¹²³ Ibid.

¹²⁴ 2001 (1) SA 1109 (CC) [43].

¹²⁵ Ibid.

According to Sutherland AJA, who wrote for a unanimous court in *Mpongo*, "there is a strong presumption against the ousting of the High Court's jurisdiction, and the mere fact that a statute vests jurisdiction in one court is insufficient to create the implication that the jurisdiction of another court is thereby ousted".¹²⁶ Sutherland AJA cited all three of these decisions in support of his conclusion.¹²⁷ The CSOS Act does not explicitly remove the High Court's jurisdiction, nor does it imply such an elimination by its language. The ombudsman's increased authority does not imply that the court's jurisdiction is void.¹²⁸ The circumstances in which a court and an adjudicator may award the same relief merely overlap.

2.4 Can a court refuse to exercise its jurisdiction?

With the exception of admiralty matters, the SCA upheld in *Agri Wire (Pty) Ltd and Another v Commissioner, Competition Commission*, that "our law lacks recognition of the doctrine of forum non convenience, and our courts are not entitled to refuse to hear cases that are properly brought before them in the exercise of their jurisdiction".¹²⁹ Different common law and statutory mechanisms are in place to mitigate any negative effects a defendant may suffer due to a plaintiff's choice of forum in legal systems with concurrent jurisdiction, where multiple courts have the authority to hear a particular case.¹³⁰ Ensuring an equitable and just legal process for all parties is the aim,¹³¹ according to Sutherland AJA's explanation in *Mpongo*.¹³² The legal notion of "abuse of process" is crucial for preserving the impartiality and efficiency of the legal system. It also encourages parties to bring legal claims in good faith by prohibiting litigants from using the court system as a tool for improper or harassing purposes".¹³³ In *Standard Credit Corporation Ltd v. Bester*,¹³⁴ Van der Walt J stated that a "abuse of process could be said, In plainer language, it happens when one side to a legal

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ 2013 (5) SA 484 (SCA).

¹³⁰ Ibid.

¹³¹ Ibid.

¹³⁵ *Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana N O and Another* [2021] 3 All SA 812 (SCA); 2021 (6) SA 403 (SCA) (25 June 2021) para 78

¹³³ *Mpongo* [68].

¹³⁴ 1987 (1) SA 812 (W) [820A-B].

dispute unfairly damages the other party or compromises the integrity of the legal system by manipulating or abusing the court system.¹³⁵

Preventing such unfair and unethical practices in legal proceedings is the goal of the abuse of process doctrine."¹³⁶ This point of view was supported by the SCA in *Beinash v. Wixley*, In a ruling where the court noted that although the term "abuse of process" has no universally accepted definition, when people or organisations manipulate the legal system for ends unrelated to the search for the truth or the smooth operation of the legal system, this is known as abuse of process. It is an idea based on the legal system's tenets of justice and fairness".¹³⁷ If the facts of the Heathrow Property case are applied in this way, it cannot be claimed that the owners abused the legal system by taking their case to court rather than the Ombud under the CSOS.¹³⁸

2.5 How can parties be encouraged to use the CSOS where appropriate?

In *Coral Island Body Corporate v Hoge*,¹³⁹ Binns-Ward J noted that the CSOS Act would be undermined if the courts arbitrarily entertained cases that should have been brought under the Act due to the compelling constitutional and social policy considerations that underpinned its introduction, including the cheap, expeditious, and informal resolution of disputes in community schemes.¹⁴⁰ In his opinion, the courts should use their judicial discretion regarding costs to deter people from inappropriately turning to the courts for issues that could have and more appropriately should have been brought to the ombudsman,¹⁴¹ even though they do not have the authority to refuse to hear such cases.

The judge cited the decision in *Goldberg v Goldberg* in which the court noted that a successful applicant could be awarded costs on a lower scale, denied his costs, or even ordered to pay any additional costs incurred by the respondent as a result

¹³⁵ Ibid.

¹³⁶ *Mpongo* [46].

¹³⁷ 1997 (3) SA 721 (SCA) [734G].

¹³⁸ 1938 WLD 83.

¹³⁹ 2019 (5) SA 158 (WCC).

¹³⁹ *Coral Island Body Corporate v Hoge* [2019] JOL 42032 (WCC).

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

of the case being brought before the High Court.¹⁴² According to this study, Binns-Ward J's strategy is categorically the right one and has been endorsed in a long line of decisions that came before Heathrow Property.¹⁴³

Furthermore, Sutherland AJA in Mpongo stated that "fish cannot always be fowl", which undermines the conclusion in Heathrow Property that the court's jurisdiction is not overridden when exceptional circumstances are demonstrated to exist.¹⁴⁴

The Community Scheme Ombud Service's main duties were to train conciliators, adjudicators, and staff, as well as to regulate, monitor, and control governance documentation within the community schemes.¹⁴⁵ The service was also responsible for resolving disputes that arise between stakeholders in community schemes in an efficient and affordable manner. Lastly, to seize, safeguard, and make available to the public the documentation of governance. Different community scheme types are combined into a single real estate development, such as sectional title plans and housing developments for retirees that fall under the purview of a single homeowner's association with "overarching" management responsibilities.¹⁴⁶ The community schemes included in these developments are frequently governed by multiple sets of governance documents. Scheme governance in these developments can be incredibly complicated.¹⁴⁷ The STA's Regulation 30 makes it clear that a sectional title scheme may delegate its duties and authority to another association that serves as an "overarching" management body.¹⁴⁸

This is the rationale behind the legislature's inclusion of all community initiatives, as well as different governing laws to be governed by the CSOS. The STA dealt with the management and administration of sectional titles schemes. The STSM Act substituted for and removed the management functions therefrom. In

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ [84].

¹⁴⁵ Section 4 of the CSOS Act.

¹⁴⁶ National Department of Human Settlements 'Business Case for the Community Schemes Ombud Service', 10 February 2012.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

accordance with section 1 of the CSOS Act, a Chief Ombud must preside over the Sectional Titles Schemes Management Advisory Council, which was the purpose of this action.¹⁴⁹

The legislature intends for the Advisory Council to make recommendations to the Minister on any concern relating to regulations, implementation, and review, including any amendments or other action that may be advisable, as well as any matter referred to it by the Minister.¹⁵⁰ As a result, the CSOS regulate the management of schemes as defined by the STSM Act, and any disputes that arise ought to be resolved by the CSOS. Sectional title ownership is analogous to share block ownership. The main distinction is that in a share block scheme, instead of owning an individual unit, one owns shares in a company that owns the land and buildings.¹⁵¹

The Registrar of Companies is where share block companies are registered. As the owner of the land and buildings, a share block company would be registered, and each unit assigned several shares known as a "share block" in the company, entitling the owner to the exclusive use and occupation of the unit.¹⁵² When converting to sectional title, the owner receives a title deed. Most share block units, on the other hand, have recently been converted to sectional titles.¹⁵³ As a member of a share block company, a person would receive a share certificate listing their ownership of shares in the company, as well as an agreement with the company known as a "Use Agreement" under which they would have the right of occupation and usage of the property in perpetuity.¹⁵⁴ As a result, the shareholder does not possess ownership of the unit. The CSOS regulate and adjudicate any disputes that arise from such an establishment's management.¹⁵⁵

¹⁴⁹ Act 09 of 2011.

¹⁵⁰ Section 18 of Act 8 of 2011.

¹⁵¹ Share Blocks Control Act 59 of 1980.

¹⁵² Act 59 of 1980 (n 38).

¹⁵³ *Ibid.*

¹⁵⁴ Act 59 of 1980 (n 38).

¹⁵⁵ National Department of Human Settlements 'Business Case for the Community Schemes Ombud Service', 10 February 2012.

2.6 The Housing Schemes for Retired Persons

2.6.1 *A historical perspective on the accommodation needs of older persons in South Africa*

Prior to the end of apartheid in 1994, South Africa had significant socioeconomic and educational disparities.¹⁵⁶ Apartheid was a South African government-enforced system of institutionalised racial segregation and discrimination. In many aspects of life, black South Africans were severely disadvantaged by this system.¹⁵⁷ The previous administration had identified these racial groups as 'African [Black], Coloured, Indian, and White'.¹⁵⁸ As a result, it is impractical to evaluate South Africa's elderly population without considering 'historical inequalities, such as land deprivation and restricted opportunities for education, which are evident in the nation's high unemployment rate.

"Prior to 1994, the majority of black South Africans were frequently extremely poor, especially those who lived in townships or rural areas that were designated as such".¹⁵⁹ Their living conditions were frequently insufficient, and they were refused access to resources, high-quality jobs, and services. Separate and unequal educational systems were mandated by the apartheid government.¹⁶⁰ Apartheid policies also shaped gender roles and norms, with black women frequently experiencing discrimination and inequality in society.¹⁶¹ They had few chances for education and work, and they were frequently cast into subservient roles.

The new democracy's transformation agenda unavoidably aimed to safeguard human rights of senior citizens, addressing racial inequality and discrimination in public services, and taking action to guarantee that the rights of older people are respected and upheld.¹⁶² South Africa has taken a developmental approach to social welfare, with the goal of fostering social development by integrating social interventions with economic development. This approach reflects the country's

¹⁵⁶ Ibid

¹⁵⁷ Ibid

¹⁵⁸ Chagali, Marais and Mpofo 'The experiences of elderly people' 21.

