Shared Living

Issue 3 of 4

October - December 2020

THE HISTORY OF COMMUNITY SCHEMES
THE WHY, WHAT AND WHEN?

APPLICATION FOR HARASSMENT
PROTECTION ORDERS VS APPLICATION FOR DISPUTE RESOLUTION IN TERMS OF SECTION 39 (2) OF THE ACT

ENFORCEMENT OF AN
ADJUDICATION ORDER

CASE CLOSED

Provision of access discs to all owners instead of waiting for the security guard to open the gate and removal of all private water meters installed to the various units in the building are the words of Adjudicator Thulani Khambule's order

Service Excellence, Independence, Integrity and Accountability

www.csos.org.za

CSOS Community Schemes Ombud Service

Affordable Reliable Justice

VISION: To be a reliable and transparent regulatory authority for community schemes in South Africa

MISSION: To regulate community schemes to ensure good governance by providing education and training to all stakeholders and an accessible dispute resolution service

VALUES: Service Excellence, Independence, Integrity and Accountability.

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CSOS Community Schemes Ombud Service

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CSOS Community Schemes Ombud Service

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CHIEF OMBUD FOREWORD

Dear Stakeholders,

One of the unexpected, successful outcomes of the national lockdown has been the resourceful way in which community schemes have engineered new processes, using available digital platforms to sustain productivity.

CSOS Directives issued during the months of April to September 2020 encouraged the use of online platforms like Zoom, Microsoft Teams, Skype and others to ensure the continuous functioning of schemes. However, the broader implication is that now and going forward, we are faced with new platforms for resolving issues in community schemes.

For Level 1, we have lifted the suspension of walk-ins to CSOS premises. Walk-ins are now allowed for the purposes of lodging an application, to follow up on a matter or application, to submit scheme registration documentation and for the collection of certificates. Conciliations and Adjudications will continue to be conducted virtually, albeit with some level of flexibility dependent on an applicant or respondent's circumstances.

To achieve optimal regulation and facilitate implementation of the CSOS's service delivery model, it is a requirement of the CSOS Regulations that community schemes must register with the CSOS. Whilst the CSOS is working on the creation of a nationwide database that captures all manner and type of community scheme, a register that captures 100% of the industry can only be attained in the long-term.

In the short-term, the entity has a strategy in place that is designed to achieve at least 80% industry compliance in the coming 3 years. We have engaged the Deeds Office, the Companies and Intellectual Property Commission (CIPC) and the Surveyor General to ascertain the quantum of community schemes registered on their databases. The CSOS is also working with the Department of Human Settlements on the amendment of the CSOS Act to ensure greater industry compliance and enforcement.

One of the questions I am often asked is whether a community scheme, which has recently appointed a managing agent or property manager, but has yet to register with the CSOS, has an obligation to raise backdated CSOS levies, or if prescription comes into play? The answer is that prescription does not apply when it comes to CSOS levies, in terms of section 59 of the CSOS Act, irrespective of whether a community scheme is registered or not, there is an obligation to pay levies. It is the right thing to do and facilitates the optimal delivery of the CSOS service delivery model. If unsure of your scheme's registration status please contact Johlene.Wasserman@csos.org.za or email info@csos.org.za

For now, please enjoy our latest articles on pertinent industry matters.

Sincerely,
Ndivhuo Rabuli
Acting Chief Ombud

ECONOMIC RELIEF MEASURES DURING COVID-19

CORONAVIRUS IS REAL

ECONOMIC RELIEF MEASURES (National Treasury)

DESCRIPTION

Tax measures

WHO QUALIFIES?

Tax compliant businesses

HOW CAN PEOPLE ACCESS THE RELIEF MEASURE?

Tax compliant businesses can apply to the South African Revenue Service for the tax relief measures.

These tax relief measures include:

- The introduction of a tax subsidy to employers of up to R500 per month for the next four months for those private sector employees earning below R6,500 under the Employment Tax Incentive. This will help over 4 million workers
- The South African Revenue Service will accelerate the payment of employment tax incentive reimbursements from twice a year to monthly, in order to get cash into the hands of tax compliant employers as soon as possible
- Tax compliant businesses with a turnover of R50 million or less will be allowed to delay 20% of their employees' tax liabilities over the next four months, as well as a portion of their provisional corporate income tax payments without penalties or interest over the next six months. This intervention is expected to assist 75 000 small and medium term enterprises.

CONTACT DETAILS

Website: Csd@treasury.gov.za
COVID19IPAbelowR100m@sars.gov.za

CSOS
Community Schemes Ombud Service

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PROCESS FOR URGENT DISPUTE APPLICATIONS

Dispute Application Email addresses:

Wc-complaints@csos.org.za
Western Cape, Eastern Cape and Northern Cape

GP-complaints@csos.org.za
Gauteng, North West and Limpopo

KZN-complaints@csos.org.za
KwaZulu-Natal, Free State and Mpumalanga

63 Wierda Road East , Wierda Valley, Sandton
(+27 10) 593 0533 l mervin.dorasamy@csos.org.za

www.csos.org.za

The electricity supply to my sectional title unit has been terminated . . . The directors have denied me access to the HOA . . .

Can I approach the csos for urgent assistance?

The good news is **YES YOU CAN!**

As with a Court application, the CSOS does accept urgent dispute resolution applications, and will hear these matters within 24 hours (circumstances permitting); provided that all other prerequisites are complied with, such as full details of the dispute being received, the opposing party or parties being notified and given the opportunity to state their case, and the dispute resolution fee being paid to the CSOS. It is also imperative that the matter is actually urgent, and that the urgency is not self-created or simply perceived by the party bringing the application as being urgent, whereas it really is not urgent.

The application can be brought in terms of any sub-section under “Prayers for Relief” in terms of section 39 of the CSOS Act No.9 of 2011. The Applicant proves that the granting of the relief is in fact urgent.

Alternatively, where, for example, the electricity or water supply to a unit has been terminated simply because money is owed to the body corporate, or access to a scheme or unit is denied for the some reason, then the application must be brought in terms of section 39(7)(b) of the Act under “any other order proposed by the chief ombud”.

A dispute application is lodged with CSOS in terms of Section 38 of the CSOS Act which provides:

38. Applications

(1) Any person may **make an application** if such person is a party to or affected materially by a dispute.

(2) An application must be-
- (a) made in the prescribed manner and as may be required by practice directives;
- (b) lodged with an ombud; and
- (c) accompanied by the prescribed application fee.

(3) The application must include statements setting out-
- (a) the relief sought by the applicant, which relief must be within the scope of one or more of the prayers for the relief contemplated in section 39;
- (b) the name and address of each person the applicant considers to be affected materially by the application; and
- (c) the grounds on which the relief is sought.

