

The effectiveness of the Judicial System and its enforcement in successfully prosecuting electricity offenders

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ABSTRACT

The paper proposes the formulation of a draft legislative framework that can be used as a catalyst for the improvement of the existing legislation with regards to theft of utility services. An in depth analysis of the current situation in terms of theft of these services was carried out both from an international as well as local perspective to analyse the prevalence of the problem. Current loopholes in the existing legislature (which hinder the effective prosecution of utility service thieves) are highlighted and possible solutions are proposed by means of the development of a draft legislative framework document. The intention of drafting legislation and/or amending existing legislation is to enhance awareness of and conviction rates for utility services related crimes which in turn may reduce the energy losses, might improve prosecution rates and the revenue losses situation that energy utilities currently face.

Key words: Legislation, prosecution, energy theft, tampering, judiciary

1. INTRODUCTION

With the current global, social & economic climate hampering the development of third world countries such as South Africa, problems associated at both the macroeconomic and microeconomic levels have become magnified. Unemployment levels and poverty are steadily increasing; presenting socio-political instability, together with the Gini coefficient at 0.6, being one of the highest in the world - businesses are set on the path of cost reduction and increased savings.

The influx of new inhabitants from foreign countries such as Nigeria, Zimbabwe, Mozambique, etc., together with the migration of local South Africans from the rural areas to the urbanised areas, have resulted in the current vacant land and buildings being illegally occupied by residents whom which have no legal Land Right to account for. This general public is desperate for electricity because it is a convenient and safe form of energy. Moreover, electricity is more affordable and safer than fossil fuels like paraffin. It is evident, that electricity is not only a basic necessity which needs to be met, but it is a means by which an enhanced lifestyle; similar to that of international standards is created. With reference to the national electricity utilities, it has caused a steady rise in non-payment of services, illegal connections/ reconnections, cable theft, tampering of meters and many more offences which have a direct impact on revenue.

In Section 2 of the paper, Energy Losses will be explored, as over recent years, Eskom Distribution's total energy losses have steadily increased at 9% p.a. (as at 08/2008 financial year). The Energy Losses

Programme was launch to counter this trend and it has made a significant impact. However, the business and industry requires the legal framework within the country to be supportive of prosecutions.

Section 3 illustrates the importance of both local and international cases, and landmark judgements which have highlighted critical aspects of effective and ineffective prosecution standards, together with the benchmarks by which the judiciary and its processes can be reformed into a model which not only serves as a catalyst to enhance current processes, but one which can channel the growth of the legislation in favour of electricity utilities and subsequently, the society as well.

Section 4 describes the invisible, yet powerful hand regulating the social environment of any country - its judicial system. It is the guiding force regulating the behaviour of the general public. Legislation is the tool with which the judiciary can enforce or regulate the behaviour of the general public to ensure fairness, opportunity for all, justice as well as the upliftment of the moral behaviour of society at large. As it stands the legislature pertaining to theft of utility services does not favour the electricity distribution companies. It has also been identified that the offences within utility services is an international problem and has become an area of focus for the majority of utilities, as experience shows that it is a complex issue to address or attempt to isolate from the total losses incurred.

The proposed draft of the legislation and the most significant aspects of it will be discussed in Section 5. This draft considers past, present and the electricity utilities' ideal legislation, subsequently formulating the proposed draft to be considered in Parliament, which is in line with the Constitution and Common Law.

The paper will be concluded in Section 6. Key findings will be considered together with recommendations that should be addressed in future work in this field.

2. ENERGY LOSSES

Total energy losses in general, can be divided into losses that are either technical or non-technical in nature. The non-technical losses, (of which will be of focus in this paper) is also known as commercial losses, can be defined as the component of energy loss that is not related to the physical characteristics and functions of the electrical system. Studies have shown that of the numerous forms or causes for non-technical losses, the dominant component of non-technical losses are electricity theft and non-payment (Suriyamongkol, 2002). These losses are almost impossible to measure using traditional power system analysis tools and can only be determined as the residual loss after subtracting technical loss from total losses (Guidi; et al, 2007). A few examples of these losses are: un-metered supplies, unauthorized or illegal connections, tampered or bypassed meters, faulty meters, incorrectly wired meters, meter constant errors, meter reading data entry errors, intentional polarity reversals amongst phases, statistical and customer billing adjustments, billing constants, unbilled customers, delayed disconnections and theft of cables, to name a few.

It can be seen that within the larger consumers there is a significant amount of energy lost due to stuck and faulty meters. This is caused either due to inadequate maintenance being carried out by the utility

or customers meddling with the installations to marginalise or not register consumption at all. Depending on the size of the installations, this has a serious impact on the energy lost in this customer class.