¹⁵⁹ Ibid

¹⁶⁰ Ibid

¹⁶¹ Ibid

¹⁶² (Republic of South Africa [RSA], White Paper for Social Welfare 1997:72)

commitment to addressing the long-standing social and economic disparities caused by apartheid's legacy, with the key component of that the commitment to older people as a primary target group for service delivery.¹⁶³ To alleviate poverty and assist vulnerable populations, South Africa has implemented a variety of social assistance programs. Grants such as the Old Age Pension, Child Support Grant, and Disability Grant are examples of these. Individuals and families in need can benefit from these programs.¹⁶⁴ The developmental approach is essential for transitioning from the concept of "care of the elderly" to that of 'ageing'. This can be described as a comprehensive and optimistic approach that recognises aging as a normal stage of life without dismissing senior citizens' unique needs.¹⁶⁵

The developmental approach to aging's central tenet is that it allows seniors to live as active, healthy, and independent lives as possible. Furthermore, it acknowledges the important contribution that older people make to society, in contrast to the widespread belief that they are a burden on future generations.¹⁶⁶ In 2009, estimates revealed that South Africa had 5% of the continent's total elderly population.¹⁶⁷ According to Statistics South Africa's 2009 mid-year estimates, 3.7 million (or 5%) of the country's population was 60 years of age or older.¹⁶⁸ According to projections, 4.24 million older people, or 9.5% of the population, would live in South Africa by 2015.¹⁶⁹ In 2009, women in South Africa made up the majority of older people, as they do globally (with an estimated 61, 6% of the population).¹⁷⁰

Older people may find themselves without the support of their grandchildren and children because of this separation. For older people, poverty is a major problem, especially in developing nations. Their vulnerability may be made worse by their inability to obtain housing, healthcare, and other necessities. The HIV/AIDS epidemic, which has disproportionately affected people of working age, has had a

¹⁶³ (Department of Social Development 2005)

¹⁶⁴ (RSA 1997).

¹⁶⁵ (Patel, 'Social welfare' 1.

¹⁶⁶ RSA, White Paper for Social Welfare 1997).

¹⁶⁷ (RSA, Minister of Social Development 2009; Van Staden and Weich 2007).

¹⁶⁸ Ibid.

¹⁶⁹ (South Africa Progress Report on implementation of Madrid Plan. 2002).

¹⁷⁰ (RSA, Minister of Social Development 2009).

serious impact on South Africa. As a result, there are more elderly people taking care of sick family members or orphaned grandchildren, which puts more financial and emotional strain on them. All of which have an impact on the demographics of elderly citizens and the amenities they need.¹⁷¹

One is vested with the right of occupation under the terms of the contract and the Housing Schemes for Retired Persons is one of the listed schemes in the definition of community schemes. However, the Retired Persons Act's provisions will still apply, and the CSOS regulate and decide any disputes arising from such schemes. A homeowners' association is a group that establishes and upholds rules for the properties and their assets in a subdivision, planned community, or condominium. According to the Companies Act, this association is registered as a non-profit organisation.¹⁷²

A homeowners' association's board of directors oversees managing the organisation's operations and finances as well as enforcing and establishing rules. The board is chosen by the homeowners to serve on the association. The area's maintenance and upkeep is overseen by the association.¹⁷³ People automatically joins a homeowners' association after buying a property that is under its control. Becoming a member of the association is, regrettably, required. A contract with the association is required once you've bought a house.¹⁷⁴

A homeowners' association is a separate organisation that is in charge of maintaining the neighbourhood's common areas and amenities. In addition, it guarantees that landowners abide by all governing documents, including the Articles of Incorporation, By-Laws, and conditions and restrictions. In accordance with the previous Companies Act of 1973,¹⁷⁵ many homeowner associations were registered as section 21 companies. The Memorandum and Articles of Association for these corporations state that they existed for no profit. The Articles of Association detail the guidelines for the homeowners' association, while the

¹⁷¹ Patel, 'the experiences of elderly people' 1.

¹⁷² Act 61 of 1973.

¹⁷³ Companies Act (n 41).

¹⁷³ Companies Act 71 of 2008.

¹⁷⁴ Ibid at 207

¹⁷⁵ Ibid.

Memorandum outlines the company's purpose.¹⁷⁶ The 2008 Companies Act was updated and became effective on May 1, 2011 (hereinafter the Companies Act).¹⁷⁷ According to the new Companies Act, section 21 companies that were already in existence were recognized as nonprofit organisations.¹⁷⁸

In accordance with the Companies Act, the old Memorandum and Articles of Association of a home-owners association became the Memorandum of Incorporation. It is critical to note that the company's Memorandum of Association and Articles of Association issues were merged into a single document known as the Memorandum of Incorporation (MOI).¹⁷⁹ The purpose of the change was to give directors of a company the authority to amend or repeal rules and register them by publishing a copy of the rules in the manner specified in the MOI and registering the rules with the Companies Intellectual Property Commission (CIPC). Such amendments, however, must not be in conflict with the Companies Act.¹⁸⁰

The definition of a community scheme includes a homeowners' association among the schemes that are mentioned. There may occasionally be disagreements over how to manage amenities and common areas. In these cases, the CSOS would decide the case. The Supreme Court of Appeal's ruling in *Singh v. Mount Edgecombe Country Club Estate Management Association*, however,¹⁸¹ showed that the interpretation should not be taken out of context. This decision overturns a prior ruling by the High Court in KwaZulu Natal that determined private estate roads met the criteria for "public roads" under the National Road Traffic Act¹⁸² and that the homeowners' association of the estate in question's enforcement of speed limits on those roads constituted "enforcement of a public road". The appropriation of duties under the NRTA that were exclusively the responsibility of the traffic authorities, and that such actions and regulations were thus unlawful.¹⁸³

¹⁷⁶ Ibid

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Companies Act 71 of 2008.

¹⁸⁰ Companies Act (n 43).

¹⁸¹ 2019 (4) SA 471.

¹⁸² No 93 of 1996 (NRTA).

¹⁸³ Ibid.

The question of whether the roads inside such private estates are in fact "public roads" was decided by the Supreme Court of Appeal using a very different methodology.¹⁸⁴ The court emphasised that the right of the public to enter and exit the estate in question was strictly controlled by boundary walls, electric fencing, security guards, access codes, and biometric scanning.¹⁸⁵ The court questioned the definition of 'public road' in the NRTA, which is "any road, street or thoroughfare or any other place, which is commonly used by the public or any section thereof or to which the public or any section thereof has a right of access".¹⁸⁶ Therefore, neither the estate in question nor any other comparable private residential estate had any common use or right of access to the estate's private roads.¹⁸⁷ The people who temporarily have access to such an estate and its roads access that can only be obtained with the consent of the estate's owners are not also considered to be members of the public.¹⁸⁸ There is no legitimate right for the general public or any section of it to enter into such an estate or use its roads, even though some members of the public are allowed to do so.¹⁸⁹

One voluntarily consents to be subject to the rules of the homeowners' association when they decide to buy property in such a private estate and join it.¹⁹⁰ As a result, the homeowners' association's relationship with its members is contractual, and the terms of the agreement they made with regard to the control of the speed limit within the estate apply in full.¹⁹¹ Additionally, the terms of the agreement are only applicable to the parties to the contract and not to third parties. The High Court's finding that the association had taken over duties that were exclusively the province of the authorities under the NRTA was explicitly rejected by the court as a result.¹⁹²

The court also emphasized that, considering the presence of children, pedestrians, and animals on the roads, a private estate imposing a lower speed limit than that

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

which is mandated by national legislation on public roads does not go beyond promoting, advancing, and safeguarding the interests of the homeowners in the estate. In the court's opinion, the enforcement of such rules could hardly be seen as objectionable.¹⁹³ The aforementioned Supreme Court decision makes us think about the significance of familiarising ourselves with the rules and founding documents of any homeowners' associations we may be a part of should we live in such a private residential estate, which is the case for approximately one in ten South Africans, since these homeowners' associations have the legal right to impose fines and other penalties on the owners of properties located in these private estates.¹⁹⁴

Thus, all administration and management services provided by a homeowners' association would be subject to the CSOS's dispute resolution program, and the registration for such an organisation would be handled by the courts.¹⁹⁵ Contractual disputes, such as those mentioned in *Singh v Mount Edgecombe Country Club Estate Management Association*,¹⁹⁶ should be litigated in court and not addressed by the CSOS. As one of the identified community schemes that the CSOS has jurisdiction over to regulate and offer dispute resolution services,¹⁹⁷ the co-operative envisioned in the Co-operatives Act is finally listed in the CSOS Act. Additionally, the management of these schemes is governed by the CSOS, and any disputes arising from conduct or management must be brought before the CSOS.¹⁹⁸

The CSOS can be consulted on a variety of issues, including the payment and calculation of levies, behaviour problems, management problems, meeting problems, governance problems, concerns with private and shared spaces, and general inquiries for more information.¹⁹⁹ The five community schemes described in the CSOS Act share each of the issues mentioned above.²⁰⁰ All disputes

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ *Mount Edgecombe* (n 45) [19].

¹⁹⁷ Section 1 of the CSOS Act 09 of 2011.

¹⁹⁸ Ibid.