(4) If the applicant considers that the application qualifies for a discount or a waiver of adjudication fees, the application must include a request for such discount or waiver.

In addition, Section 36 provides:

36. Practice directives

(1) The chief ombud must issue practice directives with regard to any matter pertaining to the operation of the Service.

(2) Practice directives must, subject to this Act and the regulations, direct the performance of any act in the operation of the Service.

Most importantly, Clause 33 of the Practice Directive on Dispute Resolution, 2019, in respect of URGENT APPLICATIONS FOR DISPUTE RESOLUTION, provides:-

33 URGENT MATTERS

33.1 The Applicant can submit an application for the matter to be heard on an urgent basis.

33.2 The applicant must demonstrate that there is a current, genuine emergency requiring an urgent adjudication order. The urgency cannot be used to circumvent the ordinary conciliation and adjudication processes.

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33.3 The grounds of the application should include details of whether

33.1.1 there is an immediate and serious health and safety issue;

33.1.2 deprivation of essential services, not limited to disconnection of water and electricity;

33.1.3 access to the scheme by unit owners and occupiers.

33.4 The fact that the applicant has failed to take appropriate or necessary action to address an issue over time does not necessarily create emergency circumstances.

33.5 The decision whether to treat the matter as urgent will depend on the nature and circumstances of the application.

33.6 While still ensuring procedural fairness to all parties, the Ombud may limit the period for the respondent and affected persons to make a submission, or for the applicant to reply to the submissions.

33.7 The Ombud may limit or refuse an extension to the submission or reply period where such a request.

33.8 If it is later found that the matter was not urgent, the Adjudicator may issue a cost order against the applicant.

The CSOS dispute resolution form can be downloaded from our website, at www.csos.org.za, filled in and then emailed (with all the supporting documents) to the office closest to where your community scheme is situated – Johannesburg (which covers the entire Gauteng region, Limpopo and North-West), Cape Town (which covers the Western Cape, Eastern Cape and the Northern Cape) or Durban (which includes Kwazulu Natal, the Free State and Mpumalanga). The website will provide you with the email addresses of the respective offices.

A new dispute application or a previously submitted application may be viewed as urgent. In the new dispute, the applicant may make an application for urgency in the application itself. For previously submitted disputes, the applicant need only make an application for the Ombud to consider that dispute application as urgent.

Regardless of the urgency, the prescribed fees must be paid within the required time, unless the applicant qualifies for a waiver or the waiver application is approved.
The application for urgency must be in respect of a dispute which applies to relief set out in section 39 of the CSOS Act.

Attach your application to a covering email that clearly states that the matter is urgent and requires immediate attention. State the grounds for urgency in your email and in the application itself. It will also be of benefit to telephone our office and speak to one of our case officers and who will afford your application the urgency that it requires.

NOTICE OF OFFICE CLOSURE

THE CSOS OFFICES WILL BE CLOSED FROM MONDAY, DECEMBER 28, 2020

We will reopen on Monday, January 4, 2021.

For any urgent matters during this time contact the provincial ombuds:

- Gauteng, Limpopo and North West: Mr Abram Masilo on 066 302 9517
- KwaZulu-Natal, Free State and Mpumalanga: Mr Mervin Dorasamy on 063 684 7740
- Western Cape, Eastern Cape and Northern Cape: Ms Maletsatsi Wotini on 066 302 9492

PLEASE ENJOY A SAFE AND JOYOUS FESTIVE SEASON

CSOS REGISTRATION & PAYMENT PROCESS

1. Registration Of A Community Scheme

- Each scheme is required to register with the CSOS in terms of Sec 59(a)(iii) & Reg 18(8) of the CSOS Act & Regulations;
- A registration form (CS1) should be completed and submitted to: **registration@csos.or.za**;
- There is NO charge for registering with the CSOS;
- The form is accessible on the CSOS website, under the heading registration of schemes;
- Click on the following link to download the form from the website: **http://www.csos.org.za/registrationOfSchemes.html**

2. Calculation Of CSOS Levies

- The CSOS levy amount is calculated as follows: (LEVIES PAID PER UNIT-500) *2%;
- For schemes within schemes if the Body Corporate is billed on scheme level – pay only one R 40 = R 40;
- If the Body Corporate is billed on per unit level – pay R 40 BC PLUS + R 40 HOA Levy = R 80;
- It is therefore imperative that this is established when a BC is billed, if within an HOA.
- The CSOS Levy Calculator is available on the website: **http://www.csos.org.za/regulations.html**

3. How Often Are Levies Payable?

- Levies are payable every quarter as per Regulation 11 of the CSOS Regulations;
- The quarters are as follows:
  - a. 31 March – Quarter 1 (January, February, March);
  - b. 30 June – Quarter 2 (April, May, June);
  - c. 30 September – Quarter 3 (July, August, September);
  - d. 31 December – Quarter 4 (October, November, December);
- Schemes that opt to pay annually are required to pay in advance on the 31 March.

5. REFERENCING WHEN MAKING PAYMENTS

- Schemes are required to make payment using their CSOS registration number; this ensures that the amount is allocated to the correct scheme;
- Example of a CSOS registration: CSOS/REG/16/GP/000000;
- Each scheme is allocated a unique number;
- The practice directive allows for schemes to make payment using SS Numbers; however, the CSOS encourage schemes to apply for a registration number with the CSOS

6. PROOF OF PAYMENTS AND LEVY SCHEDULES

- Schemes are requested to forward proof of payments and levy schedules to: **levypament@csos.org.za**;
- A levy schedule comprises of number of units, levy amount collected and the amount to be surrender to CSOS

7. INVOICING AND STATEMENTS

- The CSOS does not issue invoices as most schemes have not been registered and some are still yet surrendered amounts payable to CSOS;
- It is the responsibility of the schemes to compute levies and make payments. (Using the CSOS Levy Calculator);
- The CSOS issues a statement of account at the end of each quarter, reflecting all the payments made to date;
- Statements are available upon request throughout the quarter;
- Please ensure to use your CSOS registration number as reference this enables our system to allocate payment directly to schemes relevant account;
- For any levies payment queries please forward your email to this email address **levypayment@csos.org.za** for a prompt response

- All schemes are required to register with the CSOS
- Registration Documents can be hand delivered, couriered or emailed to Registration@csos.org.za
- A unique CSOS registration number will be allocated, eg CSOS/REG/16/KZN/123456
- Payments must be made quarterly in arrears; however schemes can make annual payments in advance
- The CSOS banking details are as follows:
  - FNB
  - Account Name: Community Schemes Ombud
  - Account no. 62682595205
  - Account type: Public Sector Cheque Account
  - Branch Code: 200607
  - Swift Code: FIRNZ AJJ
  - Reference: CSOS registration number, eg. CSOS/REG/**16/KZN/123456**

