THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 819/2024

In the matter between:

WATERFORD ESTATE HOMEOWNERS ASSOCIATION NPC	**APPELLANT**

and

RIVERSIDE LODGE BODY CORPORATE 101 OWNERS OF UNITS IN RIVERSIDE LODGE SECTIONAL TITLE SCHEME	**FIRST RESPONDENT**
	SECOND – ONE HUNDRED AND SECOND RESPONDENTS
KHOSI MABASO	**ONE HUNDRED AND THIRD RESPONDENT**
THE COMMUNITY SCHEMES OMBUD SERVICE	**ONE HUNDRED AND FOURTH RESPONDENT**
THE CHAIRPERSON OF THE BOARD OF THE COMMUNITY SCHEMES OMBUD SERVICE	**ONE HUNDRED AND FIFTH RESPONDENT**
THE CHIEF OMBUD OF THE COMMUNITY SCHEMES OMBUD SERVICE	**ONE HUNDRED AND**

SIXTH RESPONDENT

THE OMBUD FOR THE GAUTENG REGIONAL OFFICE

ONE HUNDRED AND SEVENTH RESPONDENT

THE MINISTER OF HUMAN SETTLEMENTS OF SOUTH AFRICA

ONE HUNDRED AND EIGHTH RESPONDENT

Neutral citation: *Waterford Estate Homeowners Association NPC v Riverside Lodge Body Corporate and Others* (819/2024) [2026] ZASCA 03 (14 January 2026)

Coram: SCHIPPERS, HUGHES and SMITH JJA and CLOETE and CHILI AJJA

Heard: 10 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 14 January 2026.

Summary: Constitutional Law – s 39(1)*(c)* and *(e)* of Community Schemes Ombud Service Act 9 of 2011 – power of adjudicator to declare contribution unreasonable – whether unconstitutional for vagueness and the absence of guidelines – no prospect of success – application to amend notice of appeal to include unconstitutionality challenge dismissed – review – whether adjudicator committed reviewable irregularity in deciding membership of homeowners' association, contribution levies and interest.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Makume J, sitting as court of first instance):

1. The appellant's application to amend its notice of appeal to include an order that s 39(1)*(c)*, read with s 39(1)*(e)* of the Community Schemes Ombud Service Act 9 of 2011 (the Act), is inconsistent with the Constitution and invalid, is dismissed. The appellant shall pay the costs of the application for amendment of the one hundred and fifth to one hundred and eighth respondents, including the costs of two counsel where so employed.
2. The appeal is upheld in part. The order of the high court is set aside and replaced with the following order:
   '(a) The application for an order declaring that s 39(1)*(c)*, read with s 39(1)*(e)* of the Community Schemes Ombud Service Act 9 of 2011 (the Act) is inconsistent with the Constitution and invalid, is dismissed. The applicant shall pay the associated costs of the one hundred and fifth to one hundred and eighth respondents, which costs shall include the costs of two counsel, where so employed.
   (b) The orders of the one hundred and third respondent (the adjudicator), set out in paragraphs 86.1; 86.2; 86.3 and 86.4.3 of the adjudicator's determination of 10 March 2021, are reviewed and set aside.
   (c) The order of the adjudicator that the second to one hundred and second respondents are not members of the applicant, is reviewed and set aside, and replaced with an order declaring that those respondents are members of the applicant.
   (d) The adjudicator's determinations regarding levies and contributions owed to the applicant by the first to one hundred and second respondents in respect of the 2017 to 2020 financial years are remitted for investigation and determination by a new adjudicator. The new adjudicator shall be chosen by the parties from the Ombud's list (as provided for in s 48 of the Act), by 30 January 2026, failing which the

adjudicator shall be chosen by the one hundred and seventh respondent, by 20 February 2026.

(e) The adjudicator's decision in paragraph 1.2 of the order that the first respondent shall pay annual interest at the rate contemplated in s 1(2)*(a)* of the Prescribed Rate of Interest Act 55 of 1975, from date of delivery of the order, is reviewed, set aside and substituted with a decision that the applicant is entitled to charge interest on the arrear levies:

(i) during the period 1 January 2017 to 31 January 2019 at the prescribed rate of interest, as at the time when such amounts became due; and

(ii) from 1 February 2019, at the rate of 1% per month.

(f) The first to one hundred and second respondents are ordered to pay the costs of this application, jointly and severally, the one paying the others to be absolved, including the costs of two counsel, where so employed.'

3. The first to one hundred and second respondents shall pay the costs of the appeal jointly and severally, the one paying the others to be absolved, including the costs of two counsel, subject to paragraph 4 below.
4. The first to one hundred and second respondents' legal representatives, Eugene Marais Attorneys, shall pay the costs relating to the preparation and perusal of volumes 6 to 13 of the appeal record, *de bonis propriis*.

JUDGMENT

Smith JA and Chili AJA (Schippers and Hughes JJA and Cloete AJA concurring)

[1] This is an appeal against an order of the Gauteng Division of the High Court, Johannesburg (the high court), dismissing with costs, an application by the appellant, Waterford Estate Homeowners Association NPC (Waterford): (a) to declare s 39(1)*(c)* read with s 39(1)*(e)* of the Community Schemes Ombud Service Act 9 of 2011 (the Act), unconstitutional; and (b) to review and set aside various decisions of the 103rd respondent, Ms. Khosi Mabaso, an attorney and adjudicator appointed in terms of the Act (the adjudicator), to resolve disputes regarding contributions and levies payable to Waterford by the first respondent, Riverside Lodge Body Corporate (Riverside).