¹⁹⁹ The CSOS website.

²⁰⁰ Ibid.

involving community schemes may be arbitrated by the adjudicator appointed by the Chief Ombud, but the requested relief must effectively address one of the issues covered by section 39 of the CSOS Act, which includes matters related to money, behaviour, scheme governance, meetings, management, private and public areas, as well as overall and additional concerns.²⁰¹ The adjudicator would not have the authority to decide any case that fell outside the purview of the CSOS as a creature of statute. The adjudicator's decisions are appealable, but only if they are contrary to section 34 of the Constitution or raise a legal issue that restricts the affected party's right to review.²⁰²

Despite being listed in the definitions of the CSOS Act, the Chief Ombud is only permitted to aid in relation to meetings under section 36 of the STSM Act that are related to sectional titles schemes and not to any other schemes made possible by earlier laws.²⁰³ To handle conflicts that arose in community schemes, there was a need for a regulator. The Magistrate's Court and the High Court both offered judicial review as a means of settling conflicts among administration of community schemes, in addition to arbitration, which were costly, time-consuming, and ineffective. The main duties of the Community Scheme Ombud Service is to train conciliators, adjudicators, and staff, to regulate, monitor, and control governance documentation within the community schemes, and to settle disputes that arise between stakeholders in community schemes in an efficient and economical manner. Lastly, to take custody of, protect, and make public the documentation of governance.²⁰⁴

Concerning minor disputes, aggrieved parties had to consult a qualified arbitrator or go to court. When resolving disputes in these schemes, the adversarial nature of the legal system served as a deterrent. Minor disputes ended up in the High Court, where the costs were astronomical. Most owners could not afford such legal action or arbitration. The CSOS was established as a result of an increase in disputes in community schemes in order to regulate and offer a practical dispute resolution method. The need for the CSOS was made clear by the case of Body

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Section 18 of Act 08 of 2011

²⁰⁴ Section 4(d).

Corporate of the *Pinewood Park Scheme No. 202 v Dellis, Greenacres*,²⁰⁵ and *Body Corporate of Via Quinta v Van der Westhuizen*.²⁰⁶ This study submits that in carrying out its duties, the CSOS must always abide by the rules of administrative law and make sure that administrative orders are followed.

2.7 Conclusion

The establishment of the CSOS, streamlining community schemes, and handling disputes arising from schemes were all required in South Africa due to the industry's expansion. The governance, management, and ownership of common areas for the benefit of all scheme members is the characteristic shared by the five community schemes listed in the CSOS Act's definition of a community scheme.²⁰⁷ In order to regulate and provide dispute resolution mechanisms in accordance with the CSOS Act, the Community Schemes Ombud Services was established. Numerous disputes arose because of the governance and management of schemes.²⁰⁸ Community schemes were self-governing prior to the CSOS Act, and any legal issues arising from them were handled by the courts. With the creation of the CSOS Act, questions arose as to whether certain tasks should be considered administrative or judicial.²⁰⁹ The limitation on review and the right to administrative action posed another difficulty. Considering that, in addition to the decisions of the appointed adjudicators, the Ombud has the authority to render decisions under section 6(9) of the STSM Act.²¹⁰ The Ombud Services Act and the policy framework surrounding post-promulgation community schemes will be analysed and interpreted in the following chapter.²¹¹

²⁰⁵ (2012) (1) SA 296 (SCA) (1 June 2012).

²⁰⁶ A196/2017 (2017) ZAFSHC 215 (16 November 2017).

²⁰⁷ *Ibid.*

²⁰⁸ National Department of Human Settlements 'Business Case for the Community Schemes Ombud Service', 10 February 2012.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ 9 of 2011.

CHAPTER 3: DISCUSSION ON LEGISLATION AND POLICY CONTEXT POST-CSOS

3.1 Introduction

Several pieces of legislation, including the Sectional Titles Act, the Share Blocks Control Act, the Housing Development Schemes for Retired Persons Act, the Communal Land Rights Act and the Co-operatives Act,²¹² make provisions for the shared use of common property, mandatory membership in an obligatory governance structure, and various degrees of financial interdependence.²¹³ In the various provinces, common law co-ownership schemes, gated villages such as Homeowners' Associations under Section 21 of the Companies Act, and various Town Planning and Land Use Planning Ordinances are applicable.²¹⁴ In some real estate developments, various types of community schemes can be used, such as sectional title schemes and housing developments for retired people under the jurisdiction of a single homeowner's association with "overarching" management responsibilities. Community schemes within such developments are frequently governed by multiple sets of governance documents.²¹⁵

The Introduction of Community Schemes Ombud Services has granted the Ombud ability to exert public power or public functions. The standard for determining the source of authority's power is that if that power is derived from a legislation, the body is presumed to be public.²¹⁶ As a result, the Ombud's decisions, including adjudication orders, must be subject to review. Regulation 30 of the STA expressly allows a sectional title scheme to delegate its activities and powers to an alternative organisation that serves as an overarching management body.²¹⁷

Up Prior to 2011, the sole method of resolving disputes in South Africa was the South African Ombud Service, a type of statutory arbitration governed by

²¹² STA (n 35).

²¹³ The Communal Land Rights Act 11 of 2004.

²¹⁴ Act 59 of 1980 (n 38)(n 39).

²¹⁵ Act 11 of 2004.

²¹⁶ Act 14 of 2005.

²¹⁷ PP Craig, 'What is public power' in Corder H and Maluwa T (eds) *Administrative justice in Southern Africa* (Juta 1997) 25-41.

Prescribed Management Rule 71 in Annexure 8 of the Regulations 135 under the South African Sectional Titles Act, which was promulgated in 1997.²¹⁸ Since its inception, arbitration has faced criticism for being an improper means of resolving sectional title disputes and for taking just as much time and money as legal procedures. The Sectional Titles Act dealt with the administration of sectional title schemes, which were required to file their rules and regulations with the Deeds office upon registration.²¹⁹ The Deeds were cited in all disputes pertaining to sectional title schemes. Owing to the volume of disputes, the Department of Land (Department of Rural Development and Land Reform; hereafter referred to as DRDLR) established two statutes (the Sectional Titles Schemes Management Act)²²⁰; (hereinafter referred to as STSMA) and the Community Schemes Ombud Services Act (also referred to as the CSOS Act) to create a more appropriate dispute resolution system.²²¹ The CSOS Act was created to provide dispute resolution services and regulatory functions for community schemes, and the STSMA is essentially the management provisions from the Sectional Titles Act (hereinafter STA), which were removed from the STA and placed under the Department of Housing (now Department of Human Settlements, hereinafter DHS).²²²

3.2 Lessons on the implementation of ombud service in other countries

The creation of a Special Ombudsman Service is a critical first step in handling grievances and fixing neighbourhood issues.²²³ The main goals of ombudsman services are usually to give people a fair and unbiased way to express their complaints, look for solutions, and hold government agencies and institutions responsible. These services are frequently established to guarantee justice, fairness, and transparency when handling grievances and conflicts. In the United States, similar Ombud systems are found in Nevada and Florida.²²⁴ The Nevada

²¹⁸ Act 95 of 1986.

²¹⁹ Ibid.

²²⁰ Act 8 of 2011.

²²¹ Act 9 of 2011.

²²² The CSOS website.

²²³ International Comparative Study – Parliament.

²²⁴ Ibid.

Ombudsman was tasked with providing services such as assisting owners with amongst other services filing of claims for arbitration or mediation.

The Florida Condominium Ombudsman is supported by fourteen staff members who make recommendations regarding the condition of the state's communities with multiple owners and shared interests, supervise condominium elections, help unit owners and board members, and promote the use of alternative dispute resolution methods. The ombudsman only intervene if six or more-unit owners, or 15% of the association's membership, submit a grievance against the board.²²⁵

In South Africa, community schemes, which include homeowners' associations, sectional title developments, and other shared property arrangements, are regulated and overseen by the Community Schemes Ombud Service Act.²²⁶ In fact, the Act provides for the creation of the CSOS national office as well as a number of regional offices.²²⁷ These offices are essential in carrying out the Act's provisions and guaranteeing that conflicts and problems pertaining to community schemes are successfully resolved. By providing alternative dispute resolution services and support in resolving conflicts within these kinds of shared-property arrangements, the CSOS acts as an ombudsman for community scheme disputes.²²⁸ Ombudspersons who serve regions are known as regional ombuds persons. In their respective regions, they oversee managing conflicts, looking into complaints, and making sure that conflict resolution services are offered to the public or to other members of the organisation.

In conflict resolution, adjudicators are the people who must render legally binding judgments. They evaluate the arguments and evidence put forth by the parties to a dispute and make a ruling that must be abided by. Conversely, conciliators are usually in charge of mediating and facilitating talks between disputing parties. Rather than imposing a legally binding decision, they seek to assist parties in coming to a mutually agreeable solution.

²²⁵ Ibid.

²²⁶ Act 9 of 2011.

²²⁷ Section 21 of Act 9 of 2011.

²²⁸ Ibid.

