

ELECTRICITY THEFT IN SOUTH AFRICA: EXAMINING THE NEED TO CLARIFY THE OFFENCE AND PURSUE PRIVATE PROSECUTION?

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SUMMARY

Electricity theft is one of the challenges with which South African government-owned power-distribution company Eskom is grappling. Eskom has lost billions of rands in annual revenue owing to electricity theft. Different strategies are in place to combat electricity theft. However, in South Africa, electricity theft is not a statutory offence. This contrasts with the approach adopted in countries such as China, Canada, India, Australia and New Zealand, where legislation provides for such an offence. Although electricity theft is not a statutory offence, prosecutors would like electricity thieves to be punished. In this context, there are conflicting High Court decisions on whether electricity theft is a common-law offence or indeed an offence at all. The purposes of this article are: to highlight the problem of electricity theft in South Africa and the conflicting jurisprudence from the High Court on whether electricity theft is an offence; to recommend that Parliament amend legislation to criminalise electricity theft specifically; and also to empower Eskom to institute prosecutions against those who are alleged to have stolen electricity.

1 INTRODUCTION

Electricity theft is a huge challenge in South Africa. It has led to the loss of billions of rands in annual revenue by the government-owned, power-distribution company Eskom. Electricity theft is also one of the contributors to load-shedding in South Africa, which threatens the country's development prospects. Eskom is putting in place measures to combat electricity theft. However, unlike in countries such as China, Canada, India, Australia and New Zealand where legislation provides for the offence of electricity theft, electricity theft is not a statutory offence in South Africa. There are also conflicting High Court decisions on whether electricity theft is a common-law offence or an offence at all. The Constitutional Court, the highest court in South Africa, is yet to decide the question. The purposes of this article are: to highlight the problem of electricity theft in South Africa as well as the conflicting jurisprudence from the High Court on whether electricity theft is an offence; to recommend that Parliament amend legislation to criminalise

electricity theft specifically; and to empower Eskom to institute prosecutions against those who are alleged to have stolen electricity.

2 THE PROBLEM

South Africa is struggling with a huge electricity problem, evidenced by a heavily indebted power producer and supplier (Eskom) and frequent load-shedding.¹ Eskom attributes its problems to many issues and one is electricity theft. Eskom estimates that it loses billions of rands every year through electricity theft. For example, in July 2018, Eskom “warned consumers against infrastructure and electricity theft that it says costs some R20bn per year and are a ‘leading cause’ of blackouts.”² Eskom is putting various measures in place to address the issue of electricity theft. These have included “educating the public about the consequences of infrastructure and electricity theft, including illegal connections”³ and installing smart prepaid meters. Eskom states that one of the advantages of the smart prepaid split meter is that it leads to “reduced theft and fraud” because “smart meters have anti-tampering technology and tamper alarms which are linked to the Eskom system to report malfunctions and detect meter bypassing.”⁴ Eskom is also working with the business community to end electricity theft. For example, Eskom launched an electricity-saving campaign:

“The electricity-saving campaign known as Operation Khanyisa (isiZulu for ‘enlighten’ or ‘light up’) has the support of Business against Crime of South Africa (BACSA), Business Unity South Africa (BUSA), Primedia Crime Line, Proudly South African and the South African Local Government Association (SALGA).⁵”

Eskom “asked the Justice Department and the National Prosecuting Authority to change the law to make electricity theft a form of sabotage.”⁶ However, it is evident that Eskom is yet to consider private prosecution as a means to combat electricity theft. One purpose of this article is to suggest ways in which Eskom could use private prosecutions to combat electricity theft. Before dealing with the issue of private prosecutions, it is important to discuss the offence of electricity theft in South Africa.

¹ Khumalo “Eskom Unbundling Will Result in More Debt, Job Losses – NUM” (14 February 2019) <https://www.fin24.com/Economy/Labour/eskom-unbundling-will-result-in-more-debt-job-losses-num-20190214> (accessed 2020-02-11). It is reported that Eskom’s debt stands at over R430 billion.

² Van der Merwe “Electricity Theft Causes Power Cuts – Eskom” (3 July 2018) <https://www.fin24.com/Economy/Eskom/electricity-theft-causes-power-cuts-eskom-20180703> (accessed 2020-02-11).

³ Van der Merwe <https://www.fin24.com/Economy/Eskom/electricity-theft-causes-power-cuts-eskom-20180703>.