Please note: The orange bolded part is the most important, should the bank reference field not provide for all the characters

The proof of payment must be sent to: **levypayment@csos.org.za**

THE PROOF OF PAYMENT MUST BE ACCOMPANIED BY A LEVY SCHEDULE, WHICH DETAILS THE LEVY CALCULATION. PLEASE SEE THE EXAMPLE BELOW:

CSOS Levies Calculator:				
Unit number	Scheme levy		Unit CSOS levy	
1	R	500.00	R	-
2	R	1,000.00	R	10.00
3	R	1,500.00	R	20.00
4	R	2,000.00	R	30.00
5	R	2,500.00	R	40.00
6	R	3,000.00	R	40.00
7	R	3,500.00	R	40.00
Scheme CSOS Levy			**R**	**180.00**

Add as many rows as necessary. *Copy this formula into ALL rows.*

The Levy calculator can be downloaded from the website, on the following link **http://www.csos.org.za/regulations.html**

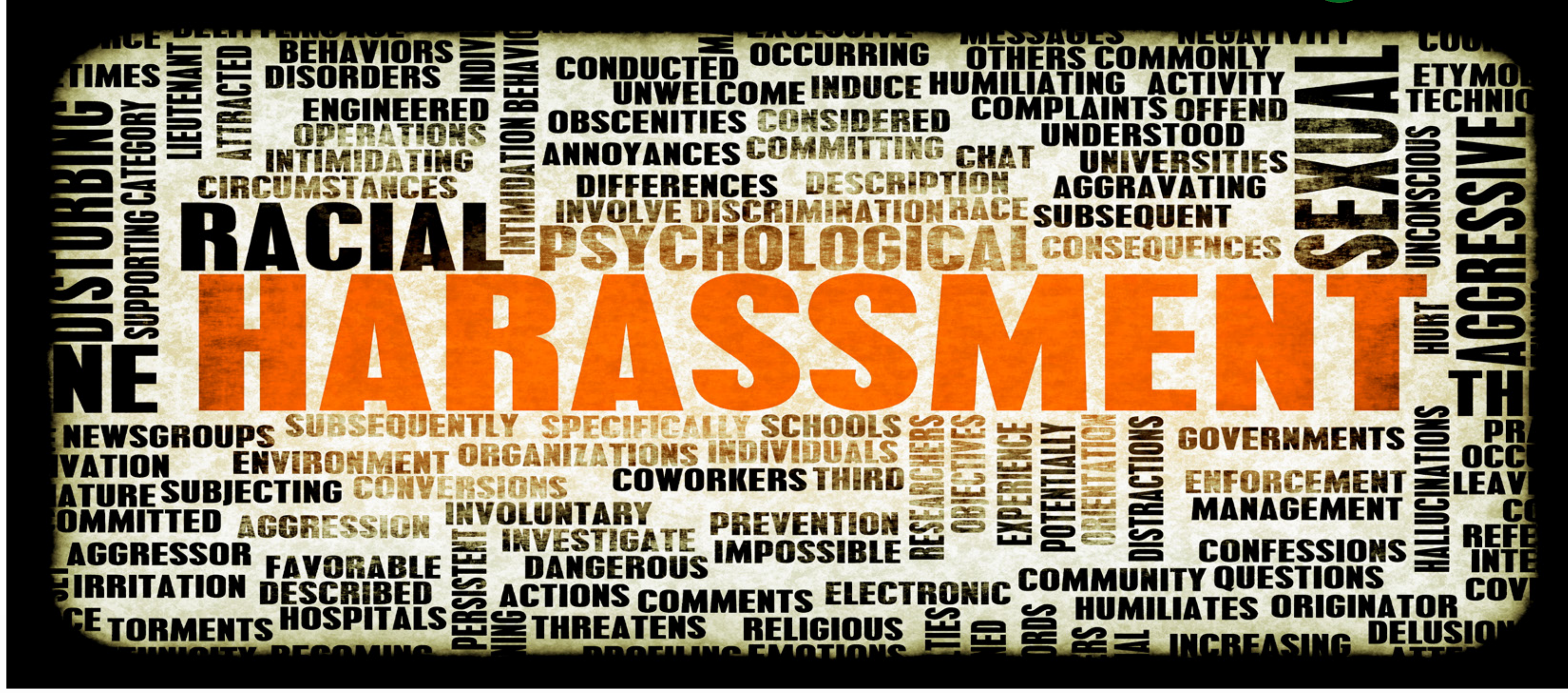
Once the payment has been allocated to the community scheme by the CSOS, a receipt statement will be issued. Kindly note that the CSOS does not issue invoices as yet.

CONTACT DETAILS:

Registration related queries: **Registration@csos.org.za** | Levy payment related queries: **levypayment@csos.org.za**

CSOS telephone number: **010 593 0533**

HARASSMENT VERSUS BEHAVIOURAL NUISANCE



APPLICATION FOR HARASSMENT PROTECTION ORDERS vs APPLICATION FOR DISPUTE RESOLUTION IN TERMS OF SECTION 39 (2) OF THE COMMUNITY SCHEMES OMBUD SERVICE (CSOS) ACT, 2011

Mervin Dorasamy: Provincial Ombud KZN, FS & MP & Acting Adjudicator-General – CSOS

We at CSOS are being approached by several people who are being turned away by the ordinary Magistrate's Courts from applying for protection from harassment under the Protection from Harassment Act 17 of 2011.

Court officials and even Magistrates are referring such persons to the CSOS when such persons show in their applications for harassment orders that they reside in a community scheme eg. a sectional title complex, homeowner's association, shareblock or housing scheme for retired persons and when the potential respondents (wrongdoers) are also from the same community scheme or complex.

The Community Schemes Ombud Service (CSOS) is established in terms of the Community Scheme Ombud Service Act 9 of 2011 (The CSOS Act) to ensure good governance within community schemes and to resolve disputes that fall squarely within section 39 of the CSOS Act.

Section 38 of the CSOS Act provides: –

(1) *Any person may make an application if such person is a party to or affected materially by a dispute.*

"Dispute" is defined in the CSOS Act means *"a dispute in regard to the administration of a community scheme between persons who have a material interest in that scheme, of which one of the parties is the association, occupier or owner, acting individually or jointly"*

The provision in the CSOS Act providing for what may be termed behavioral nuisance ie Section 39 (2) of the CSOS Act provides for the relief that applicant can apply for at CSOS, reads as follows: –

39. An application made in terms of section 38 must include one or more of the following orders:

(1) …

(2) *In respect of behavioural issues-*

(a) *an order that particular behaviour or default constitutes a nuisance and requiring the relevant person to act, or refrain from acting, in a specified way.*

The relief of dispute that CSOS has jurisdiction over relates to behavior such as nuisance within the context of the community scheme.