[2] The second to 102nd respondents are the owners of units in the Riverside Lodge Sectional Title Scheme (the Scheme). Where appropriate, we refer to the first to 102nd respondents collectively, as the Riverside respondents. The 104th respondent is the Community Schemes Ombud Service (the Ombud Service), established in terms of s 3 of the Act. The 105th to 107th respondents are the Chairperson, the Chief Ombud, and the Ombud for the Gauteng Regional Office of the Service, respectively (the Ombud Service respondents). The 108th respondent is the Minister of Human Settlements of South Africa (the Minister), the executive authority responsible for the administration of the Act. The high court granted leave to appeal to a full court only in respect of that portion of its order pertaining to the review relief. Waterford then petitioned this Court for special leave to appeal against the entire order of the high court and such leave was granted.

[3] The basic facts are uncontroversial. Waterford is the homeowners' association of a residential development known as Waterford Estate (the Estate). The Estate comprises 328 residential units consisting of 215 full title erven, 101 sectional title units in the Scheme and 12 sectional title units in the Waterford Villas Sectional Title Scheme. Riverside is responsible for the administration and management of the Scheme.

[4] Since 2002 the unit owners paid Waterford approximately the same contributions to levies, as full title owners in the Estate. However, in 2007 the unit owners insisted on a reduction of their contributions and stopped making payment thereof. This resulted in litigation which was resolved in a settlement agreement concluded on 14 October 2007 (the settlement agreement). That agreement contained a formula for the determination of the contributions payable by Riverside to Waterford (the formula).

[5] Waterford cancelled the settlement agreement with effect from 28 February 2018, when Riverside failed to make payment of the contributions levied by Waterford. In November 2017, Waterford applied to the 106th respondent, in terms of s 38 of the Act, to resolve the dispute. It sought payment of the contributions levied on Riverside for the period 1 January 2017 to 28 February 2018 (the 2017 and 2018

financial years) with interest; and in respect of the unit owners, for the period from 1 March 2018, with interest.

[6] The Riverside respondents raised three main defences: (a) the unit owners were not members of Waterford and therefore Waterford was not entitled to claim contributions from them directly; (b) the contributions in respect of the 2017 and 2018 financial years were not calculated in accordance with the formula; and (c) the contributions levied on the unit owners since 1 March 2018 were unreasonable. In a counterapplication, the Riverside respondents sought repayment of allegedly overpaid contributions.

[7] The adjudicator investigated the application and counterapplication. After hearing evidence, she made certain orders. She found that the unit owners are not members of Waterford; that the contributions were not made in accordance with the formula in the settlement agreement; and those contributions levied on the Riverside respondents were not correctly calculated and unreasonable.

[8] Waterford then brought an application in the high court to declare s 39(1)*(c)* read with s 39(1)*(e)* of the Act (the impugned provisions) unconstitutional; and to review and set aside various decisions of the adjudicator. As stated, that application was dismissed.

[9] Waterford's notice of appeal did not include a prayer relating to the constitutional challenge. At the commencement of the hearing before us, counsel for Waterford applied for leave to amend the notice of appeal to include a prayer that the impugned provisions be declared unconstitutional. The first to 102nd respondents did not oppose the application for amendment. The Minister and Ombud Service respondents, however, opposed that application.

[10] It is trite that, when considering an application to amend a pleading, a court will take several factors into account. These include: (a) the explanation why the grounds were omitted from the original notice of appeal; (b) whether any party would be prejudiced by the late amendment; (c) the need to avoid piecemeal litigation; (d) the

relevance of the proposed amendment; and (e) the prospects of success. In addition, the court is guided by the overriding consideration of the interests of justice and whether granting the amendment would ensure a just and prompt resolution of the real issues between the parties.[1]

[11] Waterford's counsel gave the following explanation from the bar for its failure to include the prayers relating to the constitutional challenge in the notice to appeal. This Court, on petition, granted leave to appeal in respect of the constitutional challenge. The prayers concerning the constitutional challenge were inadvertently omitted when the notice of appeal was prepared.

[12] Although the respondents conceded that they would not be prejudiced if the amendment is granted, this Court must still consider whether there are reasonable prospects that the constitutional challenge will succeed. We deal with this issue below.

[13] The main issues on appeal are consequently: (a) Waterford's constitutional challenge to the impugned provisions; (b) whether the unit owners are members of Waterford; and (c) whether the adjudicator's decisions relating to the contributions levied for the period 2017 to 2020, and interest on those contributions, should have been reviewed and set aside.

The alleged unconstitutionality of the impugned provisions

[14] The impugned provisions read as follows:

'Prayers for relief

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

(1) In respect of financial issues-

. . .

(c) an order declaring that a contribution levied on owners or occupiers, or the way it is to be paid, is incorrectly determined or unreasonable, and an order for the adjustment of the contribution to a correct or reasonable amount or an order for its payment in a different way;

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[1] *Caxton Ltd. and Others v Reeva Forman (Pty) Ltd. and Another* [1990] ZASCA 47; 1990 (3) SA 547 (AD); [1990] 2 All SA 300 (A).

(d) . . .
(e) an order for the payment or re-payment of a contribution or any other amount.'

[15] The founding affidavit states that the references to 'reasonable' and 'unreasonable' in s 39(1)*(c)* are vague, and that the Act does not specify the criteria that an adjudicator must use to determine the reasonableness of a contribution or the way it must be paid. Then it is said that an 'association does not know how to determine contributions (or the way they are to be paid)' and 'therefore cannot regulate its conduct to avoid such relief'; and that adjudicators are not given guidance as to the criteria they should use to exercise the s 39(1)*(c)* power, which leads to procedurally unfair administrative action and 'potentially arbitrary, unfair and inconsistent results and (in extreme cases) even corruption'.