⁴ See Eskom Smart Prepaid Split Meters Programme <http://www.eskom.co.za/CustomerCare/SmartPrepayment/Pages/default.aspx> (accessed 2020-02-11).

⁵ Baloyi “Operation Khanyisa STOP Electricity Theft – The POWER is in YOUR HANDS” (January/February 2011) <https://www.vukuzenzele.gov.za/operation-khanyisa-stop-electricity-theft-%E2%80%93-power-your-hands> (accessed 2020-02-11).

⁶ Baloyi <https://www.vukuzenzele.gov.za/operation-khanyisa-stop-electricity-theft-%E2%80%93-power-your-hands>.

3 UNDERSTANDING ELECTRICITY THEFT IN SOUTH AFRICA

It has been argued that there are four types of electricity theft that “are prevalent in all power systems” – namely, fraud, stealing electricity, billing irregularities and unpaid bills.⁷ These types of electricity theft have also been reported in South Africa. For example, it is reported that the “revenue lost by Eskom through unbilled electricity theft was ‘very significant’, adding to the problem of non-payment by both Eskom direct ... customers and municipal distributors.”⁸ A report by the Auditor General indicates, among other things, that in the City of Johannesburg, “for the 2016–17 financial year, non-technical electricity losses amounted to over R1-billion, which was due to theft, bypass of meters, illegal de-calibration of meters and damaged meters.”⁹

Unlike in some countries such as China,¹⁰ Canada,¹¹ India¹² and Australia,¹³ where national legislation provides for the offence of electricity theft, South African national legislation does not provide for this offence. This does not mean that there was no South African legislation on the basis of which a person could have been prosecuted for one of the kinds of electricity theft mentioned above. Section 27(2) of the Electricity Act¹⁴ provided:

“Any person who without legal right (the proof of which shall be upon him) abstracts, branches off or diverts or causes to be abstracted, branched off or diverted any electric current, or consumes or uses any such current which has been wrongfully or unlawfully abstracted, branched off or diverted, knowing it to have been wrongfully or unlawfully abstracted, branched off or diverted, shall be guilty of an offence and liable on conviction to the penalties which may be imposed for theft.”

The Electricity Act was repealed by the 2006 Electricity Regulation Act.¹⁵ However, it is important to highlight section 27 here because of the cases that emerged from courts interpreting it. Section 27(2) of the Electricity Act had two weaknesses. First, it did not address all the kinds of electricity theft. For example, it was silent on fraud and on stealing of electricity. The second weakness was that it would have been unconstitutional, and therefore invalid, because it created a reverse onus; it required the suspect to prove the existence of a right if he or she was to escape a conviction, which is contrary to the constitutional right to be presumed innocent and to remain

⁷ Smith “Electricity Theft: A Comparative Analysis” 2004 32 *Energy Policy* 2067–2076.

⁸ Van der Merwe <https://www.fin24.com/Economy/Eskom/electricity-theft-causes-power-cuts-eskom-20180703>.

⁹ Jordaan “Six Arrests During Johannesburg Blitz On Power Theft” (09 January 2018) <https://www.timeslive.co.za/news/south-africa/2018-01-09-six-arrests-during-johannesburg-blitz-on-power-theft/> (accessed 2020-02-11).

¹⁰ Article 31 of Regulations on Supply and Utilization of Electricity, 1996-09-01 (Laws of the People’s Republic of China).

¹¹ S 326(1) of the Criminal Code, RSC 1985, c C–46.

¹² S 135 of the Indian Electricity Act 2003.

¹³ S 49(1)(c) and 69(1)(f) of the Electricity Act 1996 provides that an authorised officer may enter any premises to investigate a suspected theft or diversion of electricity.

¹⁴ Electricity Act 41 of 1987.

¹⁵ Act 4 of 2006.

silent. There are many cases in which the South African Constitutional Court has found reverse-onus sections to be unconstitutional.¹⁶ On the basis of these cases, it would have been to successfully challenge constitutionality of section 27(2) of the Electricity Act. When the Electricity Act was repealed by the Electricity Regulation Act, the latter did not create an offence similar to that under section 27(2) of the repealed Act.

The lack of a specific statutory offence to deal with electricity theft does not mean that people have not been prosecuted, convicted and sentenced in relation to electricity theft. There have been conflicting decisions from the High Court on the issue of whether a person can be convicted of stealing electricity. A few illustrative cases are now discussed in the order of year in which they were decided (from oldest to most recent).