The CSOS does not have jurisdiction over Harassment as defined in the Protection from Harassment Act. Denying any applicant, the opportunity to apply for very significant and effective protection orders under the this Act and the vast remedies it provides for, is a travesty.

The dispute resolution service that CSOS provides for in respect of behavioural nuisance is far removed from the nature of the harassment, threats and conduct canvassed by and the protection afforded under the Protection from Harassment Act. However, any overlap in the described harassment or behavioural nuisance does not warrant the denial of the right to apply for protection under quasi judicial proceedings in the Magistrate's court.

Nuisance under the CSOS Act relates to the interference with another owner or occupier's use and enjoyment of his or her private area or the common areas within the community scheme eg sectional title complex.

Section 13 (1) of the Sectional Title Schemes Management Act, 2011 providing for the duties of owners, states an owner must: –

(d) use and enjoy the common property in such a manner as not to interfere unreasonably with the use and enjoyment thereof by other owners or other persons lawfully on the premises;

(e) not use his or her section or exclusive use area, or permit it to be used, in a manner or for a purpose which may cause a nuisance to any occupier of a section.

That being said, it becomes necessary to understand what the Protection from Harassment Act provides for. In the case of *Chilowore v Menyaka; Phiri v Sandala; Terbalanche v Nadine; Bester v Kemp; Makgareetsa v Molapisi; Kolobi v Seitebaleng* [2019] ZAGPJHC 198 (11 April 2019), the court gave this relevant background: –

The Act came into effect on 27 April 2013 to provide adequate recourse to victims of harassment who are not in a domestic relationship as required in the Domestic Violence Act 116 of 1998. The Act provides for inexpensive civil remedy to protect a person from behavior which may not constitute a crime but may impact negatively on various rights of an individual. Such conduct includes the following, watching, pursuing or accosting of the complainant or someone in a close relationship with the complainant such as a spouse or family member. Harassment under the Act includes both direct and indirect contact that either causes harm or that inspires the person complaining of harassment to reasonably believe that harm may be caused. The Act also recognises electronic communication that causes harm or makes the complainant feel in danger of being harmed as harassment. Harm under the Act includes an extremely wide range of categories being mental, psychological, physical and economic harm.

Anyone who believes they are being harassed by another person can apply for a protection order under the Act at a magistrate's court where they or the respondent live or work or where the alleged harassment took place. Legal representation is not necessary. The process for applying for a protection order is by completing an application form and where necessary with the assistance of the clerk of the court, where the complainant is required to set out the reasons why a protection from harassment order is required and listing full details of incidents complained of or experienced.

The court may, in terms of the Act, after considering the application from the complainant; issue an interim protection order against the respondent notwithstanding the fact that the respondent has not been given notice of the proceedings. The court must, however, be satisfied that there is evidence that-the respondent is engaging, or has engaged in harassment; harm is being or may be suffered by the complainant as a result of such conduct if a protection order is not issued immediately; the protection to be accorded by the interim protection order is likely not to be achieved if prior notice of the application is given to the respondent. The interim protection order together with the record of evidence must be served on the respondent, calling upon the respondent to show cause on the return date why a final protection order should not be issued against him or her.

Then interestingly, in *Rice v Dare* [2019] ZAGPJHC 63 (5 March 2019), the appellant was a woman who lived in a unit in a gated complex. The respondent, a man, was her neighbour. At the hearing the magistrate dismissed the application. The High Court, upholding the appeal found: –

> "the level of animosity between the parties, read with the allegations and counter -allegations gives cause for concern. In my view, the disputes of fact are so far-reaching that it would be unwise to attempt to resolve the matter on affidavit. These disputes include allegations of swearing, stalking, dog-kicking, loud noise and threats to kill a person."

In *De Buys Scott and Others v Scott* [2018] ZAFSHC 205 (22 November 2018), the court found that the conduct of the parties in general shows a real disturbance of order that has not been managed; neither by the appellants nor by some of their legal representatives. The parties are also neighbours. The fundamentals of this case entail more than mere economic interests. Here it is about safety of persons and property, peace and order; and more. The Preamble to Protection from Harassment Act, sets out the objectives of the Act: –

> Since the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources, and the rights of children to have their best interests considered to be of paramount importance;
>
> AND IN ORDER to-
>
> (a) afford victims of harassment an effective remedy against such behaviour; and
> (b) introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act.

One of the remedies afforded to a victim under the Act is the issue of a protection order by the Magistrates' Court against the perpetrator of harassment. The Department of Justice has also put in measures to allow victims of harassment whether in a community schemes or not to apply for protection from harassment after hours, weekends and public holidays.
In the post-apartheid constitutional dispensation, neighbour law has to support and embody a notion of neighbourliness that extends beyond the sum total of the individual interests of each neighbour or the localised interests of small, neighbourhood communities. (*De Buys Scott and Others v Scott*, above).

If people are still turned away at the courts, CSOS may find it necessary to write to the Chief Justice as Head of the Judiciary and request his office to look into this issue.

ENFORCEMENT
OF AN ADJUDICATION ORDER

The CSOS Adjudicator must investigate an application made for dispute resolution in terms of section 38 & 39 of the CSOS Act to decide whether it would be appropriate to make an order. The adjudicator must make an order granting or refusing each part of the relief sought by the applicant. An order may require a person to act, or refrain from acting, in a specified way. The order may contain such ancillary and ensuing provisions as the adjudicator considers necessary or appropriate. The order must set the time-

(a) when the order takes effect; or

(b) within which the order must be complied with.

An adjudicator's order, may in terms of section 56 of the CSOS Act, be enforced in the Magistrates Court or the High Court as if it were a judgment handed down by that Court. An adjudication order for specific performance, can only be enforced in the High Court. An adjudication order for specific performance, relates to an order that has no quantum or monetary value.

The adjudication order will have an implementation date. In the event that the party against whom the order has been issued has not complied with the adjudication order, the person in whose favour the order is issued must approach CSOS.

The person in whose favour the order was issued must file with the Clerk of the Magistrates Court or Registrar of the High Court *the* following documentation:

a. a copy of the adjudicator's order certified by the Ombud as a true copy, if the original cannot be located;
b. any relevant form/s required by the Magistrates Court or the High Court to be completed;
c. the court order to be endorsed by Clerk of the Magistrates Court or Registrar of the High Court.