There were gaps in the rules that were mostly in shambles in the various land registry offices. These bylaws are now securely stored electronically and made accessible to the general public upon request. The first stage of the Ombud Service is funded by the South African parliament, which include the establishment and equipping of the national headquarters and the most important regional offices.²²⁹ Following that, levies collected from owners of community scheme units and cost recovery fees imposed regarding the different services provided by the Service are the primary sources of funding for the national and regional offices.²³⁰ The provision of scheme documentation could generate significant revenue, especially since regular and outstanding payments can be sought through regional Ombud Service offices rather than debt collection actions in magistrates' courts. Any party who has a dispute or is a party to a dispute, or any person who is financially affected by a grievance or a dispute, may contact a regional office.²³¹ Section 39 of the Act limits relief applications to one or more of the 7 specified orders.

These categories aid in the organisation and classification of various issues or cases that the Ombud may handle. General Issues or Complaints: This category is likely to include a wide range of general issues or complaints brought to the Ombud's attention. These issues may be related to various aspects of a company or community scheme, and they may not fit neatly into other categories.²³² Meetings: This category may include issues or disagreements about meetings within an organisation or community. Meeting procedures, conflicts during meetings, or the need for improved communication during meetings are examples of such issues. Management Services: This category includes issues concerning the management and administration of an organisation or community. Concerns about leadership, decision-making processes, or the quality of services provided may be included. Private and Common Area Works: This category is most likely related to maintenance and improvement projects in a community or organisation's private and common areas. It could include issues like repairs, renovations, or disagreements over shared facilities.

²²⁹ Section 22 of Act 09 of 2011.

²³⁰ Ibid.

²³¹ Section 38 of Act 09 of 2011.

²³² Section 39(7)(b) of Act 09 of 2011.

A scheme governance order could be one requiring the recording of a new bylaw or one ruling that a specific bylaw is invalid. A directive might call for the organisation to hold a meeting to discuss a specific topic or declare that a resolution passed at a general meeting was null and void.²³³ A directive could compel a management agent to follow the terms of their employment agreement or the guideline of the code of conduct when providing management services.²³⁴ The adjudicator may order the association to perform repairs and maintenance on private and common area works, or an order stating that it was unreasonable for the association to decline a suggestion to upgrade or modify common areas and mandating that the association accept or ratify the proposal under certain conditions.²³⁵ In cases involving general concerns, the adjudicator may mandate that the applicant be given access to data or records that were incorrectly rejected.²³⁶ The application must be rejected should the alleviation requested is outside the scope within the Service, should the candidate fail to indicate that they wish the case to proceed, or if the Ombudsman is of the opinion that the disagreement should be heard in a court of law.

Accepting an Application: This is the first stage in the process when a complaint or application is received by the Ombudsman from a person or entity requesting help in addressing a dispute or providing support.²³⁷ The ombudsman's job is to hear the concerns of the complainant and compile pertinent data.²³⁸ **Getting Arguments from Affected Parties or Applicant Responses:** The Ombudsman may obtain more information by speaking with all pertinent parties after accepting the initial application or complaint. This could entail hearing arguments or responses from individuals who are impacted by the complaint as well as receiving responses from the applicant, the person who filed the complaint.²³⁹ **Assess whether a Negotiated Settlement Is Reasonably Prospective:** It is the ombudsman's responsibility to evaluate the circumstances and determine whether there is a plausible chance that the disagreement can be resolved through conciliation or negotiation. This

²³³ Section 39(3) of Act 09 of 2011.

²³⁴ Section 39(5) of Act 09 of 2011.

²³⁵ Section 39(6) of Act 09 of 2011.

²³⁶ Section 39(7)(a) of Act 09 of 2011.

²³⁷ Section 38 of Act 09 of 2011.

²³⁸ Section 43 of Act 09 of 2011.

²³⁹ Ibid.

evaluation might entail considering the arguments, supporting data, and comments from those who are impacted.

Send the Issue for Conciliation: The matter would proceed to the conciliation stage if the ombudsman thinks there is a realistic possibility of a negotiated settlement.²⁴⁰ A neutral third party, in this case the ombudsman, helps the parties involved in a dispute come to a discussion and negotiation-based resolution through the process of conciliation. After giving the matter careful thought, the adjudicator must decide whether to grant or deny each of the requested relief portions, allocate cost responsibility, finish a statement explaining the rationale behind the decision, and advise the parties of their legal rights to appeal on a legal inquiry within thirty days of the order's delivery.²⁴¹ Either a magistrate's court or the High Court may enforce the order, depending on the sum of money involved and the remedy prescribed. The clerk of the magistrate's court and the registrar of the High Court are required to register the order as an order of their respective courts upon receiving a copy of it.²⁴² Every order that is made, along with the rationale behind it, must be published and made available for public viewing by the Ombudsman Service.

The national office does not only have to resolve disputes; it also has to "control," evaluate, and regulate the standards of all sectional titles scheme governance records'.²⁴³

3.3 The legal phenomenon of a community scheme within a community scheme, its legal basis and how it operates

There are instances where a scheme exist within another scheme, where either the community scheme itself is a member of another community scheme, such as a Homeowners' Association²⁴⁴, or the members of the first scheme (whatever its legal basis is) are members of the overarching or "mother"-scheme?²⁴⁵ The By-laws and zoning regulations in South Africa differ from province to province,

²⁴⁰ Section 47 of Act 09 of 2011.

²⁴¹ Section 48 of Act 09 of 2011.

²⁴² Section 56 of Act 09 of 2011.

²⁴³ Section 41(c) of Act 09 of 2011.

²⁴⁴ Paddocks Press volume 11, Issue 09, September 2016 edition) 02.

²⁴⁵ Ibid.

particularly in Gauteng, a developer may apply to the local authority to establish a residential township, which is then approved, with some erven zoned as freehold and some zoned as sectional title schemes.²⁴⁶

A Homeowners' Association (HOA) or Non-Profit Company (NPC) is registered with the Companies and Intellectual Properties Commission (CIPC) and reflected in the title deed of each owner of a unit in a sectional title scheme or freehold erf within the township.²⁴⁷ The owner automatically and by operation of law becomes a member of the NPC registered at the CIPC upon registration of a unit or erf in his name and shall remain a member thereof until the unit or erf is sold and registration of transfer takes place out of his name.²⁴⁸ Neither the unit nor the erf can be registered in his name unless the HOA's Directors have certified that all monies owed to the HOA have been compensated or the satisfaction of the parties is ensured by that arrangement. of the HOA for payment of such monies.²⁴⁹ This effectively creates a "scheme within a scheme", though in this case, the individual members of the Body Corporate, or Bodies Corporate within the larger township, are also members of the HOA. ²⁵⁰

The Memorandum of Incorporation (MOI) may also state that it is the Sectional Title Scheme and a member of the HOA, which means that the Body Corporate or individual Bodies Corporate within the HOA would each pay a monthly contribution to the HOA.²⁵¹ It all depends on the wording of the MOI and the Developer's ultimate intention. Members of the Body Corporate must pay two monthly levies in this case.²⁵² Living in a "scheme-within-a-scheme" has distinct advantages, such as double security, a "lock-up-and-go" lifestyle within a security estate, and a greater number of shared lifestyle facilities to enjoy, such as tennis courts, swimming pools, and manicured gardens.²⁵³ However, as with anything, there are drawbacks: you are a member of two associations and must therefore pay levies

²⁴⁶ Ibid.

²⁴⁷ *Willow waters Homeowners Association (Pty) Ltd v Koka N.O.* (2015)1 All SA (SCA) [17].

²⁴⁸ *Willow waters Homeowners Association* [18].

²⁴⁹ *Willow waters Homeowners Association* [22].

²⁵⁰ *Willow waters Homeowners Association* [19].

²⁵¹ The CSOS Shared Living, Issue 3 of October 2020) 18.

²⁵² Ibid.

²⁵³ Ibid.

to both. As a result, more disputes may arise because you have more neighbours living nearby, as well as more rules to follow because you have the Body Corporate Conduct Rules in addition to the HOA Conduct Rules.

When it comes to a share block scheme converting to a sectional title under the Share Blocks Control Act, there must be one overarching legal structure to which the minor legal structure (or structures) subscribes.²⁵⁴ The units that are still owned by the Share Block Company (and whose shares are still held by the respective shareholders) are required to pay levies to the Body Corporate and to follow the STSM Act and the Body Corporate Rules.²⁵⁵ The land must be owned by a single legal entity; it cannot be shared.

3.3.1 Advantages of the Ombud Service

The Ombud option offers a speedy and low-cost alternative for resolving conflicts and grievances measured against costly and laborious court and arbitration procedures. Additionally, the magistrates' courts' workload is reduced.²⁵⁶ Owners, management boards, and other impacted parties must be made aware of their rights and responsibilities in community schemes through education, information, records, and other services that the Ombud Service's national office may provide as needed. This is in line with the roles of the Sri Lankan and Singaporean commissioners of buildings.²⁵⁷

Authority for Condominium Management A professional service is offered by the Ombud Service. In addition to having the necessary training and expertise in community scheme governance, adjudicators and conciliators must also possess the necessary credentials.²⁵⁸ In addition, conciliators and adjudicators must receive training from the national office; in contrast to their Singaporean counterparts, who work for meagre pay, these individuals are frequently appointed to full-time positions at respectable salaries.²⁵⁹ Not only must the national office

²⁵⁴ *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others* 2019 (4) SA 471.

²⁵⁵ Share Blocks Act 59 of 1980.