[16] In its heads of argument, Waterford attempts to broaden its constitutional challenge. It asserts that s 39(1)*(c)* grants an adjudicator statutory power 'to interfere with the terms of the contract between the members on the basis that the board exercised its contractual powers 'unreasonably'. This point can be dealt with summarily. It is impermissible. The Minister and the Ombud Service respondents were not called upon to meet a case that s 39(1)*(c)* is unconstitutional because it grants an adjudicator the power to interfere with contractual relations.

[17] The respondents assert that the impugned provisions are constitutional. They submit that s 50 of the Act restricts an adjudicator's discretion by requiring due process and consideration of all relevant evidence. Waterford's proposal to limit adjudicator intervention to cases of public policy is not supported by the statutory language and would amount to a substantive amendment, which is impermissible under the separation of powers doctrine.

[18] The high court dismissed the constitutional challenge. It concluded that the Act does not grant unfettered power to adjudicators. It held that s 50 provides necessary procedural safeguards, ensuring fair and proper consideration of all relevant evidence.

Discussion

[19] There is no merit to Waterford's constitutional challenge. Waterford ignores the purposes of the Act, the context in which it applies and the plain wording of its provisions.

[20] The purposes of the Act are set out in s 2. These include the establishment of the Ombud Service, the determination of its functions and operations and the provision of a dispute resolution mechanism in community schemes. The functions of the Ombud Service include developing and providing a dispute resolution service under the Act; providing training for conciliators and adjudicators;[2] promoting good governance of community schemes; and monitoring community scheme governance.[3]

[21] The situation in which the Act applies, appears from its preamble. The Act is designed to provide an informal, effective and speedy dispute resolution mechanism in community schemes, with the least amount of time, effort or resources. It seeks to ensure fairness; to protect owners from exploitative or inequitable contributions, particularly in the context of collective living arrangements where individual bargaining power may be limited; and to promote equitable governance in community schemes. To these ends, s 38 provides that any person who 'is a party to or affected materially by a dispute', may apply to the Ombud Service for the resolution of that dispute.[4]

[22] The relief that may be granted in relation to a dispute, is set out in s 39 of the Act. It includes orders concerning financial issues, behavioural issues, scheme governance issues, meetings, management services and general issues such as the

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[2] Section 4(1) of the Act.
[3] Section 4(2) of the Act.
[4] '**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.'

denial of access to information or documents. Various provisions of s 39 grant an adjudicator the power to determine the reasonableness or otherwise, of certain actions. For example, an adjudicator may issue an order that a scheme governance provision is unreasonable, having regard to the interests of all owners and occupiers in the community scheme.[5] Similarly, an order may be issued declaring that a resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or a group of owners or occupiers.[6] An adjudicator may also issue an order that an owner or occupier reasonably requires exclusive use rights to a part of a common area, and that the association has unreasonably refused to grant such rights.[7]

[23] It will immediately be observed, firstly, that there is nothing vague about these provisions, nor the impugned provisions. They indicate to associations (responsible for the administration of a community scheme), occupiers (persons who legally occupy private areas) and owners (persons who have legally secured rights to possession and occupation of private areas) with reasonable certainty what is required of them, so that they may regulate their conduct accordingly.[8]

[24] Secondly, no criteria are required for an adjudicator to determine reasonableness of a contribution or the way it is to be paid. In adjudicating an application under s 38 of the Act, an adjudicator considers the facts of the relevant case and the relief sought – which must include the orders listed in s 39. What is more, the Act requires an adjudicator to investigate an application to decide the appropriateness of an order. Thus, s 50 provides:

'**Investigation by adjudicator**

The adjudicator must investigate an application to decide whether it would be appropriate to make an order, and in this process the adjudicator-

*(*a) must observe the principles of due process of law; and

(b) must act quickly, and with as little formality and technicality as is consistent with a proper consideration of the application; and

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[5] Section 39(3)*(d)* of the Act.
[6] Section 39(4)*(e)* of the Act.
[7] Section 39(6)*(e)* of the Act.
[8] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 108.

(c) must consider the relevance of all evidence, but is not obliged to apply the exclusionary rules of evidence as they are applied in civil courts.'

[25] Waterford's reliance on *Dawood v The Minister of Home Affairs*[9] for its claim that in the absence of additional criteria, adjudicators lack the necessary qualifications to assess whether a contribution is reasonable, is misplaced. In *Dawood* the Constitutional Court emphasized the difference between a court or tribunal exercising a discretion when interpreting legislation in a manner consistent with the Constitution; and an official untrained in law, doing so. The latter requires guidelines to interpret legislation. However, the adjudicators appointed in terms of the Act are not untrained officials. They are required in terms of s 21(2)*(b)* to have suitable qualifications and experience necessary to adjudicate disputes in community schemes.

[26] Further, s 51(1) of the Act confers extensive investigative powers on an adjudicator. It reads:

'**Investigative powers of adjudicator**

(1) When considering the application, the adjudicator may-

(a) require the applicant, managing agent or relevant person-

(i) to give to the adjudicator further information or documentation;

(ii) to give information in the form of an affidavit or statement; or

(iii) subject to reasonable notice being given of the time and place, to come to the office of the adjudicator for an interview.'

[27] Sections 50 and 51 of the Act make it clear that the power of an adjudicator under s 39(1)*(c)* is not unfettered. It must be exercised rationally, reasonably, and in accordance with due process. This ensures a balance between regulatory oversight in communal living and compliance with contractual agreements, all within the bounds of constitutional principles and subject to judicial review.

[28] It goes without saying that an adjudicator's powers under the impugned provisions are central in the scheme of the Act. Without the ability to assess the reasonableness or otherwise of contributions, the Act's purposes and effectiveness

[9] *Dawood v The Minister of Home* Affairs [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (7 June 2000).

would be subverted., This, in turn, would undermine the recourse of property owners to dispute unfair contributions and exacerbate the power imbalance between community schemes and owners.

