

# Can a Municipality Serve a Pre-Termination Notice over Whatsapp or SMS?

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16 October 2024

## INTRODUCTION

This article considers the legality of a municipality serving pre-termination notices over SMS or a similar form of direct electronic communication such as Whatsapp.

Our offices have taken note of an alarming increase in the number of SMSes sent to clients by the City of Johannesburg Metropolitan Municipality (“COJ”) advising that their services would be disconnected if amounts outstanding were not paid.

**Important note:** The focus in this article will be on the laws that relate to the COJ, so if you are in a different municipal jurisdiction you may need to check the by-laws relevant to that particular municipality because they may differ to the COJ ones referenced in this article.

## CAN AN SMS CONSTITUTE A PRE-TERMINATION NOTICE?

Our law does not always require that all types of notices be given in writing (although this is most certainly the norm), so it is possible that a court may in the future find that the SMS itself constitutes sufficient notice of the pending disconnection of services. In our view, however, this can only lawfully follow if the SMS is delivered to the customer in a manner that complies with the relevant by-laws and court judgments. The four most important requirements are:

- The notice must be delivered to the customer in one of the ways prescribed by the Local Government: Municipal Systems Act (“the Act”). To the extent that a municipality’s policies or by-laws specify a method of delivery that conflicts with those in the Act, the provisions of the Act will take precedence over the by-laws/policy.
- The notice must give at least 14 days’ notice (as per the Constitutional Court in the famous Joseph case)

or the number of days specified in the by-laws or policies of the municipality concerned (if there are conflicting provisions in different laws, whichever is the longer number of days will be the provision that applies).

- The method of delivery specified in the relevant law must be complied with (examples include registered mail, hand delivery, via sheriff).
- The person to whom the notice is delivered, must be the appropriate person (where a person is specified).

## METHODS OF DELIVERY IN TERMS OF THE ACT

At present time, the Act does not expressly permit service of notice via SMS. But this is not the only relevant law – the Act must be read together with the **Electronic Communications and Transactions Act** (“the ECTA Act”). The ECTA Act recognises “data messages” as valid forms of communication, which can in some instances constitute a valid form of notice. They are given the same force in law as a hand written note, or typed/printed hard copy letter or document.

Specifically, section 11 provides that “Information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message.”

Just because a message can be transmitted electronically, however, this does not automatically mean that the other elements of the message meet the requirements in law. For example, if a law specifies that a message must be delivered to a particular address, or a certain number of days in advance, the mere fact that such a message may legally be sent electronically does not necessarily mean that it meets these other requirements. It is necessary to evaluate each of these elements, or requirements, of the message, separately.

## THE 14 DAY NOTICE REQUIREMENT

In the case of COJ specifically, a minimum of 14 days written notice of termination is required for water and electricity accounts in arrears and if the notice period is

shorter than 14 days, or not supplied, the disconnection is illegal. The 14-day notice gives the responsible party an opportunity to present any disputes or queries they may have regarding the account or allow them to repay the arrears. This was confirmed by the Constitutional Court in the famous Joseph case, and it is also written directly into the City of Joburg municipality's bylaws – section 7(1).

Please take note that different municipalities may prescribe different periods of time for the deliver of a pre-termination notice – you should check in every case with an attorney if you are uncertain as to what the relevant period is.

The purpose of giving a person 14 days is to allow that person to respond to the municipality within that time and to raise any disputes about the charges that are purportedly owing, or alternatively to allow the responsible person to make payment of the arrears or make other payment arrangements with the municipality such as by entering into an instalment payment plan. If a consumer is denied this opportunity, then this is a violation of that person's rights in terms of our administrative law and Constitution and the disconnection is accordingly unlawful.

#### **METHOD OF DELIVERY OF PRE-TERMINATION NOTICE**

If a law specifies a particular method of delivery – such as hand delivery to the property, or service via registered mail – then these are the methods that must be utilised. In the recent judgment of *Tony Magqazana v Buffalo Municipality and The Municipal Manager: Buffalo City Metropolitan Municipality*<sup>1</sup>, the High Court held that a Municipality must strictly obey its own by-laws when serving pre-termination notices to its customers.

In this case, the municipality had served the notice by placing it in the customer's post-box. The relevant legal provisions in that case provided for the manner/method of service, in the following mechanisms:

#### **“6 Service of notice**

- (1) ...
- a. when it has been delivered to that person personally;
  - b. when it has been left at that person's place of residence or business in the Republic with a person apparently over the age of sixteen years;
  - c. when it has been posted by registered or certified mail to that person's last known residential or business address in the Republic and an acknowledgement of the posting thereof from the postal service is obtained;
  - d. if that person's address in the Republic is unknown, when it has been served on that person's agent or representative in the Republic in the manner provided by paragraphs (a), (b) or (c); or
  - e. if that person's address and agent or representative in the Republic is unknown, when it has been posted in a conspicuous place on the property or premises, if any, to which it relates.”

Because the method of service of the pre-termination notice did not comply with the by-laws, the court found that the service of the disconnection notice was considered defective in that case.

#### **DELIVERY TO THE CORRECT PERSON**

If a law specifies the person to whom the notice must be delivered, and this is not done, the notice may be invalid. In the case of pre-termination notices by a municipality, it has been held by the Constitutional Court in the Joseph case that it is not only the property owner, but also the occupants (whether they are lawful or unlawful) that have a right in terms of our administrative law to receive notice of termination. If a pre-termination notice is not given to the occupants of the property (and the owner, if the owner is not the same as the occupant) then the disconnection is illegal.

#### **CAN STATEMENTS OF ACCOUNT, OR INVOICES, BE LAWFULLY TRANSMITTED ELECTRONICALLY OVER EMAIL, SMS OR WHATSAPP?**

Absolutely, yes. The National Credit Act is another piece of legislation that might apply to some (but not all) charges by municipalities. The National Credit Act provides that that “statements of amount owing” and “statements of settlement amount” may legitimately be sent by a credit provider by SMS in terms of section 92(6), 110(3)(b) and 113(2)(b).

#### **CONCLUSION**

However, again, each case will be decided on its own facts and you would need to consult with your attorney before deciding on a course of action because there are many factors not referred to herein that may affect the legal strategy adopted.



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