The first case in which the issue of whether electricity could be stolen was that of *S v Mintoor*.¹⁷ In this case, the accused had been convicted by the magistrate of “theft of 901 units of electricity”. The question that the High Court had to decide was “whether electricity was capable of being stolen at common law”. The court held:

“[A]ccording to the common law, only tangible or corporeal things were capable of being stolen. Electricity is not a physical thing but a form of energy... The common law rule that only a tangible or corporeal thing was capable of being stolen had not been expanded by any South Africa [sic] court. The only expansion of this basic rule had occurred in respect of the theft of money. In the instant case, it was unnecessary to extend the common law rule as the legislature had specifically provided (in section 27(2) of the Electricity Act 41 of 1987) that anyone who unlawfully ‘abstracts, branches off or diverts’ electric current was guilty of an offence. The Court held that it was clear that electricity was not a tangible or corporeal thing. It therefore declined to find that electricity could be the object of the common law crime of theft. The conviction and sentence of the accused were accordingly set aside.”¹⁸

The court added that several European courts had held that electricity could not be stolen, whereas some courts in certain states of the United States had held that electricity could be stolen, although these decisions were based on legislation that specifically provided for the offence of electricity theft. The court referred to section 27(2) of the Electricity Act in order to hold that the legislature had deliberately decided to create offences other than electricity theft by providing that a person convicted of an offence under that section “shall be guilty of an offence and liable on conviction to the penalties which may be imposed for theft”. The court held that it did not have the power to extend common law to create the offence of electricity theft.¹⁹ The court thus made it clear that electricity cannot be stolen at common law and that section 27(2) of the Electricity Act did not criminalise electricity theft.

The issue of whether electricity could be stolen also arose in the case of *S v Olivier*.²⁰ In October 1997, a magistrate had convicted the accused of

¹⁶ Schwikkard and Van der Merwe *Principles of Evidence* (2015) 553–561.

¹⁷ [1996] 1 All SA 451 (C).

¹⁸ *S v Mintoor supra* 514.

¹⁹ *S v Mintoor supra* 451.

²⁰ [1998] JOL 4023 (T).

contravening section 27(2) of the Electricity Act, and in February 1998 he was convicted of theft of electricity. The magistrate was of the view that “a contravention of section 27(2) of Act 41 of 1987 is not a similar offence to a charge of theft.” However, on appeal, the High Court held:

“It is clear that the offence, of which the accused was found guilty on 21 October 1997, is exactly the same offence which he committed on 20 February 1998. The fact that the accused was convicted of a statutory offence on 21 October 1997 and of a common law offence on 20 February 1998 seems to me to be of no significance.”

This judgment shows that the court was of the view that theft of electricity could be prosecuted as both a common-law offence and a statutory offence. In effect, the court held that electricity could be stolen. However, the court in this case does not refer to the case of *S v Mintoor*, which, as discussed, is to the effect that electricity could not be stolen.

The issue also arose in the case of *S v Ngomane*.²¹ In this case, the magistrate convicted the accused of contravening “section 27(2) of Act 41 of 1987 in that he unlawfully tapped electrical current from the municipal network. He was also convicted of the theft of electricity at the same time and place”. The High Court referred to the case of *S v Mintoor* to set aside the accused’s conviction for stealing electricity because “appropriating electricity is not regarded as theft”. It is clear that the High Court in this case takes us back to the starting point, which is that electricity cannot be stolen. However, it does not refer to the case of *S v Olivier*, which, as we have seen above, came to a different conclusion.

The issue of whether electricity can be stolen arose also in the case of *S v Ndebele*.²² In this case, the accused faced different charges including manipulating electricity vending machines and theft of electricity. The accused’s lawyer referred to the case of *S v Mintoor* and argued, *inter alia*, that the charges of theft of electricity should be quashed because “electricity was not capable of theft”.²³ The State argued that the court should develop the common law and rule that theft of electricity was an offence at common law. The court ultimately held that it was not necessary to develop the common law. The court considered that if it were “to find that theft of electricity was a crime, this might result in me creating a new offence. This new offence may have come into being after the accused had performed the acts complained of”.²⁴ In order to resolve the issue of whether electricity could be stolen, the court first discussed the law relating to theft in Roman-Dutch law.²⁵ It then went on to illustrate the process that was followed to create electricity, before holding that electricity could be stolen.²⁶ It concluded that:

“If electricity is not capable of being stolen, then anyone would be entitled without permission of the owner to attach a load to his batteries and deplete

²¹ [2004] JOL 12943 (T).