Once the Clerk of the Magistrates Court or Registrar of the High Court has issued the order and allocated a case number, the party may submit the order to the Sheriff of Court for further execution. CSOS will not be involved in this process and the party will bear the costs related to the execution of the order.

An application for enforcement lodged with the Magistrates Court or High Court is not an appeal or a re-hearing of the merits of the original application

If an adjudicator's order is for the payment of an amount of money or any other relief which is **within the jurisdiction of a magistrate's court**, the order must be enforced as if it were a judgment of such Court and a clerk of such a Court must, on lodgement of a copy of the order, register it as an order in such Court.

Example: Payment or reimbursement in the sum of R70 000 for repairs. A Magistrate's Court shall have no jurisdiction in matters in which is sought specific performance without an alternative of payment of damages.

If an adjudicator's order is for the payment of an amount of money or any other relief which is **beyond the jurisdiction of the magistrate's court**, the order may be enforced as if it were a judgment of the High Court, and a registrar of such a Court must, on lodgement of a copy of the order, register it as an order in such Court.

Example: Payment of outstanding levies of R340 000 (Regional civil court) or an adjudication order which requires a person to act, or refrain from acting, in a specified way (High Court-specific performance)

The current m**oney claim limits** of the courts are as follows:

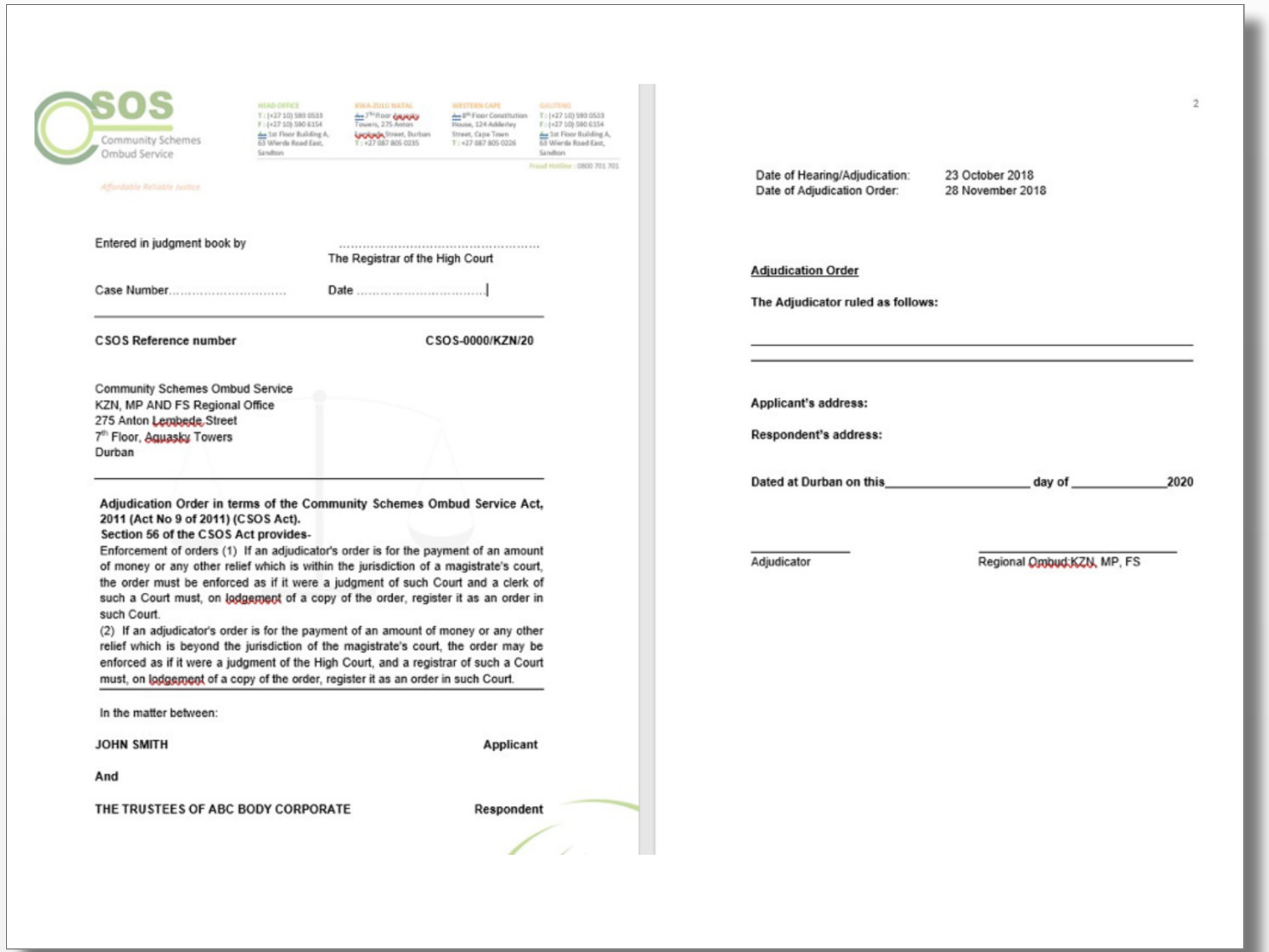
- Magistrates Court: R200 000
- Regional Civil Courts: R400 000
- High court: above R400 000

Jurisdiction means the power or ability which a court has to hear and determine an issue between parties brought before it.

Parties may consent in writing to the jurisdiction of a District Court or Regional Court to hear matters which would otherwise be beyond their respective jurisdiction.

For you to enforce the adjudication order which is in your favour, you must receive an Enforcement Notice together with the original Adjudication Order from the relevant CSOS office. The Enforcement Notice looks like this:

For enquiries, contact
Mervin Dorosamy
mervin.dorasamy@csos.org.za



Community Schemes Ombud Service

Affordable Reliable Justice

Entered in judgment book by ....
The Registrar of the High Court

Case Number.............................. Date ....

CSOS Reference number **CSOS-0000/KZN/20**

Community Schemes Ombud Service
KZN, MP AND FS Regional Office
275 Anton Lembede Street
7th Floor, Aquasky Towers
Durban

Adjudication Order in terms of the Community Schemes Ombud Service Act, 2011 (Act No 9 of 2011) (CSOS Act).
Section 56 of the CSOS Act provides-
Enforcement of orders (1) If an adjudicator's order is for the payment of an amount of money or any other relief which is within the jurisdiction of a magistrate's court, the order must be enforced as if it were a judgment of such Court and a clerk of such a Court must, on lodgement of a copy of the order, register it as an order in such Court.
(2) If an adjudicator's order is for the payment of an amount of money or any other relief which is beyond the jurisdiction of the magistrate's court, the order may be enforced as if it were a judgment of the High Court, and a registrar of such a Court must, on lodgement of a copy of the order, register it as an order in such Court.

