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Civil Liability of Eskom and Municipalities in Light (or lack thereof) of Load Shedding

By

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To Professor Birgit Kuschke: Thank you so much for all your support and understanding. It's been a long and often difficult road. I would definitely not have completed this LLM without your support and sense of humour.

To my parents, Gerben and Lee: I dedicate this dissertation to you. Without your sacrifices and motivation I would not have completed this dissertation. Thank you for all the support you gave me even when I felt so hopeless.

To my siblings: Thank you for your love and understanding. I know I haven't always been the most pleasant person to be around, especially during this whole process.

I declare that the dissertation, which I hereby submit for the degree LLM at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.

Summary

Should Eskom and municipalities be held liable for loss resulting from load shedding? In essence, this is the question this dissertation answers or at least sheds some light on.

This dissertation looks at the possibility of holding Eskom and municipalities delictually or contractually liable for loss resulting from load shedding. It does this by first discussing the delictual elements and thereafter determining whether these elements are present in the current circumstances in which Eskom and municipalities find themselves. It also looks at the relevant forms of breach of contract which may be present under the circumstances. It discusses their applicability to Eskom's Standard Conditions of Supply for Small Supplies with Conventional Metering. It also discusses the applicability of these forms of breach to the relevant electricity supply by-laws which, in essence, provide the terms and conditions relating to the agreement for the supply of electricity between municipalities and consumers. The nature of electricity supply contracts are discussed throughout the dissertation in brief. It is found that electricity in itself is a very unique thing where the supply and sale thereof cannot be separated. The dissertation also deals with some interesting legislation which has the effect of municipalities and Eskom having to prove that they were not negligent in causing loss to consumers.

Furthermore, the dissertation looks at related topics, briefly discussing class actions, pure economic loss, the "once and for all" rule, mitigation of loss, prescription, concurrent actions and possible infringement of constitutional rights. It considers the types of loss which might be claimed for as well as alternatives to instituting claims for damages.

In the end, the conclusion is reached that all claims must be assessed with due regard to the circumstances surrounding each claim. It also comes to the conclusion that, in general, Eskom can be held delictually and contractually liable for load shedding. The assessed contract contains provisions which are contrary to national legislation and thus inoperative. It is, however, doubtful if such liability would succeed since courts would in all probability deny such claims for fear of opening the flood gates. It might be harder and even impossible to hold municipalities delictually liable. However, municipalities might be contractually liable as it is clear that by-laws, which regulate the supply of electricity to the consumer by the municipality, are often inoperative since these are in conflict with national legislation.

This dissertation does not proclaim to provide all the answers relating to claims resulting from load shedding. It is, however, hoped that it will provide some insight into the considerations that need to be taken into account whilst raising some thought provoking questions.

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Chapter 1: Introduction

Oskar Schindler once said: 'Power is when you have every justification to kill someone, and then you don't.' Many consumers might have felt it was justified to kill someone while they were without power (in the form of electricity) as a result of load shedding. The electricity industry in South Africa has been dominated by Eskom for years. Dave Barry, an American journalist once said the following: 'We believe that electricity exists, because the electric company keeps sending us bills for it...' The problem is that in the near future consumers will be paying more and more for less and less to travel through the wires. The bills from the electricity company (Eskom) just keep on coming indirectly via taxes, and many people who pay these bills – in the form of taxes – don't even have access to electricity. But the electricity has to exist since we keep footing the bill.

On 25 January 2008 Eskom claimed a *force majeure* which forced mines to halt production.[1] It was quite interesting to see how Eskom was going to explain that this was in fact a *force majeure* event. At the time various reasons were given for the lack of electricity. The poor quality of coal was blamed along with problems in transporting coal to power stations. Besides that, a skills shortage in the industry was also blamed. Sudden and unforeseen economic growth was definitely the most outrageous excuse given.[2] Government subsequently admitted to being warned about a looming power crisis.[3]

Load shedding was instituted for fear of a national electricity blackout and it had far-reaching consequences.[4] Individuals and businesses suffered various types of damage as a result. Losses experienced were not only patrimonial in nature but various forms of non-patrimonial loss could also be attributed to load shedding.[5] One only needs to look to electricity's daily uses to see how many different types of loss could potentially be sustained. Anything from the milk farmer who has to throw away sour milk because there is no refrigeration, to a plastics manufacturer who has to shut down production, to water damage as a result of refrigerators defrosting, to restaurants having to turn customers away, are all possible