As an example in the case of Eskom Distribution, the extent of the presence of missing service points in this environment amounts to 1.15% of the customers audited is a significantly high figure. The presence of such problems are either due to staff not adhering to the internal processes in the metering and billing environments (as defined in the key value chains), or customers colluding with the utility staff to avoid registering key metering information on the systems. This customer class is currently managed by the metering departments in the regions and audits are carried out through a combination of targeted audits and as part of their normal maintenance plans.

In the SPU environment approximately 20% of problems found with the customers audited in this arena have higher levels of tampering due to lower voltage levels and easier access to the electrical installations relative to large power users. Although the number of customers in this environment is larger, the energy component lost in this sector is significantly lower per customer. In the PPU environment where customer numbers are huge and energy consumption is relatively lower, the major problems were due to tampering of the pre-paid meters by the consumers to intentionally reduce or halt the registering of energy consumption on their meters. There is also a significant number of missing service points or unallocated meters in this customer class which is difficult to manage owing to the large numbers and the lack of accurate information provided by the consumers in this sector. The SPU and PPU environments are managed by the Revenue Protection departments in the Business through a combination of targeted, reported and normal planned maintenance of these customers.

2. LEGISLATION

There are various acts, bills, by-laws and regulations which affect this industry. The most significant, being the Electricity Act 1987- was repealed and replaced with the Electricity Regulation Act 2006. The section relevant to Eskom's electricity offences was Section 27 which stipulated the penalties for offences of electricity crimes and was not included in the repealed Act. This was a result of politics within the industry and lack of initiative to revise this particular section within appropriate time frames.

Section 24 (1) of this Act is relevant in that it assumes that the rights of the apparatus used to supply such electricity lie with the supplier and not with the consumer. This proves to be crucial when establishing prohibited usage or handling of the equipment.

Section 27 (1) is a general provision which holds any perpetrator liable if he contravenes any of the subsections of the Electricity Act. The penalty of which, is prescribed by the Minister and is normally published in the Government Gazette.

Section 27 (2) highlights the consequences of misappropriating electricity and is considered to be guilty of a statutory offence. This subsection is divided into two sections. The first, with regard to the person who actually commits or aids in committing the offence and the second, with regard to consumption

and usage of electricity. All the elements of theft are present in this provision. The penalty associated with this is similar to that of common law theft.

Section 27 (3) deals specifically with tampering of the apparatus, which is normally the possession of the supplier of illegally mishandling apparatus or misappropriating electricity by offenders. (Electricity Act 41 of 1987)

Since the repeal of this Act, the new Electricity Regulation Act of 2006 has replaced the Electricity Act 1987 and is enforceable in the court of law. It has failed to include the illegal connection offences, and the illegal use of electricity (statutory crimes).

If an existing customer is disconnected and reconnects himself, that is a contravention of the terms of the agreement between the parties and the customer may be disconnected again with 14 days notice if the connection does not pose an immediate safety risk, as per the terms of the Electricity Regulation Act 4 of 2006, but immediately if it poses a safety risk.

Another applicable piece of legislature, is the Machinery and Occupational Safety Act 6 of 1983, which has been incorporated under the new Occupational Health and Safety Act 85 of 1983 in section 43 (5) thereof. It is expected that guidance in these regulations may be sought in the absence of other provisions in the governing Energy Legislation, the issue arises however, that this part of the legislation prosecutes on the ground of secondary offences (i.e.: prosecuting on the safety hazard when tampering with a meter and subsequently creating a live wire, dangerous to the public, and not rather for the actual offence of illegally tampering with a meter). (Occupational Health and Safety Act 85 of 1993).

Organisations involved in this electricity domain have little, if any concrete support when prosecuting of offenders. It is of utmost importance to reinstate the revised relevant sections of the preceding Electricity Act of 1987 into the existing legislature. Other critical inclusions are: a comprehensive definition of what electricity or energy theft actually is, the means by which its usage can be considered as stolen and lastly, that stolen electricity be treated as a theft in accordance with common law.

3. LANDMARK JUDGEMENTS AND BENCHMARKS

A few significant case studies are presented below. These highlight not only the judgments which have served as background for future cases presented, but also illustrates the lack of support for the electricity utility industries with reference to electricity offenders both at a local and international level.

3.1. Local Cases

In a Common Law case, which holds firm enforcement in Courts around the country, *S v Mintoor* 1996 (1) SA SACR 514 (C), it was established that the accused was found guilty of theft of electricity from the Bredasdorp Municipality, however the magistrate then set aside the ruling, due to the fact that electricity, in its own right, could not be considered a 'thing' in legal terms and thus could not be

termed as something which can be stolen in accordance with Common Law, as unlike water or gas, electricity did not comprise of any material object.