In the matter between:

JOHN SMITH **Applicant**

And

THE TRUSTEES OF ABC BODY CORPORATE **Respondent**

2

Date of Hearing/Adjudication: 23 October 2018
Date of Adjudication Order: 28 November 2018

Adjudication Order

The Adjudicator ruled as follows:

Applicant's address:

Respondent's address:

Dated at Durban on this____________ day of __________2020

Adjudicator

Regional Ombud:KZN, MP, FS

THE HISTORY OF COMMUNITY SCHEMES

THE WHY, WHAT AND WHEN?

Where did community schemes start? How did it start? Was the dreaded apartheid era a catalyst? Let us explore the journey of shared living environments from a rudimentary start to a sophisticated system of choice.

Under apartheid, segregation was mandated by law. Blacks could not live in "white" areas but had to live in townships or in impoverished rural areas know as bantustans. Very little housing was built for Africans by the apartheid regime. As a result, when the ANC-led government came to power there was only one formal brick house for every 43 Africans, compared to one for every 3.5 whites. The urban backlog alone was estimated as at least 1.3 million units in 1994. To meet population growth, 130 000 houses had to be built every year. In 1993 only about 50 000 houses were built. Between 7.5 and 10 million people lived in informal housing such as shanties in squatter camps and back yards of Black township houses. In the 1980s, as part of the struggle against apartheid, township residents organised rent and services payment boycotts.

The context in 1994 was outlined in the White Paper on a New Housing Policy and Strategy for South Africa. It highlighted the conditions prevailing at the time with particular focus on the poor. It was estimated that over 66% of South Africa's population was functionally urbanised. The remaining 34% of the total population resided in rural areas, many of whom would spend part of their working lives in the urban areas (Government Digest, 2004: 16).

Approximately 58% of all households had secure tenure whereas an estimated 9% of households lived under traditional, informal/inferior and/or officially unrecognised tenure arrangements in rural areas. An additional estimated 18% of all households were forced to live in squatter settlements, backyard shacks or in overcrowded conditions in existing formal housing in urban areas, with no formal tenure rights over their accommodation. This pattern of insecure tenure is without a doubt one of the prominent features and causes of South Africa's housing crisis in 1994.

Today, millions of people still live in shanties and squatter camps. The government estimates that an additional 2 to 3 million homes are required to meet their needs.

Initially there was extensive development of Townships by Government – despite this, informal settlements and overcrowding increases. From 1960 development slowed down as the focus shifted to homeland development. Townships were segregated physically, socially and economically from towns, residents become progressively isolated and poorer as access to economic opportunities, and urban amenities were restricted. Civil society becomes increasingly militant. International sanctions and boycotts are applied.

Boarding houses and the infamous hostels during the apartheid era were unpleasant precursors to shared living in South Africa.

In 1971, the Sectional Titles Act ushered in a new era in home-ownership in South Africa. The Sectional Titles Act was effected on 19 June 1971 and promulgated on 30 June 1971. The Act was finally proclaimed to come into operation almost two years later on 30 March 1973. For the first time in the history of South African law, home owners were able to purchase a section of a building, such as an apartment, with full ownership rights on that section (Van der Merwe 2014, pp.1–9; Woudberg 1999, p.3; Nel 1999, p.1; Shrand 1972, p.1; Paddock 2008, pp.1–3).

According a recent general household survey issued by Statistics South Africa, there are currently around 714 000 households living in flats or apartments and roughly a further 233 000 households living in town house complexes, adding up to approximately 947 000 households living in sectional title schemes.

The concept of shared living has grown in popularity and many embrace the concept as a viable means of living, given the bourgeoning problem of urban land space and secure living.

A new alternative which has emerged recently in the UK and may find its way to South Africa, is "co-buying" – when friends purchase a property together. By pooling resources with a group of friends, buyers are able to purchase a home in a better location than if they each bought a home on their own.

There has been growing popularity for some time now in many generations living together in a single home or in several homes on a single property – allowing for shared costs, assistance with child care and greater security. The new co-buying trend sees shared ownership shift beyond families to co-living with friends. But rather than sharing rent, friends are opting to buy a home together. The option of becoming a mortgage-mate is particularly appealing to those already sharing a rental property with housemates.

According to M&S Bank in the UK, there has been an increase in the number of people co-buying homes. Following research which suggested that the "majority of millennials" would take out a mortgage with two or more people to get a foot on the property ladder, the bank launched a "mortgage for four" last year.

While mortgage brokers London & Country have detected a small increase in applications by groups of three or four, this increase does not include mortgages taken out by two friends or whether a buyer has the backing of their parents – the so-called "Bank of Mum and Dad".
According to FNB there is no limit on the number of people who can be included in a mortgage agreement and they agree that a co-buying trend in South Africa is certainly emerging, however this not necessarily the case further afield. In the UK, Nationwide, the country's largest mortgage lender, stipulates a limit of two people per mortgage.

The trend is not without risks, however. For example, if one of the co-buyers wants to move on and the other co-owners cannot afford to buy them out, they could be forced to share the property. Or if one of the co-buyers were to stop paying, the financial institution would have the right to demand full payment from whoever they can reach.

These problems could, however, be addressed by co-buyers formalising their obligations towards each other by drawing up a deed of trust or some kind of other legally-binding contract. So, while it's a great idea, be sensible, think of it as a business agreement and keep your friendship intact.

Sectional Title Schemes Act:
The Sectional Titles Amendment Act No. 11 of 2010 contained the final amendments to the 1986 Sectional Titles Act before the split thereof into three separate statutes. The original 1986 Act contained a number of problems regarding the examination, approval and filing of scheme rules and dispute resolution.

The Sectional Titles Schemes Management Act No. 8 of 2011 (also referred to as the STSMA), incorporates all governance and management provisions regarding sectional titles. These sections were taken out of the 1986 Act and amended and adapted to create the STSMA. The remainder of the Sectional Titles Act No. 95 of 1986 (STA) was amended by the Sectional Titles Amendment Act No. 33 of 2013. The 1986 Act now contains only technical registrations and survey provisions. The Community Schemes Ombud Service Act No. 9 of 2011 (also referred to as the CSOSA) provides a dispute resolution mechanism for sectional title and other community schemes.

The Sectional Titles Schemes Management Act (STSMA) has been signed into law and became effective on 7 October 2016. As a result, trustees of sectional title schemes will have to reassess the levy contributions from owners each month. Every sectional title scheme comprises of three elements, owners' sections, exclusive use areas and common property.