[1] Allan Seccombe (2008) Eskom backtracks on mine deal, February 01 2008 at 08:53, <http://www.fin24.com /articles/default/display_article.aspx?Nav=ns&ArticleID=1518-25_2262420> (accessed on 5 October 2010).
[2] Carte Blanche (2008) Eskom's Darkest Hour, 27 January 2008 at 19:00, <http://beta.mnet.co.za/carteblanche /Article.aspx?Id=3444&ShowId=1> (accessed on 23 November 2010); Jocelyn Newmarch (2008) Booming Economy Not to Blame, 01 February 2008 at 00:00, <http://www.mg.co.za/article/2008-02-01-booming-economy-not-to-blame> (accessed on 23 November 2010).
[3] AFP (2008) Mbeki takes Eskom blame, January 10 2008, <http://mybroadband.co.za/news/Telecoms/2582. html> (accessed on 08 October 2010).
[4] Eskom What is Load Shedding? < http://loadshedding.eskom.co.za/WhatsLoadshedding.do> (accessed on 23 November 2010).
[5] Johanna van Eeden (2008) Power cuts do make you nuts, January 19 2008, <http://www.witness.co.za/? showcontent&global[_id]=2562> (accessed on 08 October 2010); Stephen Bevan (2008) Power cuts disrupt surgery in South Africa, January 19 2008, <http://www.telegraph.co.uk/news/worldnews/1576012/Power-cuts-disrupt-surgery-in-South-Africa.html> (accessed on 08 October 2010).

patrimonial losses. Non-patrimonial loss can be sustained where medical equipment cannot operate, or where a motor accident occurs because a traffic light goes out. The list can go on and on. The question begs who needs to be accountable and held liable for this.

Electricity by its very nature is a unique thing. It cannot be separated from its supply and its quality can only be evaluated after it has been delivered and used. Electricity is simply the movement of electrons.[6] This is why the supply of electricity is so hard to separate from the electricity itself. One cannot have electricity in a bottle, as with water, and claim that the bottle contains electricity of a poor quality. Only when it has been used, can one say that it was substandard because of the manifestation of incorrect voltage or frequency. One is thus being forced to use what is provided. The agreements for the sale of electricity are unique. One can distinguish the supply, which can be described as constant or intermittent, from the electricity, which can be described according to its voltage etc. What is being affected by load shedding is not the actual quality of the electricity itself, but the supply thereof.

When looking back to early 2008 one thing that really stood out was the feeling of helplessness, anger and frustration people felt. Even though, officially, there has not been load shedding since 2008, we're not out of the woods yet. The anger and helplessness experienced during 2008 might now be a distant memory, but load shedding is expected to be implemented where drastic action is not taken soon and those familiar feelings might be waiting just around the corner to return. The various actions that could be taken to prevent load shedding from happening again include the purchasing of electricity from independent producers, and also the introduction of steps to reduce electricity consumption.[7]

So it seems that there are numerous culprits involved. One could blame various government officials who did not heed the warnings posed by Eskom. One could also blame Eskom and its top management at the time for not forcing the issue and making a big noise about it. One could even blame consumers for using electricity much too liberally. It is however trite knowledge that not everyone who can be blamed can be held liable in law. Uncertainty still exists as to who can be held liable and what can be claimed. This dissertation is written with

[6] What is Electricity? <http://www.eskom.co.za/content/ESKO000038WhatisElectricity.pdf> (accessed on 24 November 2010).
[7] Linley Donnelly (2010) Blackout alert, October 08 2010 at 08:14, <http://www.mg.co.za/article/2010-10-08-blackout-alert> (accessed on 08 October 2010).

the purpose to shed some light on the situation by looking specifically at the civil liability of Eskom and municipalities.[8]

[8] Statutory liability might also be present, and a host of other persons may be held liable. This would require a far more extensive study which would be beyond the scope of this LLM degree. Extensive investigation into civil liability for non-patrimonial loss as a result of load shedding may also be a very interesting topic yet is not dealt with in this study. The ramifications of load shedding from a purely constitutional perspective may also be a very interesting topic to investigate on its own.

Chapter 2: Background and Delineation of Scope

2.1 Background

In the late 1980's and early 1990's several power stations were decommissioned. Three of these power stations have either become operational again or are in the process of becoming operational again.[9] In the White Paper on the Energy Policy of the Republic of South Africa which was published in December of 1998, government was warned that the demand for electricity would outstrip supply by 2007.[10]

In 2001 Eskom was converted from a statutory body to a public company known as Eskom Holdings Ltd. This was done by means of the Eskom Conversion Act,[11] which came into operation on 1 July 2002. The two-tier governance structure, consisting of the Electricity Council and the Management Board, was replaced by a Board of Directors.[12] The Board of Directors is the body which is to account on behalf of Eskom.[13] The Government of the Republic of South Africa is the sole shareholder in Eskom Holdings Ltd with the Minister of Public Enterprises as the shareholder representative.[14]