This decision may be broken down as follows: The Court rejected the differing stance of two well respected legal commentators, Hunt and Snyman. Hunt, a legal academic, was of the opinion that similar to other utilities such as water or gas, electricity formed part of 'res commercium' aka commercial goods, which are capable of being stolen. This opinion was declined by the Court, on the grounds that electricity was not tangible nor is electricity in existence such as a material object. Snyman, a well respected criminal law expert claimed that electricity (as is other forms of energy) is a distinctive aspect of nature which is used economically in the form of energy – which is able to be stolen. His viewpoint was denied on the grounds that even though electricity formed a part of nature, it once again still cannot be described as having a physical, tangible existence. Due to the ruling of this case being enforced in all Courts in South Africa, unless the current legislation is adjusted surrounding the theft of electricity, it would not be feasible to initiate a Court ruling, unless the electricity supplier appeals such a ruling for the specific case to the Supreme Court of Appeal, in the hope that a further ruling shall be differing to that of the Mintoor Case, of which whose ruling is binding and enforcing. (Snyman, 2008)

A case presented at the South African Revenue Protection National Conference in Ethekeweni made reference to illegal connections in Mpumulanga and the Cato Manor informal settlements. Upon commencement of this project, a team was created who were involved in identifying the illegal connections and removing them. It was discovered that within informal settlements, it proved to be a tedious process since the land rights of a resident can be contravened and subsequently, he/she could not obtain rights to a legal connection, not only for electricity supply, but as Security of Tenure. Residents of the settlement were basically forced to connect to electricity supplies illegally (Gower; Makhoba, 2003). This proved to be a stumbling block when it came to the number of arrests that were made, as there was no proof of usage of the electricity by the 'illegal consumers'. Criminal cases were opened in terms of Section 27 (2) of the Electricity Act. "In most cases, the defendants claimed that they were making use of battery or generators and due to the fact that we could not prove otherwise, these cases were withdrawn. In some cases, illegal wires were proven to be going into a house, but we could not prove that the user was actually consuming electricity so these cases were also thrown out of court (Gower; Makhoba, 2003, pg5).

3.2. International Cases

In a paper written in early 2004 during consultation on the Utilities Bill in the United Kingdom, specific loopholes in the efficient operating of the electricity utilities (similar to those of which the South African legislature currently face) with specific reference to electricity offences were discussed. It had been established that the importance of detection and prevention of energy theft should be addressed, together with areas such as tampering of meters, illegal connections, reconnections, meter defects, billing errors and meter connection. The legislation however was considered adequate in supporting the supplier. The pressing issue was that, "...strictly speaking, electricity cannot be stolen at all as it is not a

material substance” (Wallace, 2004, pg1). This is a problem which South Africa too faces. Illegal abstraction (gas and or electricity) is a criminal offence as described by the Theft Act. The distinction is that the legal framework in the Electricity Act of the United Kingdom is thorough in so far as successfully supporting the aforementioned electricity offences, and is maintained by a strict law enforcement group, whereas in South Africa, there is no such framework currently in place. (Wallace, 2004)

A World Bank Article titled ‘Controlling Electricity Theft and Improving Revenue’ illustrates a program initiated in Andhra Pradesh, with the intention of reforming the power sector, which over recent years has matured into a successful program which has seen significant and sustainable improvements. The cornerstones of the program were: enacting a new law to address electricity theft, strengthening enforcement mechanisms, reorganising the anticorruption function in the utilities, and reengineering business processes to improve management control and customer service. Monthly billing increased substantially, whilst collection rates for payment of services reached approximately 98%. Losses reduced by 12% and illegal or unaccounted for connections totalled 2.25 million. The number of cases reported and taken through for prosecution amounted to over 16 fold more than in the previous 10 years. (Bhatia; Gulati, 2004). From the above, there are significant recommendations which the South African judicial system can utilise. These are:

- Stringent judicial enforcement and litigation
- Electricity theft to be considered as theft & perpetrators be prosecuted for theft
- The right of duty and entry (and restriction thereof at certain times)
- Government support
- Adopting modern technologies
- Improving management information and control systems
- High quality metering
- Adjusting the incentives of managers and staff by punishing collusion and poor performance

4. PROPOSED DRAFT OF THE LEGISLATION

In analysing the disparity amongst current legislation, international benchmarks and what the utility industry’s model legislation proposes (from Eskom itself), the ideal legislation has been drafted. The implementation or amendment of new legislation is often a complicated and time consuming process as it involves a number of steps in terms of formulation, debate and various stages and levels of approval before successful implementation.