[29] And the standard of reasonableness is commonplace in administrative decision-making. As the Constitutional Court held in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*, s 6(2)*(h)* of PAJA which requires a reasonable exercise of a power or the performance of a function, must be construed consistently s 33 of the Constitution; and posits a simple test, namely that an administrative decision will be reviewable if it is one that a reasonable decision maker could not reach.[10] The Court went on to say:

'What will constitute a reasonable decision will depend on the circumstances of each case, much of what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected…'[11].

[30] For the above reasons, Waterford's submission that the impugned provisions are unconstitutional because (i) they are vague in that an association does not know how to determine contributions (or the way they are to be paid); and (ii) the provisions contain no guidelines to assist the adjudicator, is misconceived. Waterford has for more than 20 years determined levies and contributions owed by the Riverside respondents. And the answering affidavit states that 'historically Waterford has been raising *unreasonable* and unfair levies' against the Riverside respondents (emphasis added). They had no difficulty with unreasonableness as an objective standard. Indeed, the settlement agreement was concluded on that basis, which included payment of the historic debt owed by those respondents.

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[10] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) [2004] ZACC 15; 2004 (7) BCLR 687 (CC) para 44.
[11] *Bato Star* fn 10 para 45.

[31] Moreover, our courts have consistently upheld the presumption of constitutional validity in statutory interpretation. In *Hyundai*,[12] the Constitutional Court emphasised that legislation must be interpreted, where reasonably possible, to avoid constitutional invalidity.[13] The Court affirmed that if a legislative provision is reasonably capable of a meaning consistent with the Constitution, that interpretation should be preferred.

[32] On a proper reading of the Act, the impugned provisions set a reasonable and objective standard for an adjudicator to adjust contributions or payment methods. This standard informs the adjudicator's discretion. Given the diversity of potential disputes within community schemes, imposing circumscribed criteria for reasonableness would undermine the effectiveness of this provision. Assessments of reasonableness are inherently fact-specific and must be determined according to the circumstances of each case.

[33] The adjudicator's power under s 39(1)*(c)* of the Act is thus both broad and bounded: intervention is permitted to ensure fairness, but decisions must be rational, reasonable and procedurally fair, and are open to judicial scrutiny. The provisions accordingly set reasonable objective standards for an adjudicator to adjust contributions or payment methods.

[34] In conclusion, the impugned provisions grant adjudicators powers that balance contractual autonomy with the necessary regulatory oversight; and provide protection against abuse or unfairness in communal living. These powers are neither absolute nor unconstrained: they are governed by principles of rationality, reasonableness, and procedural fairness, and remain subject to judicial review. For these reasons, there is no reasonable prospect that the constitutional challenge will succeed. Consequently, Waterford's application for leave to amend its notice of appeal must be refused with costs.

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[12] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC); 2000 (2) SACR 349 (CC).
[13] Ibid.

Are the unit owners members of Waterford?

[35] The Waterford scheme originated from the consolidation of erven 380 and 381 into erf 645. The estate, which includes Maroeladal Extension, was initially owned by Ilro Housing (Pty) Ltd (Ilro), referred to as the developer in the relevant articles. Waterford contends that, pursuant to condition 4(9) of the schedule which accompanied the application for the opening of a sectional title register (the schedule), all owners of erven within the township automatically become members of the residents' association upon transfer of ownership. This condition stipulates that each owner of an erf shall become a member of a residents' association, which is responsible for maintaining the access erf and essential services. Waterford, in its capacity as the residents' association, manages the security gatehouse and private roads for the benefit of all property owners and residents.

[36] On the other hand, the Riverside respondents argue that although the township establishment conditions impose statutory obligations, these do not have statutory force against the respondents. They maintain that any legal requirement for an owner to join Waterford can only be enforced by the local authority, not by Waterford itself. Article 3 of Waterford's articles of association merely identifies who may become members and does not mandate automatic membership. While article 5 provides that property owners who become members also join Waterford, Riverside points out that under s 103(2) of the Companies Act 61 of 1973 and item 4(2)(a)(ii) of Schedule 1 to the Companies Act 71 of 2008, actual membership still requires the owner's consent and formal registration in the company's register. This position is reinforced, they argue, by Waterford's own articles, which allow for refusal of membership in certain circumstances. The obligations from the sale agreement and schedule were limited to ensuring that Riverside became a member and that subsequent sale agreements required purchasers to acknowledge Riverside's membership. Accordingly, the adjudicator did not err in law and rendered a rational decision.

[37] The high court found that condition 4(9)(f) of the schedule does not refer to the consolidated erf (comprising erven 380 and 381), but specifically applies to erven 431 and 432, which are zoned for access purposes. The high court further held that this condition conflicts with the title conditions and s 11(3)*(b)* of the Sectional Titles Act 95

of 1986 (Sectional Titles Act). As a result, the high court concluded that there is no indication in the title conditions that unit owners must become members Waterford.

[38] Before addressing the parties' submissions regarding the unit owners' membership of Waterford, it is necessary to consider whether this issue impacts the unit owners' liability for levies imposed by Waterford according to their participation quotas. In this regard, the relief Waterford sought in its s 38 application is significant. In prayer 1, it sought a determination of levies and contributions owed by the Riverside respondents under the 2007 settlement agreement. In prayer 2, it requested a determination of levies and contributions due by the second to 102nd respondents from 1 March 2018, under the memorandum of incorporation or articles of association, or alternatively, by each owner under s 47 of the Sectional Titles Act.