²² *S v Ndebele* 2012 (3) SA 226 (GSJ).

²³ *S v Ndebele supra* 229.

²⁴ *S v Ndebele supra* 229.

²⁵ *S v Ndebele supra* 235–236.

²⁶ *S v Ndebele supra* 236–237.

the energy within them, thereby rendering the batteries useless. Yet nothing will have been stolen. Nothing physically has been taken from the battery; however, its characteristics have changed. It appears to me that modern-day society has already advanced and accepted that there can be theft of this nature ... It has long been recognised that the abstract and incorporeal nature of a right, which has been taken in the context of notes and coins, is a loss ... The same reasoning applies to the submissions made in relation to electricity credits. It was submitted that I should consider developing the common law to encompass energy as a thing capable of theft. In my view, I do not have to do so and I do not deal further with this issue.²⁷

In this case, the court held expressly that electricity is capable of theft at common law. The court did not refer to section 27(2) of the repealed Electricity Act although it was in force at the time of the judgement. This is explained by the fact that none of the activities of the accused amounted to a crime under that section. The court also refused to follow the reasoning in the case of *S v Mintoor*. Since then, there has been no reported case in which a person has been prosecuted for electricity theft. However, there are cases where people have been found guilty of electricity theft by employment committees and dismissed from work.²⁸ All the cases dealing with the issue of whether the common law provides for the offence of electricity theft have been decided by the High Court. The Supreme Court of Appeal and the Constitutional Court, the latter being the highest court in South Africa, have not yet dealt with the issue of whether, at common law, a person can be convicted of electricity theft especially in the light of the fact that section 27(2) of the Electricity Act, which was sought by some quarters to have created a statutory offence, was repealed and a similar offence not reintroduced in the Electricity Regulation Act. This means that there is a possibility that in the future the Constitutional Court could answer this question either in the negative or in the positive. It is argued that the national legislature would have to amend the Electricity Regulation Act or another piece of legislation such as the Criminal Procedure Act²⁹ to provide expressly for the offence of electricity theft. This offence should then address all types of electricity theft. In doing so, the South African parliament could refer to legislation from different countries on this issue.

4 PROSECUTING ELECTRICITY THEFT: EMPOWERING ESKOM TO PROSECUTE

One of the measures that could be invoked by Eskom in its fight against electricity theft is the prosecution of those who have committed such offences. In all the cases in which people have been prosecuted for electricity theft, the prosecutions were instituted by public prosecutors. Put differently, Eskom has never itself instituted a prosecution against a person for stealing electricity. This is understandable in light of the fact that the repealed Eskom Act, of 1987,³⁰ although empowered Eskom to carry out

²⁷ *S v Ndebele supra* 238.

²⁸ See *SAMWU obo Theunissen/Theewaterskloof Municipality* (2013) 23 SALGBC 8.8.5; *SAMWU obo Plaatjies Applicant and Swellendam Municipality Respondent* Case No: WCP071213 (The South African Local Government Bargaining Council).

²⁹ Act 51 Of 1977.

³⁰ Act No.40 of 1987.

many activities (section 12), did not expressly allow it to institute a prosecution. In 2001, the Eskom Act was repealed by the Eskom Conversion Act.³¹ As with the Eskom Act, the Eskom Conversion Act 2001 does not empower Eskom to institute a private prosecution. All it does is to convert Eskom into a public company. According to South African law on private prosecutions, this means that Eskom does not have a right to institute a prosecution for any offence committed against it. There is therefore a need to amend that the Eskom Conversion Act to expressly empower Eskom to prosecute electricity thieves. In South Africa, there are two types of private prosecutions: private prosecutions by natural persons (who are victims of crime) under section 7 of the Criminal Procedure Act³² and private prosecutions by statutory bodies under section 8 of the Criminal Procedure Act. The discussion in this article is limited to section 8 of the Criminal Procedure Act. For Eskom to be able to institute a private prosecution, the Eskom Conversion Act would need to be amended; also, in accordance with section 8 of the Criminal Procedure Act, Eskom could only prosecute if the Director of Public Prosecutions has declined to prosecute. Section 8 provides:

- “(1) Any body upon which or person upon whom the right to prosecute in respect of any offence is expressly conferred by law, may institute and conduct a prosecution in respect of such offence in any court competent to try that offence.
- (2) A body which or a person who intends exercising a right of prosecution under subsection (1), shall exercise such right only after consultation with the attorney-general concerned and after the attorney-general has withdrawn his right of prosecution in respect of any specified offence or any specified class or category of offences with reference to which such body or person may by law exercise such right of prosecution.
- (3) An attorney-general may, under subsection (2), withdraw his right of prosecution on such conditions as he may deem fit, including a condition that the appointment by such body or person of a prosecutor to conduct the prosecution in question shall be subject to the approval of the attorney-general, and that the attorney-general may at any time exercise with reference to any such prosecution any power which he might have exercised if he had not withdrawn his right of prosecution.”