The draft is the catalyst for the entire process, so that momentum is gained in the implementation of such types of legislation. This draft of the ‘model legislation’ is in line with The Constitution and Common Law of the country.

DEFINITIONS

The following critical terms are included and defined in the draft (RES/RR/08/29741- ESKOM Report) for the actual words and definitions):

- electrical installation

- point of consumption
- point of control
- point of supply
- prepayment meters
- service connection
- service protective device
- supply main

OFFENCES AND PENALTIES

- 1) No person –
 - a) without legal right may abstract, branch off or divert or cause to be abstracted, branched off or diverted any electric current or attempt to do so or in any manner or for any reason whatsoever by-pass any metering equipment of any licensee or tamper or interfere with any meter, including a prepayment meter, or with any service connection or service protective device or supply mains or any other equipment, assets, or electricity infrastructure of any licensee;
 - b) other than a person whom a licensee specifically authorises in writing to do so, may directly or indirectly connect, attempt to connect or cause or permit the connection of an electrical installation or part of an installation to the supply mains or service connection;
 - c) other than a person whom a licensee specifically authorises in writing to do so may reconnect, attempt to reconnect or cause or permit the reconnection of the supply mains or service connection of an electrical installation that has been disconnected by a licensee;
 - d) may consume, use or distribute any electrical current which has been wrongfully or unlawfully abstracted, branched off or diverted, knowing it to be wrongfully or unlawfully abstracted, branched off or diverted.
- 2) Any person who contravenes any provision of subsection (1) is guilty of an offence and :
 - (i) on a first conviction of a contravention referred to in subsection 1(a) and (b), is liable to a fine not exceeding the amount of R10 000 or imprisonment for a period not exceeding 12 months or to both a fine and such imprisonment;
 - (ii) on a second or subsequent conviction of a contravention referred to in subsection 1(a) and (b), is liable to a fine not exceeding the amount of R20 000 or imprisonment for a period not exceeding 24 months or to both a fine and such imprisonment;
 - (iii) on a conviction of a contravention referred to in subsection 1(c), is liable to a fine not exceeding the amount of R20 000 or imprisonment for a period not exceeding 24 months or to both a fine and such imprisonment;
 - (iv) on a conviction of a contravention referred to in subsection 1(d), is liable to the penalties which may be imposed for theft.

CONSTITUTIONALITY OF OFFENCES

Section 2 of the Constitution of the Republic of South Africa provides that the Constitution is the supreme law of the Country and that any law inconsistent with it is invalid. The purpose of statutory interpretation is to test legislation against the values and principles imposed by the Constitution. In the interpretation of legislation the spirit, purport and objects of the Bill of Rights must be promoted. The

statutory offences created by the proposed provisions are capable of justification in terms of the Constitution on the basis that they relate to a legitimate government purpose to combat unlawful conduct and do not amount to an infringement of a fundamental right or freedom.

5. CONCLUSIONS

Each recommendation should not be considered in isolation, but rather as a part of a whole. However, the model draft is the stepping stone to the process which can minimise or eradicate the bottlenecks faced in the judicial system and its process, by actively addressing the setback of an unsuitable legislation. These recommendations also prove to be grounding in which further research or work must be done.

- The 'new and improved' legislation be IMPLEMENTED
- Create a public awareness of offences and the appropriate penalties
- Stricter enforcement of the legislation and regulations
- Greater involvement of utility legal teams, protective services and law enforcement agencies to further research and encourage information sharing
- Ensure adherence to defined value chain processes within utilities
- Incentive schemes to be implemented to encourage regions that are effectively combating non-technical losses and engaging in revenue recovery exercises
- Role of NERSA – NERSA should regulate the policies, procedures and could introduce targets for technical and non- technical losses

These recommendations, if implemented correctly, will assist the electricity utility industry in general by: decreasing the number of offences, improving prosecution rates for similar types of offences as well as creating consumer awareness of the implications of careless behaviour (which as a form of deterrent in the future), and greater empowerment of existing legislation in this domain.

The proposed draft legislation produced from the research aims to close this existing loophole in the legislation and arm the judiciary as well as the energy utilities with effective processes that can safeguard their infrastructure, services and safety of the general public as well as abiding by the Constitutional requirements of the nation.

In order for utilities to combat theft and strive to minimise their loss of revenue and improve service delivery, it is of paramount value that the legislation and the judiciary adequately provide support to their objectives and also need to be relevant, in promoting social harmony, public development and unity, and the effort to strengthen the country as a whole.

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