[39] At that time, there was no dispute that unit owners were liable for contributions based on their participation quotas – whether to Riverside or Waterford. This point was affirmed in a 2006 summary judgment application, where Mr Theunis Botha (Mr Botha), then a director of Riverside, in his affidavit, referred to Waterford's memorandum and articles of association, and admitted that each sectional title unit owner in Riverside was liable for contributions to Waterford. As we demonstrate below, the adjudicator did not fully appreciate the distinction between the liability of the sectional title holders for levies and their membership status in Waterford. Importantly, the obligation of the sectional title owners to pay levies does not arise from, nor is it contingent upon, their membership in Waterford. Rather, the issue of membership serves only to identify the entity to which these levies are payable. This means that while membership may determine the recipient of the payments, it has no bearing on whether the levies themselves are reasonable or not.

[40] In any event, the settlement agreement clearly indicates that the parties accepted both the liability of unit owners for levies and their membership in Waterford. Clause 3.11, for example, states that levies are 'payable by its (Riverside's) members to Waterford,' and clause 3.12 affirms that 'all the members of Riverside will continue to hold one vote each and continue to remain members of Waterford'. Thus, the agreement did not create new obligations but rather confirmed the existing

relationship. The cancellation of the agreement did not affect the unit owners' liability for levies nor their membership status.

[41] The high court, in upholding the adjudicator's finding that unit owners are not Waterford members, failed to consider the relevance of the settlement agreement or Mr Botha's concession. Its subsequent brief mention of the agreement in the context of PAJA review was insufficient, and its conclusion – that cancellation of the agreement and denial of AGM participation meant Waterford never considered unit owners to be members – rests on a misinterpretation of the settlement agreement.

[42] Riverside's argument that neither Waterford's articles of association nor the Township Conditions confer membership on unit owners is also untenable. Article 3 of Waterford's memorandum restricts membership to bodies corporate, homeowners' associations, and registered property owners (including erf, sectional title, or cluster unit owners within the development). Articles 5 and 10 specify that membership is automatically conferred on all registered owners and only ends upon cessation of ownership; resignation is not permitted. Thus, both the statutory framework and Waterford's own rules ensure that unit owners automatically become its members upon transfer of ownership of a unit.

[43] Section 11(2) read with s 11(3)*(b)* of the Sectional Titles Act, allows a developer to impose registrable conditions in the schedule accompanying the sectional plan's registration. These conditions become part of the sectional title deed, binding owners to the specified terms.

[44] Capferrat Properties CC (Capferrat), the scheme's developer, purchased erf 645 from Ilro. The schedule conditions[14] required Capferrat to become and remain a member of Waterford upon registration of erf 645, to pay all levies charged by Waterford, and to ensure that any sale of a unit included purchaser acknowledgment of Waterford and the members' agreement.

[14] Conditions E.(a), E.(b), E.(d), and E.(e) of the schedule.

[45] Upon transfer of erf 645 to Capferrat, it became a Waterford member, and the schedule confirmed that both Capferrat and Riverside would be members. When the sectional title register was opened, Capferrat received certificates of registered sectional title for each section and its undivided share in the common property, making it (and, upon transfer, the unit owners) co-owners of erf 645. 'Common property' includes the land in the scheme, so when Capferrat transferred a unit, both it and the unit owner became co-owners of the land in undivided shares.

[46] Riverside contends that Capferrat's membership in Waterford ceased once Riverside was established as the body corporate. This assertion is based on Riverside's reading of condition E.(a), which stipulates that Capferrat would, upon registration of transfer of erf 645 into its name, become a member of Waterford and, prior to the establishment of a body corporate in terms of the Sectional Titles Act, remain a member of Waterford for as long as it is the registered owner of erf 645. However, as previously demonstrated, Riverside's interpretation is at odds with the plain language of condition E.(a) and the requirements of condition 4(9)(*f*). Accepting Riverside's position would not only create a conflict between the conditions but would also result in an interpretation that is contrary to law.

[47] Condition E.(a) also applies to Capferrat's successors-in-title, namely, the unit owners who are joint owners of the common property. Condition E.(b) imposes a duty on Capferrat (and any member transferring ownership) to comply with article 6, which requires that no member may sell or transfer property unless the transferee irrevocably undertakes, to Waterford's satisfaction, to become a member upon registration. This ensures continuity of membership as properties change hands.

[48] For these reasons, we conclude that unit owners are members of Waterford and are liable for levies in line with their respective participation quotas. Against this backdrop, we now address the disputes concerning levies for the 2017 to 2018 financial years.

Levies for the 2017 and 2018 financial years

[49] In respect of the 2017 and 2018 financial years (the period up to 28 February 2018), Waterford claimed levies and contributions in the sum of

R1 070 346.83, with interest, calculated in terms of the formula contained in the settlement agreement. By agreement, the adjudicator was tasked with determining: if disputed budget items for the 2017 and 2018 financial years fell under the settlement agreement's formula; whether dispute resolution procedures were followed; if Riverside is estopped from challenging contributions; and, if required, whether Riverside should contribute to such expenses. She ruled against Waterford on the first three issues but did not address the question of Riverside's liability (the fourth issue).

[50] In respect of those financial years, the adjudicator determined that the main contested line items – such as garden services and other major capital expenses – were not included within the scope of the formula set out in the settlement agreement. She found that the formula used to calculate contributions, as specified in the agreement, applies only to standard operational costs and excludes additional charges like major repairs or special projects. As a result, Riverside was not obliged to contribute to these particular items. Nevertheless, the adjudicator ordered Riverside to pay Waterford the sums of R34,566.02 and R20,243.26 in respect of contributions levied for the 2017 and 2018 financial years, respectively.

[51] The adjudicator's failure to decide the fourth issue effectively absolved the Riverside respondents of liability for the expenses without a reasoned decision on the merits of their obligation. This omission is significant because the agreed structure of adjudication required a sequential and comprehensive determination of all issues. The failure to address the issue deprived the parties of a final and reasoned resolution on a key matter in dispute, undermining both the procedural fairness and the completeness of the adjudicatory process. The omission constitutes a reviewable irregularity and necessitates that this issue be remitted for proper determination.