²⁵⁶ See no 217.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

handle disputes, but it must also 'regulate, monitor, and control the quality of all sectional titles scheme governance documentation'.²⁶⁰

This is reinforced by a provision in the Sectional Titles Schemes Management Act, through the provision of sufficient funding and equitable contribution determination, this provision aims to encourage the appropriate upkeep and repair of community scheme buildings. In the event of financial difficulties or disagreements among community members, it also offers a system for oversight and dispute resolution.

Important points: Keep safe all documentation pertaining to the community scheme, which probably consists of maintenance schedules, financial records, and other pertinent data. Public access to documentation should be provided online. This implies that locals or interested parties can view these documents online. There is a clause that permits any owner to contact the Ombud Service if the maintenance and repair budget is insufficient. The Ombud Service is being approached to obtain an order stating that contributions that were calculated incorrectly ought to be modified to a "just and appropriate amount."²⁶¹ This suggests that in the event that the budget is insufficient, the Ombud Service may step in to make sure that property owners or other community members pay a reasonable and fair amount to cover the buildings' required upkeep and repairs.

3.3.2 A model of dispute resolution from New South Wales Australia

An additional illustration of a specialised court or tribunal established to resolve disputes in sectional title schemes is the forum established under Chapter V of the New South Wales Strata Schemes Management Act 138 of 1996. This Act gives adjudicators appointed by the Consumer, Trader, and Tenancy Tribunal and the Minister of Fair Trading the authority to issue orders to resolve disagreements regarding specific areas of strata scheme administration and operation. A directive application is first processed by the Registrar.²⁶²

²⁶⁰ Ibid.

²⁶¹ Section 39(1)(c) of Act 09 of 2011.

²⁶² Section 124 of STRATA Schemes Management Act 138 of 1996.

If the Registrar is certain that mediation was appropriate but not tried, she must decline to take on the case. One can ask the Director-General of the Department of Fair Trading to mediate the dispute, or they can make other arrangements for mediation.²⁶³ If mediation fails or a dispute is not appropriate for mediation, the Registrar may approve the application for an order. Depending on the kind of order prayed for, either the Customer, Trader and Tenancy Tribunal Act ("CTTT Act") or a strata schemes adjudicator will hear the case.²⁶⁴

Strata Schemes Adjudicators in Australia's New South Wales are chosen by the Commissioner for Fair Trading, not the Minister of Fair Trading. The adjudicators of strata schemes and community title schemes oversee settling conflicts and rendering decisions pertaining to these schemes. These adjudicators are usually chosen for their expertise in conflict resolution and strata law. Their role is of utmost importance in mitigating conflicts and issues that may emerge in strata communities, including disagreements regarding bylaws, maintenance and repairs, or other issues pertaining to strata living. Australia's legislation governing the management and operation of strata schemes, also referred to as condominiums or multi-unit developments, is the New South Wales Strata Schemes Management Act 2015. The section or division of the Act that describes the different orders that can be made in relation to strata schemes is referred to as Part 4 of Chapter V.

Different parties involved in stratum schemes, including the owners corporation, individual lot owners, and the New South Wales Civil and Administrative Tribunal (NCAT), may be able to make different kinds of orders under the Act.²⁶⁵ Ten categories comprise these orders, which begin with a general directive to resolve conflicts or grievances pertaining to the execution of the management, administration, and operation of the scheme.²⁶⁶ Additionally, Adjudicators may deal with directives pertain to property; insurance; levies; animal ownership; parking on common areas; air conditioning or obtrusive neighbours; insufficient flooring in an owner's lot; unpermitted changes to common areas; meetings and

²⁶³ See n 138.

²⁶⁴ 82 of 2001.

²⁶⁵ Section 140-162 of STRATA Schemes Management Act 138 of 1996.

²⁶⁶ Section 124 of STRATA Schemes Management Act 138 of 1996.

decisions of the body corporate. Documents relating to the corporation, policies and procedures, and the appointment of administrators to oversee the corporation's activities.²⁶⁷

The Adjudicator may reject some petitions and refer others such as those involving difficult issues—to the Tribunal. The basis for the Adjudicator's decision-making is written submissions.²⁶⁸ He or she may ask specific questions and must act in a judicial manner when issuing the written order. An order is valid for two years. The Registrar shall serve a copy of the order to the applicant, the body corporate, the parties in dispute, and the individual on behalf of whom the order is being requested.²⁶⁹ A party may file an appeal with the Consumer, Trader, and Tenancy Tribunal within 21 days of the Adjudicator's order going into effect.²⁷⁰

Among the divisions that comprise the Tribunal are the Motor Vehicle Repairs and Sales Division, Retirement Village Division, and Strata and Community Schemes Division.²⁷¹ The Minister of Fair Trading appoints the Chairperson, Deputy Chairperson, and Members. At least one of the governing fields of the Tribunal must be understood by the members. One, two, or three persons may make up a tribunal, depending on what the Chairperson specifies. Part V contains a list of subjects on which the tribunal may issue orders.²⁷² These consist of cases that an adjudicator presents to the tribunal, caretaker agreements, participation quota reallocation, administrator appointment, and approval of specific acts during the first phase. The Tribunal has the power to look into requests and deny requests.²⁷³ This indicates that it is involved in the evaluation of applications and the collection of data or proof pertaining to cases that are presented before it. At the hearing, applicants may bring attorneys, legal counsel, or other representatives. In order to guarantee that the parties' rights and interests are sufficiently protected, this is a standard practice in legal proceedings.²⁷⁴

²⁶⁷ Ibid.

²⁶⁸ Section 138 of STRATA Schemes Management Act 138 of 1996.

²⁶⁹ Section 135 of STRATA Schemes Management Act 138 of 1996.

²⁷⁰ Ibid.

²⁷¹ Civil and Administrative Tribunal.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid.

Hearings before the Tribunal must be open to the public. The public and interested parties can watch the proceedings thanks to this requirement, which also ensures transparency.²⁷⁵ A vital component of many legal and administrative procedures is the holding of open hearings. The CTTT Act's requirements must be followed in all aspects of the Tribunal's operations. The rules and legislation governing the Tribunal's functions and processes are probably contained in this Act.²⁷⁶ A copy of the order must be sent to every stakeholder in the case. This is crucial in order to inform all pertinent parties about the Tribunal's decisions and results. There are rigorous procedures to adhere to when appealing a Tribunal order to the District Court. Under specific legal circumstances, the CTTT Act permits a Supreme Court appeal.²⁷⁷ The Strata Schemes Management Act imposes civil penalties for adjudicator or tribunal orders that are broken. The dispute resolution statute in New South Wales is problematic because it is extremely complicated. The CTTT Act and the Strata Schemes Management Act both address this topic

Regulation 30 to the STA was repealed in its entirety on May 12, 2017,²⁷⁸ by the Minister of Rural Development and Land Reform by notice in the Government Gazette, which took effect one month later. Prior to such repeal, in accordance with Regulation 30(3),²⁷⁹ if every member of the body corporate was a member of the association, whose bylaws required its members to transfer the authority and duties of the corporate body to the association, then the annexure 8 management guideline would apply.²⁸⁰ In other words, the scheme would be a corporate body under the STA, but it might be controlled, administered, and function under the rules or Constitution of the association.

3.4 Analysis of legal phenomenon of a community scheme within a community scheme

Since so many people live in these kinds of schemes, disagreements inevitably arise. The service handle these disagreements, and if the parties are not satisfied with the adjudicator's decision, they are be free to approach a court without being

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Sectional Titles Act, 1986: Amendment of Regulations GN R427 in GG 40842 of 12 May 2017.

²⁷⁹ STSM Act (n 6).

²⁸⁰ See n 334.

constrained by section 57 of the CSOS Act. One of the pillars of South African democracy is judicial review of administrative action.²⁸¹ It is a fundamental right because it is part of the heart of the right to administrative justice given in Section 33 of the Bill of Rights. Section 34 of the Constitution protects all people from the behaviour of individuals in conflicts to which legal procedures can be applied.²⁸²

In accordance with section 36 of the Act,²⁸³ the Chief Ombud has issued practice directives. The practice directives' goal is to offer additional information on the methods and content requirements for dispute resolution applications submitted to the CSOS,²⁸⁴ as well as to approve rules in accordance with section 6(9) of the STSM Act.²⁸⁵ The practice directives provide additional information regarding the implementation of dispute resolution in accordance with the Act, but they do not replace the Act or the Chief Ombud's competence to decide what is required for a dispute.²⁸⁶

Furthermore, not all instances of dissatisfaction with an adjudicator's decision can be adequately addressed through an appeal. Some of the grievances would be over how a matter was handled procedurally,²⁸⁷ for example. The disagreement would not necessarily deal with the merits of the case, and it would be difficult to fit such a complaint within the literal reading of the clause. This is the difficulty raised by section 57 of the CSOS Act, and the unhappy parties would be materially and adversely affected by the Ombud's administrative action. In *Stenersen and Tulleken Administration v Linton Park Body Corporate*, the issues in dispute was the determination of the category that an appeal filed under section 57 falls into and the process that must be followed when filing such applications were the points in contention.²⁸⁸ Only appeal categories were discussed in this case. The following

²⁸¹ Williams RC, 'The concept of a 'decision' as the threshold requirement for judicial review in terms of the PAJA,' *Potchefstroom Electronic Law Journal*, volume 14, 2011 230.