Electricity theft in South Africa is committed not only by poor people but also by very rich companies. It is therefore fair that, should Eskom be empowered to prosecute electricity theft, the law should also expressly allow it to recover from the offender the expenses it has incurred in the prosecution. This should also include the costs it has incurred in conducting the investigations. Examples from other countries, such as Ireland, show that electricity companies incur expenses in investigating electricity theft.³³ The challenge with private prosecutions under section 8 of the Criminal Procedure Act is that, should the accused be convicted of an offence, Eskom would not be able to recover from the accused the expenses it has incurred in prosecuting the accused. This is because section 15(2) of the Criminal Procedure Act provides:

³¹ 13 of 2001.

³² 51 of 1977.

³³ *Morgan v Electricity Supply Board* [2018] IEHC 357 (10 May 2018) par 1.

“[t]he court may order a person convicted upon a private prosecution to pay the costs and expenses of the prosecution, including the costs of any appeal against such conviction or any sentence: Provided that the provisions of this subsection shall not apply with reference to any prosecution instituted and conducted under section 8.”

It is submitted that, in order to overcome this challenge, a law empowering Eskom to institute prosecutions should be enacted to expressly empower it to recover from the offender the expenses it has incurred in the prosecution. By empowering Eskom to institute prosecutions against electricity thieves, South Africa would be following the example of other countries. For example, in Malaysia, a public company can institute a prosecution for the theft of electricity³⁴ and in Singapore, the Electricity Authority has prosecuted those who have contravened the Electricity Act.³⁵ In India, the High Court held that it is only the Electricity Board, and not any other person, that is empowered under the Electricity Act to prosecute electricity theft.³⁶

5 THE OFFENCE OF ELECTRICITY THEFT: COMPARATIVE LEGISLATION

As mentioned above, various countries have provided in their legislation for the offence of electricity theft. These countries have taken three different approaches; South Africa, should it choose to enact legislation to this effect, may find it useful to consider the legislation from these countries in deciding which approach to adopt. The first approach is the one adopted in Canada and Australia (New South Wales), where legislation criminalises a few types of electricity theft. The second approach is the one taken in China, where legislation provides for various types of electricity theft but the list is open-ended to accommodate future developments or new types of electricity theft, should they arise. The third approach is the one taken in India, where legislation provides for a detailed but exhaustive (closed) list of the different types of electricity theft. In this part of the article, the author examines legislation from these countries and recommends which of these approaches should be adopted in South Africa.

Section 326 (1) of the Canadian Criminal Code (1985) provides:

“[e]very one commits theft who fraudulently, maliciously, or without colour of right, (a) abstracts, consumes or uses electricity or gas or causes it to be wasted or diverted.”

³⁴ *Wrp Asia Pacific Sdn Bhd v Tenaga Nasional Berhad* – W-02-647-2010 [2011] MYCA 36 (28 February 2011).

³⁵ In *Khian Heng Construction (Pte) Ltd v Public Prosecutor* [2012] SGHC 141 par 2, it is reported that “CS Geotechnic was charged under s 80(4)(a) of the Electricity Act (Cap 89A, 2002 Rev Ed) (‘Electricity Act’) for failing to comply with all reasonable requirements of SPPG to prevent damage to high voltage electricity cables. The appellant was charged by way of private prosecution (initiated by the Energy Market Authority) on 16 January 2009 under s 85(2) of the Electricity Act for suffering to be damaged a high voltage electricity cable on 11 November 2006 in the course of carrying out earthworks at Block 129 of the Worksite.” See also *Public Prosecutor v Fonda Global Engineering Pte Ltd (formerly known as Fonda Construction Pte Ltd)* [2012] SGDC 117 (10 April 2012) par 1; *Public Prosecutor v Hexagroup Pte Ltd* [2013] SGDC 154 (13 May 2013) par 1.