Approximately 41,5% of electricity generated by Eskom is supplied to municipalities. A 6,1% portion of Eskom's electricity is sold in foreign markets, while the remaining 52,4% is supplied in varying amounts to rail, mining and industry, commerce and agriculture and a small number of residential users. What is quite impressive is that Eskom is one of the top ten electricity generators in the world, measured by capacity and by sales. It also generates 45% of Africa's electricity. [15]

Eskom is also a licensee of the National Energy Regulator which was established by the National Energy Regulator Act.[16] The National Energy Regulator is, amongst other things, responsible for the issuing of licenses for the generation, distribution, import or export of

[9] Seseko Njobeni (2010) Eskom will not be held hostage on coal prices, 25 October 2010, <http://allafrica.com/stories/201010250657.html> (accessed on 23 November 2010).
[10] White Paper on the Energy Policy of the Republic of South Africa <http://www.info.gov.za/whitepapers/1998/energywp98.htm> (accessed on 23 November 2010), which just proves that the excuse of unforeseen levels of economic growth cannot hold water since those levels were used in reaching 2007 as a date at which there would be an electricity shortage.
[11] Act 13 of 2001.
[12] Eskom <http://www.eskom.co.za/live/content.php?Category_ID=62> (accessed on 24 November 2010).
[13] This must be done in terms of the Public Finance Management Act 1 of 1999.
[14] Eskom <http://www.eskom.co.za/live/content.php?Category_ID=62> (accessed on 24 November 2010).
[15] Eskom 2010 Annual Report <http://www.eskom.co.za/annreport10/downloads/eskom_ar2010.pdf> (accessed on 24 November 2010).
[16] Act 40 of 2004.

electricity.[17] These functions are performed in terms of the Electricity Regulation Act. The National Energy Regulator is also responsible for the approval of tariffs.[18]

Eskom does not have exclusive power generation rights, yet it still has a practical monopoly as it generates 95% of South Africa's electricity.[19] In 2003, the Government of the Republic of South Africa approved private-sector electricity production. It was decided that future power generation would be divided between Eskom – to produce 70% of South Africa's electricity - and independent power producers – to produce 30% of South Africa's electricity.[20] Eskom now wishes to purchase from independent power producers electricity to remedy its lack of generating capacity.[21] Eskom also intends to create a new generating capacity. This is being paid for by the consumer in the form of increased electricity tariffs, by a loan obtained from the World Bank and also by a loan obtained from government.[22] Eskom is thus frantically trying to secure new generation capacity so that there isn't a repeat of what happened in 2008.

2.2 Delineation of Scope

- The study of Eskom's contractual liability is limited to the Standard Conditions of Supply for Small Supplies with Conventional Metering, and bespoke contracts will thus not be examined.
- Contracts are treated as supply agreements whereby a constant supply of a service or a good, such service or good being electricity, must be delivered. The supply has certain qualities in that it has to be rendered constantly, whereas the electricity also has certain qualities such as the voltage at which it is generated and delivered. This dissertation will only assess the supply of the electricity and not the quality of the electricity itself.
- The liability of Regional Electricity Distributors (or RED's) as envisioned in the restructuring of the electricity industry will not be assessed.[23]

[17] S 4 (a) (i) of the Electricity Regulation Act 4 of 2006.
[18] S 4 (a) (ii) of the Electricity Regulation Act.
[19] Eskom 2010 Annual Report <http://www.eskom.co.za/annreport10/downloads/eskom_ar2010.pdf> (accessed on 24 November 2010).
[20] Department of Minerals and Energy Electricity Overview <http://www.energy.gov.za/files/electricity_frame .html> (accessed on 24 November 2010).
[21] Linley Donnelly (2010) Blackout alert, October 08 2010 at 08:14, <http://www.mg.co.za/article/2010-10-08-blackout-alert> (accessed on 08 October 2010).
[22] Reuters (2010) Eskom secures funds to build plants, 23 November 2010 at 23:53, <http://www.timeslive.co.za/business/article780301.ece/Eskom-secures-funds-to-build-plants> (accessed on 24 November 2010); One can then very logically deduct that there are in fact people who do not even have access to electricity but are paying for it in the form of taxes such as VAT, since this is how government generated these funds.
[23] Department of Minerals and Energy Electricity Overview <http://www.energy.gov.za/files/electricity_ frame.html> (accessed on 24 November 2010) where reference is made to Regional Electricity Distributors.