²⁸² Act 108 of 1996.

²⁸³ G Quinot, 'New procedures for the judicial review of administrative action,' *South African Public Law journal*, volume 25 2010 *SAPL* 646.

²⁸⁴ CSOS Act (n 1).

²⁸⁵ CSOS Practice Directive No 2 of 2018: *Dispute Resolution*.

²⁸⁶ CSOS Circular No 2 of 2018: *Procedure for the Application of Unanimous and Special Resolutions* in terms of s 6(9).

²⁸⁷ CSOS Act (n 1).

²⁸⁸ *Stenersen* (n 65) [42].

three appeals categories were established by the *Tikly v Johannes* case,²⁸⁹ which was cited by the parties:

An appeal in the widest sense, suggesting a thorough retrial; By definition, an appeal is heard on the merits but limited to the evidence in a strict hearing. Review is limited to re-hearing with or without supporting documentation; The court ruled as follows: The *Tikly* case established the second category of appeals, which is a High Court appeal against an adjudicator's decision anticipated under section 57. The appellate process is restricted to legal matters exclusively.²⁹⁰ This ruling failed to address the parties' rights under Section 34 of the Constitution, therefore limiting it to a restricted notion of appeal. The legislature's objective in applying Section 57 of the CSOS Act only on a point of law took away the right of aggrieved parties to review the adjudicator's decision.²⁹¹ According to Section 34 of the Constitution, aggrieved parties have the right to petition the court for a review if they are dissatisfied with the adjudication ruling, without being limited to an appeal on a point of law as provided for in Section 57 of the CSOS Act.²⁹²

There is no defined process for appealing a CSOS adjudicator's order in court rules, nor is there one in the Community Schemes Ombud Services Act ("the CSOS Act") or its implementing regulations.²⁹³ Nonetheless, it was believed that the Western Cape High Court had clarified the process to be followed for all appeals under section 57 of the CSOS Act after rendering a decision in the case of *The Trustees for the Time Being of the Avenues Body Corporate v Shmaryahu* on May 10, 2018.²⁹⁴ In the *Shmaryahu's* Judgment, the Court held that the appropriate procedure for filing an appeal against a CSOS order is to serve the adjudicator and the sheriff on the Community Schemes Ombud Service with a notice of motion accompanied by affidavit(s).

²⁸⁹ *Tikly* (n 23).

²⁹⁰ *Stenersen* (n 296) [42].

²⁹¹ CSOS Act (n 1).

²⁹² Act 09 of 2011.

²⁹³ 2020 (1) SA 651 (GJ) (24 October 2019) [2].

²⁹⁴ 2018 (4) SA 566 (WCC) (10 May 2018).

Reiterating the conclusions of the High Court, the CSOS issued Practice Directive on Dispute Resolution,²⁹⁵ which went into effect on August 1, 2019, based on this judgment. Later, on May 13, 2019, the KwaZulu-Natal High Court adopted this appeal procedure in *Body Corporate of Duroc Centre v Singh*.²⁹⁶ In *Stenersen and Tulleken Administration CC v Linton Park Body Corporate and Others*, the Western Cape High Court rendered a Shmaryahu Judgment.²⁹⁷ This finding was not agreed upon by the South Gauteng High Court.²⁹⁸ In this ruling, rendered on October 24, 2019, the South Gauteng High Court was asked to determine the classification of appeals filed under section 57 of the CSOS Act and the procedures that an appellant must follow in order to file such an appeal.²⁹⁹

Section 57 of the CSOS Act was the main focus of the South Gauteng High Court, which came to the following conclusions: It is not necessary for the Community Schemes Ombud Service to approve an appeal; A CSOS order appeal may not be filed for more than 30 days; the appellant must specify a particular legal question, and the High Court will only consider that issue; no other issues may be considered.³⁰⁰ Put differently, the evidence-based decisions made by the adjudicator cannot be reviewed on appeal. Lastly, the statute restricted the appeal process to guarantee promptness, effectiveness, and closure.³⁰¹

The High Court concluded, based on these conclusions, that an appeal court's jurisdiction is limited to establishing whether the adjudicator correctly applied the law, correctly interpreted the law, or correctly applied the law to the facts that the adjudicator had determined.³⁰²

Consequently, the appellate court's jurisdiction is limited to determining the accuracy of the adjudicator's legal conclusions. In order to relieve the High Court of its burden in handling cases of this kind, the High Court concluded that this

²⁹⁵ No. 1 of 2019.

²⁹⁶ 2019 (6) SA 45 (KZP) (13 May 2019).

²⁹⁷ *Ibid* (no 350).

²⁹⁸ *Ibid* (no 349) 42.

²⁹⁹ *Ibid*.

³⁰⁰ *Ibid*.

³⁰¹ *Ibid*.

³⁰² *Ibid*.

illustrates not only the significance of ultimately settling factual disputes at the adjudication level but also the significance of preventing or minimising the number of appeals brought before the High Court.³⁰³ To reach a different conclusion would be to undermine the goals pursued by the CSOS Act.

The High Court decided that an appeal under section 57 against a CSOS order is a rehearing on the merits, but restricted to the evidence or information that supported the decision under appeal; the court of appeals should only decide whether the decision was right or wrong on a legal question.³⁰⁴ The High Court held that the application submitted to the CSOS, any subsequent written submissions between the parties for the adjudication, along with the written reasons for the determination that the adjudicator is required to provide, are sufficient for adjudication hearings. This is interesting because the CSOS had noted that recording and transcription of adjudication hearings would be an expensive expense.³⁰⁵

In the end, the High Court made the following ruling: That a notice of appeal with explicit grounds for appeal be submitted in order to begin an appeal against a CSOS order; The notice of appeal will be served by the sheriff to the CSOS and the adjudicator, and Nothing stops the adjudicator or the CSOS from reporting to the court on any area of the law that they feel will be beneficial, even though they are required to respect the court's ruling.

3.5 Conclusion

The ruling in *Stenersen and Tulleken Administration v Linton Park Body Corporate* contradicts the essence of the CSOS's functions, which should be administrative to judicial in nature. This leads to uncertainty about the CSOS's powers and functions. The CSOS legislation is riddled with gaps that make it difficult to comprehend and apply. Regulations under the CSOS Act could not correct the faults of the legislation since they had to be compatible with the

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Paddocks Press: Volume 15, Issue 1.

designated legislation. Despite the fact that Section 36 of the CSOS Act authorises the regulator to issue Directives, this would not be sufficient to address the situation because it must be consistent with the underlying legislation. Only the amendment can correct the legislative flaws.

The tasks of the Adjudicator are judicial rather than administrative, therefore section 57 of the CSOS Act contradicts the powers provided in section 34 of the Constitution. As a result, the regulator's judgments must be scrutinized. Section 57 of the CSOS Act must be changed to ensure constitutional compliance. It is stated that to assure compliance with administrative action, regulatory functions should be separated from dispute resolution functions, which clearly identify the hallmark of judicial function. Selected judicial decisions rendered by the regulator in accordance with administrative law are examined in the next chapter.

CHAPTER 4 A DISCUSSION OF DECISIONS MADE BY THE REGULATOR IN COMPLIANCE WITH ADMINISTRATIVE LAW

4.1 Introduction

The Ombudsman's role included issuing practice directives dealing with unanimous and special resolutions, as well as one dealing with dispute resolution.³⁰⁶ The Practice Directives for Rule Approval in conformity with Section 6(9) of the STSM Act provide procedures for the application of Unanimous and Special Resolutions that are consistent with administration action. Section 1(a)(ii) of PAJA states that administration action is defined as "any decision made or not made by using public authority or carrying out public duties in accordance with laws".³⁰⁷ The procedure outlined in Section 6(9) of the STSM Act must be procedurally fair, according to Section 3(1) of the PAJA. The powers of the Ombud extend beyond the powers espoused by a regulatory body to provide a dispute resolution mechanism in community schemes.³⁰⁸

Given the hybrid system, the question of how administrative law applies in community schemes, including the right of appeal under Section 57 of the CSOS Act, remains. Administrative law is a subset of public law that governs the relationship between the government and the general public, as well as the activities of officials or bodies (administrators) who wield public power and perform public functions.³⁰⁹

4.2 DECISIONS OF OMBUD IN TERMS OF 6(9) OF THE STSM ACT

PAJA offers comprehensive guidance on when and how to assert the constitutionally protected right to just administrative action (Section 33). A party may review an administrative action if they think there was procedural injustice. Section 6(9) of the STSM Act guarantees the right to just administrative action. A legal challenge to an administrative action may be brought by anyone. The

³⁰⁶ Circular no 2 and Practice directive on dispute resolution on the website of community schemes Ombud services.

³⁰⁷ Section 1 PAJA.

³⁰⁸ Ibid.

³⁰⁹ Hoexter, 'Administrative law in South Africa' 1.

decision in *Bhugwan v JSE Ltd*,³¹⁰ was the first High Court decision to consider what, for the purposes of PAJA, constitutes a decision reviewable under the Act as opposed to an inchoate decision.³¹¹

In *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd and Others* the Constitutional Court was presented with the question of the inequality of these agreements. The decision that followed outlines the process of filing the complaint, the controller's discretion, and the arbitrator's authority. The Constitutional Court made it clear that any ongoing legal action be put on hold until the procedure specified in Section 12B is finished when a complaint is referred to the controller. The Constitutional Court held that even in a contentious case, the arbitrator has the authority to reinstate a cancelled agreement. Since the arbitrator's ruling is final, an appeal is not possible.