Owners' sections are the houses within a scheme that are individually owned and are registered in the name of the owner. These areas can sometimes include gardens, storerooms or garages.
This legislation repeated previous laws, which required a body corporate to maintain common property, essentially the land and all improvements other than the owners' sections shown on the sectional plans. At the same time it introduced a new provision, which required a body corporate to establish a reserve fund in addition to the administrative fund 'to cover the cost of future maintenance and repair of common property' (see s 3(1)(b) of the Act).

What needs to be done from an administration perspective:

- Within 30 days of coming into effect, i.e. from 7 October 2016, each body corporate has to be registered with CSOS.
- Within 90 days, CSOS will need to be provided with supporting documentation, Sectional Title plans, rules etc., specific to each body corporate.
- An annual return must be submitted to CSOS within four months of the scheme's financial year end, including the annual financial statements
- A levy must be paid quarterly to CSOS - Refer below for levy amounts and calculation.
- A reserve fund must be established for maintenance.
- A maintenance plan must be prepared for 10 years.

The Act gives no further details of the reserve fund. It was left to the regulations, which includes a new set of Management Rules to work out. Management requires a body corporate to prepare a maintenance plan for 'major capital items' over the next ten years. The plan is to be tabled at each annual general meeting (AGM) and owners are required to approve contributions to the reserve fund.

Attention must be given to two constraints against the imposition of prescribed contributions.
Firstly, the proposed annual contributions to the reserve fund are voted on by owners at the AGM. If the majority of the owners do not accept or cannot afford the amounts to be contributed there is nothing that can be done to enforce payment. Trustees who have done their best to introduce a budget will have discharged their fiduciary responsibility.

While schemes registered after 7 October 2016 must observe the Act and its Regulations, schemes registered under the Sectional Tiles Act 95 of 1986 retain most of their Management Rules and these do not require a maintenance plan.

The CSOS Act:
The Community Schemes Ombud Service Act (CSOSA) has also been signed, and became effective on the same date as the STSMA. Each community scheme, which includes sectional title schemes, share block companies, home or property owners' associations, housing schemes for retired persons and housing co-operatives, is required to fund the Community Schemes Ombud Service (CSOS) and must collect a prescribed monthly levy from every unit and pay it to the CSOS on a quarterly basis. The levy will be based on a sliding scale according to levies paid by the owners. The current prescribed maximum CSOS levy is R40 a month.

The main function of the Community Schemes Ombud Service (CSOS) will be to assist in dispute resolutions and control sectional title governance. The service will be available to all with a minimal administration fee and it will also be funded via the CSOS levy. With the current backlog and prohibitive costs of going through our normal courts this will be a welcome change and will offer a speedy and cost effective dispute resolution alternative. The findings of the CSOS will have the same effect as a court judgement.

The Act as amended introduced the following important amendments:

- Firstly, all residents of community schemes will now have access to a low-cost dispute conciliation (mediation) and adjudication (arbitration) service provided by CSOS. This obviates the need to pay a private arbitrator or go through costly and lengthy litigation. The Ombud's office will be able to decide all matters related to the finances, governance and management of community schemes as well as the conduct of residents, and an adjudicator's order will carry the same legal weight as a magistrate's court judgment.
- The second major change brought about by the new Act will be the introduction from January 2017 of a new levy to contribute to the funding of the CSOS, which has already been established. This CSOS charge will be 2% of the portion of each owner's usual monthly levy over R500 and will be capped at R40. Anyone who initiates a conciliation with the CSOS will also have to pay an application fee of R50 and another R100 if conciliation fails and adjudication becomes necessary.
- Thirdly, the Regulations of the Act provide for every scheme to take out fidelity insurance to cover itself against fraud or misappropriation of their funds by any "insurable person" who has access to those funds, such as a trustee, employee of the body corporate or a managing agent. The minimum amount of insurance is also prescribed.

Retirement Villages Act:
In South Africa, people looking to buy into a retirement village have a lot of choice when it comes to purchase models. There are three broad options:

- Freehold and sectional title
- Rental and share block schemes
- Life right

Freehold and sectional title:
The governance structure in a freehold development is a homeowners' association (HOA). In a sectional title scheme, it's a body corporate. Legislation is in place for both of these options, but essentially, these retirement villages are self-managed by residents. The developer of the estate usually departs after the last unit is sold and residents are required to serve on the governance structure and either run the village themselves, or appoint and pay a third-party managing agent to do so.

Rental and share block schemes:
In rental schemes, governance lies with the landlord. In share block schemes, however, the residents are shareholders and must run their village collectively. The risk with this model is that it may be difficult to reach a consensus on important decisions.

Life right:
residents do not have to take on the administration and financial management of the estate. The Housing Development Schemes for Retired Persons Act No 65 of 1988 provides the flexibility for Life Right developers to put a management and governance structure in place. Life Right holders are able to express their interests and aspirations via a residents' committee, without having to take on estate and financial management.

Implications of the Companies Act on HomeOwners Associations (HOAs):

1. While the Close Corporations (CCs) Act will remain in force for as long as it is needed to cater for existing CCs, it will be amended so as to incorporate the new features of the Companies Act. No new CCs can be formed.
2. The new Act provides a simpler approach to corporate structures. There will only be Profit Companies (of which there are just a few types) and Non-Profit Companies. All new companies will have a single fundamental governance document, a Memorandum of Incorporation (MOI).
3. Directors are more strictly responsible and their responsibilities and liabilities are more clearly set out.
4. There is a requirement for "plain language" in company communications
5. There is provision for electronic communication and online meetings.
6. A local variation of the "business judgment" rule has been introduced.
7. Most of the sanctions for non-compliance with the requirements of the new legislation are civil, not criminal.

Looking further at the issue of accessibility, the Act consists of 225 sections (the previous legislation had twice as many) and they are clearly labelled. The South African version of the business judgment rule is worth looking at in detail. The Act provides that a director is protected against actions for breach of the duties of care, skill and diligence and the duty to act in the best interests of the company in relation to a matter where that director has:

(a) taken reasonably diligent steps to become informed about the matter,
(b) either had no conflict of interest in relation to the matter or complied with the rules on conflicts of interest and
(c) had a rational basis for believing, and did believe, that his decision was in the best interests of the company.

In acting as such, a director may rely on information given by and actions taken by persons such as employees and advisers who that director reasonably believes to be reliable and competent.

These provisions mark a step towards greater accountability on the part of directors – no more initialing at the bottom right of each page without looking at the content, at least not without risk!

The Act is divided into nine Chapters and it has five Schedules. The Regulations are divided into eight Chapters and they have 3 Annexures. Finally, there are a set of Forms and Notices.

"Airbnb's" SHORT TERM LETTING IN COMMUNITY SCHEMES!