[52] The remaining substantive issue is whether expenses for 'Garden Service Company' were included within the formula set out in the settlement agreement. The adjudicator determined that 'garden services' and 'estate management' are distinct functions and should be separately accounted for, particularly given the scale of the expense. She found that there was an absence of documentary evidence – such as a contract or invoice – from the garden service provider in support of Waterford's claim.

[53] In reaching her conclusion, the adjudicator found that the settlement agreement did not anticipate Waterford providing garden services, especially as Riverside maintained its own contract for such services. She interpreted the formula as only allowing for a maintenance contribution regarding gardens, not for major expenses, inferring that only repairs and maintenance were agreed upon, not ongoing service fees. She was consequently not prepared to accept that 'Management Fee in the Formula included the Garden Service fees without an indication that a clause 9 consultative process was followed'.

[54] However, this approach failed to consider material evidence. Mr Richard Paul Evans (Mr Evans), a director of Waterford from 2004 to 2018, testified that at the time of the settlement agreement, the estate manager's responsibilities included providing gardening services to Waterford, and that this was encompassed within the 'management fee' line item in the formula. He further explained that the subsequent division of the 'management fee' into 'estate management fee' and 'garden service co', resulted from the appointment of two separate service providers, not from a change in the nature of the services or the formula's intent. The adjudicator's written determination contains no reference to this testimony, nor does it engage with the substance of Mr Evans's evidence. This omission is critical, as it directly relates to the interpretation of the settlement agreement and the scope of liability for expenses.

[55] By disregarding the evidence of Mr Evans, the adjudicator's decision is not rationally connected to the information before her or the reasons given for it. Consequently, the decision must be set aside for want of rationality and proper consideration of relevant evidence.

[56] The adjudicator was also tasked with determining whether certain other expenses – specifically, 'Major Expenses Security Cameras', 'Hardware Upgrades', and 'All Major Expenses Main Entrance' – were covered by the settlement agreement formula. While the adjudicator addressed these items as they appeared in Riverside's 2018 schedule, she failed to consider individually other significant expenses listed in the 2017 schedule, such as costs related to the electric fence, boundary wall, gardens,

and the clubhouse. Instead, she issued a blanket ruling that all ‘Major Capital Expenses’ should be deducted from amounts payable by Riverside, without providing any reasons or explanations.

[57] This lack of individualised analysis and the absence of reasons for excluding these line items from Riverside’s obligations contravene the requirement that administrative decisions must be explained and justified. Furthermore, the adjudicator’s determination that no formula items could be included in the budget without following the consultative process in clause 3.9 of the settlement agreement reflects a misreading of that clause. Clause 3.9 requires consultation only for expenses not already included in the formula, namely unforeseen or new costs, not those expressly contemplated by the agreement. The formula’s explicit exclusion of Riverside’s obligation to contribute to phase 3 of the electrical fence supports the inference that other listed items remain subject to contribution.

[58] In summary, the adjudicator’s findings regarding garden services were materially influenced by a failure to consider relevant and uncontradicted evidence (namely, Mr Evans’s testimony) and a misinterpretation of the settlement agreement’s provisions. The omission to decide the fourth issue constitutes a procedural irregularity requiring remittal. The approach to other disputed line items lacked individualised analysis and failed to apply the correct legal standard.

[59] Accordingly, the decisions and orders relating to the contributions for the 2017 and 2018 financial years should be reviewed, set aside, and remitted for reconsideration by a different adjudicator.

Levies for the 2019 and 2020 financial years

[60] In its s 38 application, Waterford claimed payment from Riverside in the sum of R750 433.74 for contributions levied for the 2019 financial year. For the 2020 financial year, Waterford sought an order that it must repay R83 260.74 to Riverside. These sums were levied on the individual unit owners in accordance with their respective participation quotas as members of Riverside.

[61] In respect of the 2019 financial year, the adjudicator found it fair and reasonable to use the contribution formula contained in the settlement agreement, noting that it had been successfully applied for more than ten years. She further ruled that her findings regarding contested line items should be incorporated into the calculation of how much Waterford owes Riverside for that period.

[62] Regarding the 2020 financial year, the adjudicator determined that calculating Riverside's contribution to estate expenses on a one-to-one basis – meaning each unit owner pays an equal amount, regardless of property size or value – was unreasonable and unfair. This was the case even though Waterford had applied a 45% discount to the levies. Instead, she ruled that levies should be recalculated using the municipal valuation method, which determines contributions according to the official property value assigned by local authorities.

[63] Consequently, the adjudicator ordered Riverside to pay R566 355.04 to Waterford for the 2019 financial year. In respect of contributions levied for the 2020 financial year, Waterford was ordered to pay R939 151.58 to Riverside.

[64] Waterford proffered an alternative argument concerning the levies owed by Riverside for the 2019 and 2020 financial years, in the event of its constitutional challenge failing. Concerning the levies assessed for the 2019 financial year, it contended that the adjudicator erroneously relied on findings in respect of the 2017 and 2018 financial years; and applied the formula contained in the cancelled settlement agreement as if it were still in effect. Consequently, Riverside's 2019 contribution was reduced to 14.83% instead of the 19.65% set by the formula.

[65] Riverside proposed that unit owners' contributions for 2019 and 2020 should be either 9.94% of the total estate budget, based on the municipal valuation or 10.29%, based on the participation quota calculation method.[15] Alternative scenarios suggested contributions ranging from 19.65% to 30.79%, depending on the method used. The Riverside respondents proposed a calculation based on the municipal

[15] This approach allocates each owner's contribution based on the proportion of their unit's size or value relative to the total size or value of all units within the estate.

valuation method and submitted that they should only contribute 1/217 of Waterford's administration costs.