Whether or not the complaint is legitimate need not be decided by the court when it is requested to halt eviction proceedings in anticipation of a section 12B referral. In a similar vein, the Act allows for an internal appeal to the Minister of Energy Affairs, who has the power to review the controller's decision, if a party is unhappy with it. Engen claimed that because the decisions made by the Controller and Minister were preliminary, they could not be considered "administrative action" that was subject to PAJA review. However, the court rejected this claim.³¹² In *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v. Hidro-Tech Systems (Pty) Ltd*, the court cited the ruling at paragraph 6 of that case, which held that each case's facts must be considered when evaluating whether or not "administrative action" is necessary.³¹³

It insisted that the Pension Fund Act's section 12B's statutory context made it clear that the Controller's decision constituted a final pronouncement. This study concurs with Williams that the prima facie decision or provision is not a deferred decision but rather belongs in the category of decisions as specified in PAJA

³¹⁰ 2010 (3) SA 335 (GSJ).

³¹¹ Williams, 'The concept of a "decision" as the threshold requirement' 230.

³¹² Engen relied on *City of Cape Town v Hendricks* 2012 (6) SA 492 (SCA) at 495C-D in support of its proposition. 2011 (1) SA 327 (CC) 2017 (6) BCLR 773 (CC).

³¹³ *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC) [7].

section 1 instead of being a deferred decision. The argument goes that the Ombud's choice to confirm the unanimous decision with a section 6(9) certificate qualifies as a decision under section 1 of the PAJA.³¹⁴

The Ombud is expected to make a decision that adds uncertainty to a conclusion, as contemplated by PAJA, and thus subject to PAJA review.

To remove ambiguities between the adjudicator's regulatory powers and judicial functions, it is critical to clearly separate the functions of the Ombud. The reason for more specific legislation is to include a decision regarding the meaning of "decision" in order to keep an administrative decision maker from going beyond the scope of PAJA. The current legislation lacks a definition of a decision and decision-maker, which conflates with adjudication powers, which are not clearly defined as administrative or judicial functions.

4.3 Decisions of the adjudicators and right of appeal

It is necessary to clarify whether the adjudication orders are administrative actions or judicial functions. The individual's request may address other issues affecting CSOS's role and powers. These questions must be addressed, if not in terms of PAJA, then in terms of customer focus. It might be best to respond to those questions because they may not be directly related to the adjudication order. The Adjudicator is a CSOS employee who is appointed under section 21 of the Act to hear disputes filed under section 39 of the CSOS Act.³¹⁵

According to Section 51 of the CSOS Act, the adjudicator must investigate the application and issue an order after considering the evidence. The Constitutional Court delivered a judgment in the Viking Pony case concerning a provisional cost order it made in a judgment handed down on November 23, 2010. The provisional order required the City of Cape Town to pay the costs of Viking Pony and Hydro-Tech Systems in the Constitutional Court. The court ruled that if the City of Cape Town had followed through on its obligation to investigate, the case would not have

³¹⁴ Williams (n 319) 238.

³¹⁵ CSOS Act (n 1) section 21.

come before it.³¹⁶ Section 56 of the CSOS Act allows the adjudicators' decision to be enforced. Due to the adverse nature of the adjudicators' decisions, such decisions are appealable under section 57 of the CSOS Act.³¹⁷

According to Section 51 of the CSOS Act, an alternative method to formal administrative tribunals for resolving complaints and disputes within legal or administrative frameworks is the use of adjudicators empowered to render legally binding decisions under the investigative ombudsman concept.³¹⁸ Adjudicators working within an ombudsman framework are tasked with resolving disputes or complaints in place of a traditional formal administrative tribunal. There are some potential benefits to this strategy:

The investigative ombudsman concept is typically less formal and may provide a more approachable and user-friendly procedure. In this situation, adjudicators might be highly knowledgeable about the field or problems at hand, which could result in better informed and effective decision-making. Because ombudsmen are frequently seen as impartial and independent, the dispute resolution process may be seen as more credible and reliable. It is a more economical course of action because the procedure might be quicker and require fewer resources than traditional administrative tribunals.

It is the study's considered opinion that Adjudicators have the same remedial powers as a court of law, albeit not as a court but with investigative administrative powers. Furthermore, pursuant to Section 50 of the CSOS Act, the CSOS Adjudicators are individuals or who make judgments or decisions in the course of resolving a dispute or complaint. They serve in a quasi-judicial capacity and are frequently tasked with applying specific cases to the law, regulations, or established policies. Binding decisions have legal force and must be followed by the parties involved in a dispute. In other words, once an adjudicator makes a legally binding decision, it is legally binding.³¹⁹

³¹⁶ *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC) [7].

³¹⁷ *Ibid.*

³¹⁸ CSOS Act (n 1) section 51.

³¹⁹ CSOS Act (n 1) section 50.

The High Court ruled in *Shell and BP South Africa Petroleum Refineries v Murphy*,³²⁰ that, while the adjudicator is required by section 30D of the Pension Funds,³²¹ they perform the same role as a court of law by acting to settle complaints in a procedurally fair, cost-effective, and timely manner. In a same vein, the CSOS carries out its duties in a timely, fair, and economical manner. Although the Adjudicator has the same authority as a court of law, according to Mhango, it is not a court; rather, it is an investigative administrative body that carries out quasi-judicial functions. Formal procedural requirements, unlike those in regular civil court litigation, must not impede it.³²² In *Sidumo* case, Ngcobo J ruled that because there is a disagreement between the employer and the employee, the CCMA is a tribunal under section 34 of the constitution and possesses all the characteristics of a court.³²³

In addition, if the court heard the case, section 30M of the Pension Funds Act requires the adjudicator to submit his decision to the court's clerk or registrar. Not to mention, if the issue had been heard by a court of law, Section 30O of the Pension Funds Act states that the adjudicator's decision would have been a civil judgment of that court.

This study contends that an adjudicator's decision does not meet the definition of administrative action as defined in PAJA. As a result, individuals should exercise their right to appeal under section 57 of the CSOS Act. Ordinarily, the adjudication order would explain why certain players were denied. If this is not the case, the parties should exercise their right to appeal. If the Applicant has a material interest, she may file an application or initiate a dispute resolution.

Section 1 of the CSOS Act states: Put more simply, a disagreement or conflict pertaining to the management or administration of a community scheme is referred to as a "dispute" under this act. Individuals with a substantial stake in the plan, such as the association, occupiers, or owners, may be involved in this dispute and

³²⁰ *Shell and BP South Africa Petroleum Refineries (Pty) Ltd v Murphy* 2000 (9) BPLR 953 (D).

³²¹ Act 24 of 1956.

³²² Mhango M, 'Does the South African Pension Funds Adjudicator perform an administrative or a judicial function' 2016.

³²³ *Sidumo and Congress of South African Trade Unions v Rustenburg Platinum Mines Ltd, Commission for Conciliation, Mediation and Arbitration and Moropa* NO CCT 85/06

may choose to resolve it individually or collectively. The Court held in *Trustees for the Time Being of the Avenues Body Corporate v Shmaryahu*³²⁴ that a person must be materially impacted by one or more community scheme-related issues before they are eligible to seek relief under the Act. However, the individual must also have to be eligible to use the unique statutory dispute resolution mechanism.³²⁵ In the *Body Corporate of the Sorronto v Koordom*,³²⁶ In order to examine a leak, the applicant requested access to the Respondents' apartment. The applicant asked the High Court for relief after the Respondent rejected her request.

Although the court has concurrent jurisdiction with the CSOS, the court decided that the applicant avoided the CSOS and agreed that the matter should have been referred to the CSOS. The applicant could win, the court further decided, but it could not decline to hear the case.³²⁷ "Convenience" would not constitute exceptional circumstances, and it assessed punitive costs against the applicant. This confirms my belief that the decisions of the CSOS adjudicators are judicial rather than administrative.

In the case of *Community Schemes Ombud Service v. Stonehurst Mountain Estate Owners Association*,³²⁸ this viewpoint was further demonstrated. A cost order against the CSOS and/or the adjudicator was the relief requested. The respondent demanded that the application of the CSOS order be stayed while Part B was being decided, and that the party opposing the application be ordered to pay the Stonehurst's costs jointly and severally. The application was not opposed by the CSOS or the Adjudicator.³²⁹

In relation to the appeal, the Court determined that the question of costs against the CSOS and the adjudicator should not even have come up, and that with regard

³²⁴ *Trustees for the Time Being of the Avenues Body Corporate v Shmaryahu and Another* 2018 (4) SA 566 (WCC) (10 May 2018) [19].

³²⁵ *Ibid.*

³²⁶ *The Body Corporate of the Sorronto Sectional Title Scheme, Parow v Koordom and Another* (5439/2021) [2022] ZAWCHC 99 (26 May 2022).

³²⁷ *Body Corporate of the Sorronto.*

³²⁸ *Community Schemes Ombud Service v Stonehurst Mountain Estate Owners Association* (12399 of 2021) [2022] ZAWCHC 113 (17 June 2022).