By Karen Bleijs Adjudicator: Gauteng Regional Office

If you were able to rent out your furnished apartment in Sandton's Golden Mile for only three nights a month to an overseas visitor, and in so doing service your mortgage bond and utility account for the entire month on the Airbnb platform, why wouldn't you 'seize the day', so to speak?

Well, unless the Management or Conduct Rules of the community scheme places a minimum time limit on the period for which a property in the scheme can be rented out, *or any other reasonable condition with which you must adhere*, surely you can go ahead and do just that!

But you must remember that when you buy a unit in a sectional scheme (or an erf in a homeowner's association), you are buying into a community of people. You may own the four outer walls that you live in, or the erf that you live on in the case of a HOA, but the common property belongs to all the owners in the scheme in undivided shares and their collective interests must be considered. It is for this very reason that most, if not all, community schemes have rules in place that either prohibit the operation of AirBnB or short-term letting platforms from the scheme, or place a lower limit on the periods for which a unit may be let out. Furthermore, given the tough economic times that we find ourselves in, to not permit rooms in the unit from being let out on a night-by-night basis.

In October 2019, the issue of short-term letting in a sectional title scheme came before the High Court in the case of ***The Body Corporate of the Paddock Sectional Title Scheme No 249-1984 v Nicholl (29534/18) [2019] ZAGPJHC 437***. In this matter the body corporate's rules prohibited short-term letting for a period of less than six months. The Court upheld the Rules and the Respondent was directed to immediately cease from operating a short-term letting scheme from her unit.

The CSOS is unsure as to whether Respondent has taken this decision on appeal or not, but we shall keep you updated.

Members of community schemes who either utilise their units as Airbnb's or wish to do so, usually fail to take the following factors into account:

1. The extra insurance cover that they must take out when operating such an establishment;
2. Concerns around legal compliance relating to fire safety and other aspects of security – necessary safety signs and disclaimer signs must be put up in and around the unit;
3. The fact that the rules of the scheme must be given to each and every short-term lessee;
4. Short-term tenants often compromise the security of a scheme as they tend to have a lackadaisical approach to issues such as ensuring that gates and the like are properly closed;
5. Access to, and the use of any common property areas, especially swimming pools, gyms, tennis courts and the like, are usually tightly controlled, but short-term tenants have no vested interest in the scheme and will take less interest in taking care of these facilities;
6. Frequently when it comes to short-term tenants, noise and other forms of nuisance increase significantly and this places an unnecessary strain on permanent residents and other occupants of the scheme;
7. Short-term tenants often do not respect the strict parking rules of a scheme and park anywhere they please, which irritates existing residents of the scheme.

In terms of the Sectional Titles Schemes Management Regulations an owner must take all reasonable steps to ensure that his tenant complies with the Conduct Rules of the scheme, and rules made in terms of Memoranda of Association usually include a similar provision.

Of course, the same would apply in all other types of community schemes.

With the advent of fines and penalty provisions in Conduct Rules, unit owners would have to bear the cost of any fines that their short-term tenants incur should they incur transgressions.

CASE CLOSED

> **"Provision of access discs to all owners instead of waiting for the security guard to open the gate, removal of all private water meters installed to the various units in the building, minutes of the special meetings, AGM and statement of levies must be distributed in the manner that is accessible to the Applicant, which is her physical address, same will apply to all other owners who do not have access to email"**

These are the words of Adjudicator Thulani Khambule's order when closing a case in Durban between Adelaide Norris, an Applicant and the Respondent, Trustees of Stretten Bay Body Corporate recently.

The Applicant submitted that as owners they were not given the choice to make a collective decision on implementing prepaid water meters, Furthermore, they do not have access discs as they should have access to their properties, i.e. the building entrance. She further alleged that they do not have Annual General Meetings (AGM) which is imperative to discuss important decisions affecting the building, and as owners they feel it's important to receive minutes of the meetings held as some of them do not have access to emails and they do not receive levy statements.

In their response, the Managing agent of the Stretten bay Body Corporate said in their opinion the dispute by Ms Norris, the Applicant, is baseless and there is no merit.

Through their Managing Agent the Respondent stated that with regards to access discs to allow access to the property, it has always been via a security guard who physically opens and closes for residents and visitors. Therefore, no access discs are necessary.

"Private water meters were installed to recover costs in 2007. The amount charged to owners for water use is fully aligned to what the municipality charge. The prohibitive costs involved to install municipal meters far outweigh the need for change, given that the current longstanding meters adequately fulfill their function" said the Stretten Body Bay Corporate when responding to private meter allegations.

The Applicant's allegations that they do not receive minutes for the meetings held by the Body Corporate were refuted by the Managing Agent who indicated that owners may view any meetings of trustees on request and are sent minutes of all general and special meetings held.

Upon evaluating the information and evidence obtained for the case, Adjudicator Thulani Khambule said that the general rule is that only evidence which is relevant should be considered. "Relevance is determined with reference to the issues in dispute. The degree of extent of proof required is a balance of probabilities. This means that once all the evidence has been tendered, it must be weighted up and determine whether the applicant's version is probable. It involves the findings of facts based on an assessment of credulity and probabilities," he said.

Adjudicator Khambule said upon further assessment of evidence he observed that with regard to private water meters, they were installed 12 years ago and there is no evidence led by the Applicant indicating that she consistently raised the issue with Trustees. Furthermore, she did not challenge the respondent's submission. However, her application states that she had been raising the matter with the supervisor. "The Respondent states that its prohibitive costs involved to install municipal meters far outweigh the need for change; however this has not been substantiated by any evidence in the form of quotations that has been sourced except that there are prohibitive costs."

With regards to the access discs "the Respondent deny that access into the building is through access discs. It has always been via a security at the entrance," says Adjudicator Khambule. With further evaluation, Khambule said with owners without access to emails the challenge might be the manner of form that those minutes are sent e.g. when they sent via email then the Applicant and other owners who do not have access to email cannot access such minutes.

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COMPLAINTS

1. Gauteng, Limpopo and North West
Email applications to gp-complaints@csos.org.za
Contact **(+27 10) 593 0533**
Visit 1st Floor, 63 Wierda Road East, Sandton

2. KwaZulu-Natal, Free State and Mpumalanga
Email applications to kzn-complaints@csos.org.za
Contact **(+27 31) 001 4215**
Visit 7th Floor Aquasky Towers, 275 Anton Lembede Street, Durban

3. Western Cape, Eastern Cape and Northern Cape
Email applications to wc-complaints@csos.org.za
Contact **(+27 21) 001 2569**
Visit 8th Floor Constitution House, 124 Adderley Street, Cape Town

COMMUNITY SCHEME REGISTRATION

Register a Community Scheme online at **www.csos.org.za** or **Click Here**

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