Delivering notices to shareholders: it's time for companies to consider more efficient and cheaper methods

November 2025

by Brendan Olivier – Director

Company secretaries and corporate legal advisors will know the difficulties, time and costs involved, when engaging in the mandatory process of sending notices to shareholders. It is a process that is commonly fraught and frustrating, and often one that is undertaken with the knowledge that actual notice is unavoidably unlikely to be effected.

However, whilst the Companies Act may, as a default, require that notice be given to shareholders through outdated and byzantine methods, there is another way. Ironically, help lies in the Companies Act itself, by allowing companies to seek a High Court's assistance. Company secretaries and corporate legal advisors who take a small step now, can pave the way for easier, faster, cheaper, more reliable and more efficient means of giving notice in the future.

The position relating to delivery, is this: regulation 7(1) to the Companies Act provides that if a notice is to be delivered, there are certain default means of dispatching such a notice. The notice may be transmitted electronically in terms of s6(10), or it can be delivered in terms of the means set out in Table CR3. In simple terms, a notice can be transmitted / delivered to the recipient:-

1. By fax (in terms of Table CR3); or
2. By registered mail (in terms of Table CR3); or
3. Electronically in terms of s6(10), including by way of e-mail (in terms of Table CR3).

There is no leeway – a company must use one or more of these default means of delivery in order for the notice to be regarded as having been properly delivered to shareholders.

The difficulties associated with a closed list of delivery means, is well-known to company secretaries and corporate legal advisors, particularly where there are large numbers of shareholders, or where existing shareholders acquired their shares some time ago.

Expecting shareholders to still have access to a fax machine is a concept so outdated, it barely warrants discussion. It suffices to say that fax machines are effectively obsolete, and the overwhelming majority of private individuals do not have access to a fax machine or even possess a fax number. In an age of embedded AI and life-changing technology, fax delivery is so unfeasible, one is surprised it was even listed in Table CR3 as a means of delivery.

A surprising number of shareholders are not in possession of an e-mail address, or do not have regular access to a computer. From a practical perspective, many long-standing shareholders acquired their shares years before it was thought to ask each shareholder for additional, 'modern' contact details, like an e-mail address. This presents a common practical difficulty: the company is simply not in possession of shareholders' e-mail addresses.

This leaves a final means of 'default' delivery, using a contact detail that a company is most likely to possess: registered mail delivery, to a physical address. However, this means of delivery comes with its own problems:-

1. Registered mail deliveries need to be physically collected by the recipient. In a post-pandemic world, and where the Post Office faces branch closures, collection by a recipient is both unpopular, and inconvenient.
2. Registered mail is often unreliable, with recipients complaining of not receiving notification slips. Placing increased pressure on the constrained resources of the Post Office, is bound to have an adverse effect on the ability to properly, accurately, efficiently and effectively process registered mail deliveries, within the required time periods.
3. Registered mail is expensive. Companies with substantial numbers of shareholders, face eye-watering delivery bills in order to comply with this mode of delivery.
4. Many shareholders complain that they receive their notification clips too late, simply because of the delays inherent in the process of despatching notices by registered mail, particularly where the volume is substantial.

Placing reliance only on the 'default' means of notice, often defeats the very purpose of giving notice: shareholders receive notice only after the occurrence of the event to which the notice relates. However, these difficulties are unnecessary and can be avoided: the Companies Act specifically provides for an alternative that can avoid these problematic issues. Table CR3 provides a final means of delivery: **by any means authorised by the High Court.**

This 'mode' of delivery is not for the taking – a company needs to ask a Court for its leave to allow the company to deliver its notices to shareholders by means other than the 'default' means. The company does so by way of making formal application to the relevant High Court. The application can be made ex parte, which all but eliminates the possibility of opposition.

For instance, if a company can substantiate it, a company can ask for permission to send notices by ordinary (as opposed to registered) mail, thus avoiding all difficulties associated with registered mail. If ordinary mail is still cumbersome or problematic, there is nothing to prevent a company from asking the Court to permit 'delivery' by way of (as examples) online advertisements, website notices, SENS announcements, media platforms, or even social media. A declaration of a delivery date, being delivery which is deemed to have been effected to recipients, after a certain number of days following the alternative delivery, can also be requested from the Court. In addition, it may well be that the Court's permission could be obtained to dispatch all future notices, by way of alternative delivery means.

In determining whether to grant its permission, the Court is likely to consider a range of facts, including the difficulties encountered in the past, the anticipated problems and associated costs with continuing to use the default means of delivery, the extent to which alternative delivery means have been employed previously, the level of success achieved through such previous alternative delivery means, and the basis, need and justification for any further alternative means of notice to shareholders.

These factors will likely determine how far a Court is prepared to go in permitting different means of notice. It may be assessed on a case-by-case basis, and perhaps the process of proposing and employing alternative delivery means, might be an incremental one. Ultimately, a Court will need to be persuaded that other delivery means will still result in effective, real and timeous notice to shareholders.

Such an application needs to be crafted with care, and include all relevant facts. We have been successful in each application of this nature which we have brought for our clients. Company secretaries and corporate legal advisors have found that taking these steps, and engaging legal assistance, in order to be permitted to utilise alternative notice, soon reaps the rewards of lower costs, fewer administrative and logistical difficulties, and a decrease in the number of recorded instances of non-delivery. It also provides an increased level of certainty and reliability, and the ability to utilise modern and convenient forms of notice.

In a fast-developing technological era, there is no reason for companies to continue to lose valuable time and expend precious resources in continuing to apply old-fashioned and outdated practices when giving notice to shareholders. The solution is readily available and is one that can be adapted to suit the needs of the company, the rights of its shareholders, and the duties of a company secretary or corporate legal advisor.

Contact the author

Director

Brendan Olivier

Cape Town

+27 21 405 5181

E: bolivier@werksmans.com

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