[66] The adjudicator ruled that Waterford's proposed one-to-one levy was unreasonable and burdensome for unit owners. She decided to calculate contributions using the municipal valuation method since Waterford allegedly did not challenge its application.

[67] Waterford challenged this ruling on the grounds of error of law; irrationality; taking into account irrelevant considerations; and bias. At the outset, the challenge based on bias – that the adjudicator ruled in favour of the Riverside respondents on every dispute on dubious grounds – has no merit. It does not begin to meet the test articulated by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, [16] namely. 'whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that [the decision-maker] has not or will not bring an impartial mind to bear on the adjudication of the case'.

[68] The adjudicator's decision was influenced by her conclusion that Waterford did not challenge the municipal valuation method. However, Waterford's legal representative had explicitly challenged the appropriateness of applying that formula. Furthermore, the decision is also tainted by her erroneous finding regarding the unit owners' membership of Waterford. This is evidenced by her statement that she would have regarded Riverside as one erf for purposes of the calculation of contributions had she been requested to do so. This means that she regarded a monthly contribution of R32.20 per unit for the 2020 financial year as reasonable.

[69] The adjudicator disregarded the evidence and took into account irrelevant considerations. Further, her decision is not rationally connected to the evidence and the reasons given for it. Consequently, the decision falls to be reviewed and set aside.

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[16] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC) para 48.

[70] There are compelling reasons why the matter should not be remitted to the same adjudicator. The material error regarding the unit owners' membership of Waterford would irredeemably compromise her ability objectively to determine the reasonableness of the contributions. That this in fact happened is evidenced by her statement that if she had been requested by Riverside, she would have regarded Riverside as one consolidated erf for the purposes of levies. For all these reasons, the contested issues must be remitted for determination by a different adjudicator chosen by the parties from the Ombud's list, failing which by an adjudicator appointed by the 107th respondent.

Interest on arrear levies

[71] The adjudicator ruled that the interest rate charged from 1 January 2017 to 31 January 2019 was in excess of the rate mandated in Waterford's articles of association. She further ruled that the interest should be deducted from the amounts Riverside owed Waterford, and that Waterford was only entitled to 1% interest per annum from 1 February 2019. However, this was an error: the correct rate was 1% per month. The adjudicator's order also awarded interest at the prescribed rate as of the order date, conflicting with both the factual finding and s 1 of the Prescribed Rate of Interest Act 55 of 1975 (the Prescribed Rate of Interest Act), which applies only if no other rate is agreed or applicable.

[72] Waterford had conceded during the adjudication that it was not entitled to charge its members interest at the rate of 1% per month, as it had previously done. Consequently, at its November 2018 annual meeting, Waterford resolved to delete the words 'not exceeding' in the proviso to article 13, which limited interest to the prescribed rate under the Prescribed Rate of Interest Act. The Waterford board then set the interest rate at 1% per month effective 1 February 2019.

[73] Waterford therefore correctly submitted that there is no basis for disallowing interest on arrears for the period before 1 February 2019. The adjudicator lacked authority to apply the prescribed rate because the contractual rate was already determined. Therefore, the interest-related decisions should also be reviewed and set aside and replaced with an order that Waterford is entitled to charge interest on arrear levies during the period 1 January 2017 to 1 January 2019, at the rate contemplated

in s 1(2)*(a)*[17] of the Prescribed Rate of Interest Act, as at the time when such interest begins to run, and for the period from 1 February 2019, at the rate of 1% per month.

Costs

[74] The main issues regarding costs are: should the first respondent's attorneys, Eugene Marais Attorneys, pay wasted costs for including unnecessary documents in the record, *de bonis propriis;* and whether the principle enunciated in *Biowatch Trust v Registrar, Genetic Resources and Others,*[18] (*Biowatch*) applies.

[75] We deal first with the question whether it is appropriate to order costs *de boniis* against Eugene Marais Attorneys. Waterford submits that the attorneys' insistence that the whole record of proceedings in the high court should be included in the appeal to this Court was unreasonable, misguided and a blatant disregard of the terms of rule 8(9)(*a*)(i) of the Supreme Court of Appeal (SCA) Rules. This resulted in the inclusion in the record of all confirmatory affidavits, documents submitted by the parties in the adjudication, and the transcripts of ten days of hearing. These documents, contained in volumes 6 to 13 of the record, consist of some 1564 pages of irrelevant matter.

[76] Rule 8(9)(*a*)(i) of the SCA Rules provides that whenever the decision of an appeal is likely to hinge exclusively on part of the record in the court a quo, the appellant shall, within ten days of the noting of the appeal request the respondent's consent to omit the unnecessary parts from the record.

[77] It is trite that the main consideration in the award of costs *de bonis propriis* is whether the attorneys acted mala fide, negligently to a serious degree, or unreasonably, thereby abusing the court process. Other factors include the bulk of the unnecessary material, duplication of documents, the extent to which the conduct wasted the court's time and effort and placed an undue burden of unnecessary expense and labour on the opposing party.

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[17] Section 1(2)*(a)* provides: 'For the purposes of subsection (1), the rate of interest is the repurchase rate as determined from time to time by the South African Reserve Bank, plus 3,5 percent per annum.'
[18] *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 323 (CC).

[78] In our view, the attorneys' decision to decline to agree to the omission of volumes 6 to 13, despite repeated requests from Waterford's attorneys, constitutes a serious departure from the professional standards expected under rule 8(9)(*a*)(i) of the SCA Rules. The documents contained in those volumes were manifestly irrelevant, as evidenced by the fact that only about four pages from those volumes were referenced during argument.