³⁶ *State of Madhya Pradesh v Ramcharan* - CRA-279/2000 [2007] INMPHC 513 (31 August 2007).

Likewise, section 64(1) of the Electricity Supply Act (New South Wales) provides:

“[a] person must not abstract, cause to be wasted or diverted, consume or use any electricity from a generating, transmission or distribution system unless authorised to do so under a wholesale supply arrangement or customer retail contract.”

It is clear that sections 326 of the Canadian legislation and 64(1) of the Australian legislation criminalise a few different types of electricity theft.

Section 135 of the Indian Electricity Act provides:

“(1) Whoever, dishonestly, (a) taps, makes or causes to be made any connection with overhead, underground or under water lines or cables, or service wires, or service facilities of a licensee or supplier as the case may be; or (b) tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration, calibration or metering of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or (c) damages or destroys an electric meter, apparatus, equipment, or wire or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity, (d) uses electricity through a tampered meter; or (e) uses electricity for the purpose other than for which the usage of electricity was authorised, so as to abstract or consume or use electricity shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.”

Section 135 of the Indian Electricity Act is more detailed than the Canadian and Australian provisions and includes conduct that is not considered to be electricity theft in Canada and Australia – for example, tampering with a meter and destroying or damaging a meter and other relevant electricity equipment. However, the list of the prohibited conduct is exhaustive.

In China, Article 31 of Regulations on Supply and Utilization of Electricity, (1996) provides:

“It shall be forbidden to steal electricity. The following acts shall be deemed as stealing electricity: (1) without authorization, connect wires with and use electricity from the supply facilities of the electricity supply enterprise; (2) use electricity by evading the electricity metering apparatus of the electricity supply enterprise; (3) use electricity by forging or opening seals on the electricity metering apparatus put by the metrological inspection authorities or its authorized organization; (4) intentionally damage the electricity metering apparatus of the electricity supply enterprise; (5) intentionally cause the inaccuracy of the electricity metering apparatus of the electricity supply enterprise or make the apparatus lose efficiency; and (6) steal electricity by other means.”

Unlike the Canadian and Indian pieces of legislation, which provide for exhaustive lists of conduct that amounts to electricity theft, the Chinese legislation is open-ended when it provides in Article 31(6) that it is an offence to “steal electricity by other means”. This enables the prosecution to prosecute a suspect for any conduct that amounts to electricity theft but which is not expressly mentioned in Article 135.

The New Zealand Crimes Act (1961) does not expressly provide for the offence of theft of electricity. However, people have been convicted of theft of electricity under the general provision criminalising theft or stealing.³⁷

In the author's opinion, the Chinese approach is the best alternative because it is detailed, but, most importantly, because it enables the prosecutor to deal with new types of electricity theft that were not known at the time the legislation was passed.

6 CONCLUSION AND POLICY IMPLICATIONS

In this article, the author has highlighted the problem and types of electricity theft in South Africa, the measures being implemented by Eskom to combat electricity theft, the conflicting High Court decisions on the issue of whether electricity is capable of being stolen at common law, and the limitations under the repealed section 27(2) of the South African Electricity Act. The author has recommended that legislation (in particular the Eskom Conversion Act) be amended to empower Eskom to institute prosecutions against electricity thieves. It is further recommended that South Africa amend its legislation to provide specifically for the offence of electricity theft so that the ambiguity reflected in the High Court decisions is brought to an end. In providing for the offence of electricity theft, South Africa may find legislation from other countries on this issue to be relevant. However, when amended, legislation should not follow the repealed section 27(2) of the Electricity Act which created reverse onus. Otherwise its constitutionality could be challenged.

The implication of the suggestions is that Eskom needs to put in place measures to lobby government to amend the relevant legislation (the Eskom Conversion Act). Once legislation is amended, Eskom would have to employ a team of lawyers for the purpose of conducting the prosecutions in question, or would have to set aside a budget to do that and engage the services of private lawyers who should prosecute on behalf of Eskom. This is an approach that is followed, for example, by the Singapore Energy Market Authority, to prosecute those who have committed offences under the Electricity Act.

³⁷ S 219 of the New Zealand Crimes Act (1961). See for e.g., *Hockly v Police* [2012] NZHC 2938 (7 November 2012); *R v Spencer* HC TAU CRI 2009-070-9161 [2010] NZHC 42 (5 February 2010).