³²⁹ *Community Schemes Ombud Service* [24].

to the declaratory relief, the CSOS and adjudicator had no stake in the interpretation of a provision in the Association's constitution. Section 37 of the CSOS Act states that the Chief Ombud, Regional Ombuds, and Adjudicators have the same privileges and immunity from liability as Judges of the High Court, granting adjudicators the right to perform judicial functions.

PAJA excludes decisions of courts from the definition of administrative action. This exclusion does not apply to all tribunals and adjudicating authorities. It is argued that an adjudicator performs judicial functions and that his/her actions are not administrative. As a result, the PAJA does not apply. Courts have differing opinions on this issue; however, majority decisions such as *Otis South Africa Pension Fund v Hinton* and *Pretoria Portland Cement Company Limited v Competition Commission, Shell & BP South African Petroleum Refineries (Pty) Ltd v Murphy NO & others*, and *Meyer v Iscor Pension Fund* appear to favour the view that adjudicators perform judicial functions and that PAJA does not apply. As a result, the decision in *Stenersen and Tulleken Administration v Linton Park Body Corporate*³³⁰ can be interpreted to mean that the adjudicator's functions are judicial; however, section 57 of the CSOS Act is inconsistent with section 34 of the Constitution.

Sections 51, 52, 53, 54, 56, and 57 of the CSOS Act make it clear that the legislature intended to create a complaints forum that would be functionally equivalent to a court of law. Though not subject to procedural requirements, which often cause the parties to expand large costs for legal counsel and postpone the adjudication process. The absence of formal procedural requirements under Section 51 of the CSOS Act does not, however, diminish the nature of the adjudicator's function, which is clearly a judicial function. The CSOS has issued a practice directive that seeks to clarify, among other things, the procedure for filing an appeal under section 57.³³¹

The practice directive specifies the procedure to be followed, which is outlined in High Court Uniform Rules 53. Rule 53 only allows for judicial reviews, not civil

³³⁰ CSOS Act (n 1), section 37.

³³¹ *Stenersen* (n 65) [42].

appeals.³³² Section 57 of the CSOS Act states that if an adjudicator's decision is challenged, an appeal must be filed.³³³ The right to appeal is provided for in Section 57(1) of the CSOS Act. The High Court would inadvertently hear cases in which, while the parties are unhappy with the adjudicator's decision, they do not effectively fit the classical definition of an appeal, which contends with the merits of the decision appealed against. A literal reading of the section implies that an aggrieved party can only file an appeal. According to the section, an applicant may only appeal on a question of law. According to the CSOS Act, not all decisions made by an adjudicator are appealable. In some cases, a review may be necessary. The Chief Ombud's practice directive states that a party may use the procedure in Rule 53,³³⁴

Rule 53 provides that: 'Except where otherwise provided by law, A notice of motion directed and delivered by the party wishing to review the decision or proceedings to the magistrate, presiding officer, chairman of the court, tribunal, or board, or, if applicable, an officer performing judicial, quasi-judicial, or administrative functions, shall be used in all legal proceedings to examine the decision or proceedings of any inadequate court and of any tribunal, board, or officer carrying out judicial, quasi-judicial, or administrative functions'.

Requesting explanations from those concerned as to why the decision or proceedings should not be reviewed, corrected, or set aside. Requesting that the registrar receive a copy of the record of proceedings that need to be corrected or set aside from the magistrate, presiding officer, chairman, or officer, as appropriate, along with any justifications that he may be required by law to provide or make, and to notify the applicant that he has done so, no later than fifteen days after receiving the notice of motion.

4.4 Conclusion

The powers of the Ombud extend beyond the powers espoused by a regulatory body, as it overlaps with the regulator to provide a dispute resolution mechanism

³³² Superior Court Act 10 of 2013.

³³³ Clause 35 of the Practice directive on dispute resolution on the website of Community Schemes Ombud Services provides.

³³⁴ Superior Court Act 10 of 2013.

in community schemes.³³⁵ Section 6(9) of the STSM Act decisions are reviewable in accordance with Section 33 of the Constitution and PAJA.³³⁶ However, the adjudicator's decisions are judicial rather than administrative, and they are contradicting Section 34 of the Constitution. The CSOS legislation must be amended to give meaning to the purpose and object of the legislature in accordance with the Constitution. Legislation must be written as clearly as possible to avoid ambiguity. The current legislation makes the drafting and issuance of Practice Directives impossible because the primary legislation is unclear, and Practice Directives must, subject to the CSOS Act and the regulations, oversee the execution of any action related to the Service's operation. It is argued that more clearly defined legislation will go a long way toward assisting community schemes in litigating their disputes at the Service. Especially given that the CSOS was established to provide a quick and cost-effective dispute resolution mechanism consistent with the object, purport, and spirit of the Bill of Rights. In its current form, the CSOS legislation allows litigants to approach the High Court on technical issues rather than substantive issues, which may bring resolution to disputes within community schemes. Such actions undermine the purpose of the Act and increase the costs that the legislation was intended to reduce. The study's recommendations and conclusion are presented in the next chapter.

³³⁵ CSOS Act (n 1), s 57

³³⁶ Superior Court Act (n 105), Rule 53

CHAPTER 5: RECOMMENDATIONS AND CONCLUSION

Introduction

This chapter looks at recommendations and conclusion. The two most important areas of discussions such as STSM Act section 6(9) decisions and section 57 of the CSOS Act, which have divergent applications. The section 6(9) have characteristics of administration action whereas section 57 has the hallmark of the judicial function. Also, the limitations in section 57 require amendment of the legislation to ensure its application is consistent with the Constitution. This could improve access to justice for those who cannot afford civil court litigation.

5.1 Recommendations

Since adjudication orders' decisions have wide-ranging effects on scheme participants, the CSOS legislation needs to be changed because, as was already mentioned, it contains basic flaws that are unconstitutional.

In accordance with STSM Act section 6(9), Ombud decisions have all the characteristics of an administrative action. On the other hand, Section 57 of the CSOS Act embodies every aspect of the judicial function. There are multiple cases before the CSOS that could be viewed as having been handled procedurally unfairly. Since there is only one available option—an appeal under section 57 of the CSOS Act—the Ombud must accept the decisions made by adjudicators and cannot intervene on their behalf.³³⁷

Even in cases where judicial review would have benefited the aggrieved parties, they are limited to appealing. The right guaranteed by section 34 of the Constitution—which states that Every person has the privilege to have any dispute settled in an open and equitable proceeding before a court, or where suitable, a different impartial and independent tribunal or forum, according to section 34 of the Constitution is restricted by the limited procedure under section 57 of the CSOS Act. Because section 57 of the CSOS Act is written in such a formalistic manner, a party who feels that their case would be better resolved through review

³³⁷ CSOS Act (n 1).

proceedings is effectively denied access to the courts. According to section 34 of the Constitution, this is an unjustified restriction on the party's rights.

The appropriate interpretation of Section 57 of the CSOS Act is that the appeal contemplated should not be construed as a civil appeal. Any party should be free to assert whatever legal right it has and to follow whatever legal procedure is available to it. An appeal, as defined in section 57 of the CSOS Act, should be interpreted broadly to mean that a party may approach the court for judicial review, with the judicial review procedure in rule 53 of the uniform rules of courts preferred to be followed in challenging an adjudicator's decision. The powers of the Ombud extend beyond the powers espoused by a regulatory body to provide a dispute resolution mechanism in community schemes.³³⁸

Finally, the Ombud's decision to issue the certificate in accordance with Section 6(9) of the STSM Act must be clearly defined to ensure consistency with the PAJA and the Bill of Rights' object, purpose, and spirit. It is argued that once the regulatory functions are separated from the dispute resolution functions, the powers of the Ombud must be clearly defined, and supporting regulations must be drafted to provide clear guidance on how to carry out the Ombud's functions. It is also argued that dispute resolution must operate independently to ensure consistency with the legislature's object and purpose. It is recommended that the dispute resolution mechanisms be separated from the Ombud's functions and operated separately and independently from the regulatory functions.

Furthermore, the appeals process should be expanded to include an independent tribunal with self-review mechanisms before approaching the high court, rather than just the high court and point of law. The self-review mechanism would ensure that cost-cutting measures are implemented. This would improve access to justice for those who cannot afford civil court litigation.

5.2 Conclusion

To avoid ambiguities, the CSOS legislation must be written in the clearest possible language. As a result, the CSOS legislation must be amended to give meaning to

the legislature's purpose and object in accordance with the Constitution. The CSOS Act must be amended to eliminate the ambiguities that have plagued the Service. This legislation must promote access to justice for those who cannot easily afford civil court litigation.

The Court determined that an individual's right to seek relief under the Act is contingent on his or her being materially affected by one or more of these community scheme-related issues. Even so, the personal liberty to use the special statutory dispute resolution mechanism is conditional on the individual having 'a material interest in the scheme'. The courts interpreted this requirement, which was not defined in the CSOS Act. When bringing matters to the CSOS, an ordinary person would not be able to identify and understand his or her rights and limitations. This Act contradicts the legislative purpose. Therefore, this legislation must be amended to include review mechanisms and internal appeal, align with PAJA, align with Constitution and separate the functions of Ombud from that of Alternate dispute resolution. This legislation must promote access to justice for those who cannot easily afford civil court. This legislation must promote access to justice for those who cannot easily afford civil court litigation.

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