[79] Furthermore, if the attorneys believed those specific pages were pertinent to the Court's consideration, it would have been appropriate to include only those in a core bundle, rather than insisting on the inclusion of eight entire volumes. By failing to exercise this professional judgment and by insisting on including extensive irrelevant material, the attorneys not only disregarded procedural expectations but also imposed unnecessary burdens on both Waterford and this Court. As a result, their actions led to wasted judicial resources and additional expenses for Waterford. For these reasons, we conclude that the attorneys' conduct warrants censure, and they should accordingly be ordered to pay the attendant costs associated with the inclusion of volumes 6 to 13 in the appeal record, de *bonis propriis*.

[80] Regarding the issue of costs relating to the constitutional challenge, Waterford submitted that, pursuant to the *Biowatch* principle, it should not be liable for costs arising from the constitutional challenge if the appeal is unsuccessful. It argued that the high court erred in characterising the challenge as lacking merit and frivolous, thereby warranting a departure from the *Biowatch* principle.

[81] The Riverside respondents and the Minister maintained that the high court correctly determined that the appellant's constitutional challenge was insubstantial and unsupported, rendering the issue of costs pertinent. They argued that the meaning of the impugned provisions is unambiguous and manifestly confer neither unfettered nor unguided discretion. Waterford's constitutional challenge was therefore manifestly devoid of merit.

[82] The Constitutional Court in *Biowatch* explained the test as follows:

'At the same time, however, the general approach of this Court to costs in litigation between private parties and the state, is not unqualified. If an application is frivolous or vexatious, or in

any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs order. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the state, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to avoid costs against the state in favour of a private litigant who achieved substantial success in proceedings brought against it.'[19]

[83] In our view, and for the reasons explained above, Waterford's challenge to the impugned provisions did not raise any constitutional issues of import, was without any merit and frivolous. Furthermore, Waterford was quite willing to utilise the remedies provided for in terms of the impugned provisions. It was only after the adjudicator had made adverse findings against it that it cynically launched an application to challenge the constitutionality of those provisions.

[84] We therefore find that the *Biowatch* principle does not apply in this matter and that Waterford should be ordered to pay the costs attendant upon the unsuccessful constitutional challenge. Regarding the costs relating to the challenge to the adjudicator's orders, Waterford has been substantially successful and is accordingly entitled to those costs.

Order

[85] In the result we make the following order:

1. The appellant's application to amend its notice of appeal to include an order that s 39(1)*(c)*, read with s 39(1)*(e)* of the Community Schemes Ombud Service Act 9 of 2011 (the Act), is inconsistent with the Constitution and invalid, is dismissed. The appellant shall pay the costs of the application for amendment of the one hundred and fifth to one hundred and eighth respondents, including the costs of two counsel where so employed.
2. The appeal is upheld in part. The order of the high court is set aside and replaced with the following order:
   '(a) The application for an order declaring that s 39(1)*(c)*, read with s 39(1)(*e*) of the Community Schemes Ombud Service Act 9 of 2011 (the Act), is

[19] *Biowatch* ibid para 24.

inconsistent with the Constitution and invalid, is dismissed. The applicant shall pay the associated costs of the one hundred and fifth to one hundred and eighth respondents, which costs shall include the costs of two counsel, where so employed.

(b) The orders of the one hundred and third respondent (the adjudicator), set out in paragraphs 86.1; 86.2; 86.3 and 86.4.3 of the adjudicator's determination of 10 March 2021, are reviewed and set aside.

(c) The order of the adjudicator that the second to one hundred and second respondents are not members of the applicant, is reviewed and set aside, and replaced with an order declaring that those respondents are members of the applicant.

(d) The adjudicator's determinations regarding levies and contributions owed to the applicant by the first to one hundred and second respondents in respect of the 2017 to 2020 financial years are remitted for investigation and determination by a new adjudicator. The new adjudicator shall be chosen by the parties from the Ombud's list (as provided for in s 48 of the Act), by 30 January 2026, failing which the adjudicator shall be chosen by the one hundred and seventh respondent, by 20 February 2026.

(e) The adjudicator's decision in paragraph 1.2 of the order that the first respondent shall pay annual interest at the rate contemplated in s 1(2)*(a)* of the Prescribed Rate of Interest Act 55 of 1975, from date of delivery of the order, is reviewed, set aside and substituted with a decision that the applicant is entitled to charge interest on the arrear levies:

(i) during the period 1 January 2017 to 31 January 2019 at the prescribed rate of interest, as at the time when such amounts became due; and

(ii) from 1 February 2019, at the rate of 1% per month.

(f) The first to one hundred and second respondents are ordered to pay the costs of this application, jointly and severally, the one paying the others to be absolved, including the costs of two counsel, where so employed.'

3. The first to one hundred and second respondents shall pay the costs of the appeal jointly and severally, the one paying the others to be absolved, including the costs of two counsel, subject to paragraph 4 below.

4. The first to one hundred and second respondents' legal representatives, Eugene Marais Attorneys, shall pay the costs relating to the preparation and perusal of volumes 6 to 13 of the appeal record, *de bonis propriis*.

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J E SMITH

JUDGE OF APPEAL

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N CHILI

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	H F Oosthuizen SC with D J Smit
Instructed by:	Warrener De Agrela & Associates Inc, Johannesburg Honey Attorneys, Bloemfontein
For 1st to 102nd respondents:	H P van Nieuwenhuizen
Instructed by:	Eugene Marais Attorney, Johannesburg Symington De Kok Attorneys, Bloemfontein
For 103th to 107th respondents:	T Manchu SC with F Sangoni
Instructed by:	Seanego Attorneys, Johannesburg Blair Attorneys, Bloemfontein
For 108th respondent:	M Makumu
Instructed by:	The State Attorney, Johannesburg The State Attorney, Bloemfontein.