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## Can a Consumer “Contract Out” of a Right to Receive a Pre-Termination Notice?

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### **Introduction**

Our offices have taken note of an alarming increase in the number of SMS’s sent to clients by the City of Johannesburg Metropolitan Municipality (“COJ”) advising that their services would be disconnected without notice, due to an alleged breach of the payment terms of an acknowledgement of debt (“AOD”). The legal implications thereof are discussed below.

### **Signing of an AOD**

Many consumers within the jurisdiction of the COJ sign AOD’s with the City in terms of which they agree to make payment of the ‘arrear’ in monthly instalments over a certain period. The reasons for this are threefold: firstly, this gives them an opportunity to rectify their non-payment in a way that does not render them insolvent or unable to comply with their other monthly financial commitments, and secondly it allows them to avoid interest accruing on the arrears, and thirdly it allows them to avoid disconnection of services for non-payment. In order to qualify for an AOD consumers are often required to pay up to 50% of all amounts outstanding, with the

balance owing usually being payable between 12 and 60 months (the maximum that the City is lawfully permitted to allow to consumers is 60 months). In the AOD a specific date is given by which the monthly repayments in terms of the AOD must be paid. AOD’s also require that the customer make payment of all current charges by their due date. Many of the AOD’s prescribe further that if the consumer does not comply with the terms of the AOD and misses any payments in terms thereof, that the COJ is entitled to disconnect the consumer’s services without any prior written notice being given.

### **Risks Associated with an Acknowledgment of Debt**

It should be noted that the COJ will not allow its consumers to make any changes to their AOD’s whatsoever and so they must be accepted or rejected wholesale, meaning that often customers who have no other choice are often forced into signing them even if they don’t agree with the contents of the document. This is particularly problematic for consumers who do not agree that the amount reflecting on their invoices, is actually owing to the City. They may be signing the AOD because it is the



only way that they can avoid disconnection, even though they are paying what they owe and are pressing the COJ to resolve the billing dispute that they have raised with it.

In cases such as these consumers should note that a court may find that when they signed the AOD they waived any right that they had to continue with their dispute, because they expressly acknowledged indebtedness of the amounts claimed by the COJ. In our view if a customer was compelled to sign an AOD because it was a 'last resort' to avoid disconnection in the situation where the COJ had not resolved a billing query, the AOD would not be enforceable because it would have been entered into under duress. That being said, customers need to consider their options carefully when deciding on whether to sign this document because it might count against them in the future.

### **“Dishonouring” your AOD**

We have been advised that the City’s system automatically considers an AOD as dishonoured when payment of the “AOD monthly instalment amount” is not made by the due date set out in the AOD document, or when payment is not made of the current charges that appear on the invoices presented to the consumer each month. This means that there is no human oversight in relation to these issues - the computer automatically detects and issues disconnection instructions when (according to its own records) the AOD has been dishonoured.

This results in “the system” incorrectly instructing terminations in several instances, such as where the customer made payment on the due date, but the payment does not reflect in the COJ’s bank account

by that date. It also will not detect that a customer is actually up to date with his payment commitments if the customer double pays his AOD instalment amount in one month, and then doesn’t pay in the subsequent month (because he paid double the month before). If a customer pays into the wrong account number, or uses the incorrect account reference when making payment, the system will not detect this. The system is also unable to detect where a customer has raised a dispute with the COJ in relation to any portion of the amount that the AOD is signed in respect of, and which the customer is accordingly entitled by law to not pay (until such time as the dispute has been resolved). In such instances, the customer’s AOD will be considered to have been dishonoured.

When an AOD is dishonoured, the system “kicks it out” and essentially demands payment of the full outstanding balance (including the arrears that were previously included in the AOD) by the due date appearing on the subsequent invoice. A customer would ordinarily not be permitted to enter into a second AOD if the first one was dishonoured, and this then presents an extraordinary challenge for a customer whose AOD was kicked out by the system for technical reasons but where that customer did actually pay in good faith (albeit that the payment was not detected by ‘the system’ for any of the reasons aforementioned). The customer is then forced to pay the full amount outstanding in order to avoid disconnection or if they cannot afford to make that payment, to suffer without electricity or water until they have saved up enough to be able to pay the bill.



## **Disconnection without notice after dishonouring an AOD**

Municipalities are compelled by virtue of the Constitution, the Promotion of Administration of Justice Act, case law and their own by-laws and policies to give consumers at least 14 days written notice of the pending decision to terminate service supply. The pressing legal issue that this article is intended to consider is whether it is lawful for a municipality to disconnect a consumer's supply without further notice if that consumer has signed an AOD and agreed in writing that if the payment terms are not adhered to, disconnection can follow without further notice. Fortunately for consumers in Joburg the answer to this question must be a resounding "No".

It is trite law in South Africa that you cannot contract out of a legislative or Constitutional right meaning that you cannot 'lose' or 'waive' your rights by your signature on a contract that purports to take those rights away. In the opinion on the authors, this means that even if a consumer's AOD prescribes that the COJ may disconnect the consumer's services without prior notice if the AOD is dishonoured, the COJ must still give you a pre-termination notice before terminating your supply. Failure to do so would violate your constitutional and administrative law rights and would entitle you to obtain an urgent court order reconnecting you and a costs award against the municipality. *It is important to note, however, that this issue has not yet been tested in court, and there is always the possibility that a court might find to the contrary. Consumers are advised to take legal advice in each and every instance from an expert and never to rely on the kind of general advice dealt with in our*

*articles as such general advice may not be applicable to the unique facts of your case.*

## **What to do if you receive an SMS saying you will be Cut Off without Notice**

If you did actually make payment and for some or other reason the COJ's system isn't reflecting this, then you can attempt to have your AOD reinstated by talking to COJ's officials. If you know who you entered into the AOD with, (i.e. who represented the COJ when you entered into the agreement) and you are still in contact with them, try and contact them to see if you can have your AOD reinstated. If they agree, ask them to ensure that any disconnection instruction that has been sent is withdrawn. You can also try and approach other COJ officials to explain the problem and ask that your AOD be reinstated and request that any pre-termination notice already issued be withdrawn. Alternatively, you can contact your lawyer to assist you in negotiations to have the AOD reinstated on the same terms as before, without having to pay another deposit. We stress, however, that COJ might not agree to this. Each case will depend on its own facts.

If, however, your AOD was dishonoured because you simply did not keep to the payment terms, then you will likely not be permitted by COJ to enter into another AOD - but again, we stress that each case will be decided on its own facts. Many of the officials at COJ are people with big hearts, and often they will come to the assistance of a customer in genuine distress where it is just and appropriate for them to do so.



### **Can an SMS constitute Notice?**

Our law does not always require notice 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 apply if the SMS gives at least 14 days notice (as per the Constitutional Court in the famous *Joseph* case) and if the COJ can prove that it was delivered to the customer in one of the ways prescribed by the Local Government: Municipal Systems Act (“the Act”). At present time, the Act does not permit service of notice via SMS. The natural conclusion of the above is therefore that at this time our law would not regard an SMS as adequate notice.

### **What if you did not receive the SMS and your services are disconnected?**

If your services are disconnected because of your alleged dishonouring of an AOD, without you having received the requisite 14 days prior written notice, such a disconnection of services are unlawful. The first step would be to demand that the City reconnect your services immediately, due to the disconnection having been unlawful. If you are unsuccessful in this regard, you would be able to launch an urgent court application against the COJ to have your services reconnected and request the court to make an appropriate cost order, for the COJ to pay for the costs of the application.

### **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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