- Initial impossibility of performance and supervening impossibility of performance with the absence of fault (where it does not qualify as prevention of performance but as an unforeseen circumstance or *force majeure*) will not be included in this study.
- Validity requirements for the conclusion of a contract will not be discussed, as this dissertation is written from the point of view that a valid contractual agreement is already in place.
- Non-patrimonial losses and damages will not be discussed. Only the possibilities of claims of a patrimonial nature will be examined.
- The implications under the Consumer Protection Act 68 of 2008, which at the time of writing the dissertation had not yet come into operation, will not be included in the discussion.
- Joint wrongdoers and contributory negligence, specifically of the consumer, will not be discussed.
- Inequality of bargaining positions during initial contractual negotiations and their effects on the eventual contractual relationship will not be examined.
- Lifting of the corporate veil, the liability of directors and shareholders of Eskom and the various possibilities of liability under the Companies Act 71 of 2008 and the Companies Act 61 of 1973 will not be included in this study.
- Eskom's transboundary liability towards consumers outside South Africa does not form part of this dissertation.
- Cancellation as a contractual remedy will not be discussed as restitution is impossible because of the nature of electricity and irrelevant, since the consumer only pays for what he uses. Furthermore, the consumer generally does not have an alternative when cancelling an agreement since Eskom has a practical monopoly.
- The *exceptio non adempleti contractus* is not helpful in this case since a consumer only pays for the electricity he uses. As such, it will be excluded from this discussion.
- Only the possibility of civil liability will be investigated. Statutory liability will not be examined and assessed.
- Any reference to Van der Merwe *et al*, Neethling *et al*, Visser and Potgieter, Van der Walt and Midgley and Christie is a reference to the textbook by these authors unless stated otherwise.

Although each chapter contains a brief conclusion, Chapters 6 and 7 provide final summaries and conclusions relating to Eskom and municipalities respectively.

Chapter 3: Relevant Aspects of General Delictual Liability

Contents:

3.1 Introduction

Five requirements have to be met before it can be said that a delict has been committed. Neethling and Potgieter provide the following definition of a delict: 'A delict is the act of a person that in a wrongful and culpable way causes harm to another.'[24] Van der Walt and Midgley defines delict as 'wrongful and blameworthy conduct which causes harm to a person.'[25] The word 'conduct' is preferable over 'act' as 'conduct' encompasses *omissio* as well as *commissio*.[26] Thus it can be said that the requirements for the commission of a delict are as follows:

- conduct;
- wrongfulness;
- fault;
- causation; and
- damage or loss.

It must just be mentioned that in no way does the order in which the different delictual elements are discussed in this study reflect the order in which it is thought they should be proven.[27] Once all these requirements have been met, a claim for patrimonial loss can be instituted by using the *actio legis Aquilia*.[28] In *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd*[29] it was stated that pure economic loss can also be claimed by using the *actio legis Aquilia*.[30]

Various questions arise which relate to the topic. Would it be load shedding or would it be Eskom's inability to supply power that qualifies as the conduct needed to found a claim in delict? How would one go about establishing wrongfulness when the circumstances giving rise to this situation are so extreme and absurd? Would one be able to establish negligence or intent? Is causation present? Might the damage be too remote?

[24] Neethling J and Potgieter JM, (2010) at 4.
[25] Van der Walt JC and Midgley JR, (2005) at par 2.
[26] In other words, omissions to act as well as positive conduct.
[27] For various discussions and opinions on the order in which delictual elements should be proven see Knobel, JC, (2008); Knobel, JC, (2005); Neethling, J, (2006) and Nugent, RW, (2006) for example; Van der Walt and Midgley starts with a discussion of harm for instance before moving on to wrongfulness, fault and causation. Neethling *et al*. starts off with conduct before moving on to wrongfulness, fault, causation and then damage.
[28] *Matthews and Others v Young* 1922 AD 492 at 504; *Kellerman v South African Transport Services* 1993 (4) SA 872 (C) at 877H – I, *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) at 395 H – I where wrongfulness in the case of an omission is also dealt with; *Telematrix (Pty) Ltd v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at 468A – C; cf *First National Bank of South Africa Ltd v Duvenhage* 2006 (5) SA 319 (W) at 320E – F and *Black v Joffe* 2007 (3) SA 171 (C) at 183A – B; see also Visser PJ and Potgieter JM, (2003) at 6; Neethling J and Potgieter JM, (2010) at 10; Van der Walt JC and Midgley JR, (2005) at par 36.
[29] 1982 (4) SA 371 (D).
[30] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) at 377D – E.

3.2 Conduct

Neethling *et al* state that the first requirement to prove the presence of a delict is that an act or conduct must be present.[31] This act or conduct is defined as 'a voluntary human act or omission'.[32] The conduct must thus be caused by a natural person. It must be voluntary, which merely means that the person, when performing the act or omission, must have 'the mental ability sufficiently to control his muscular movements.'[33]

The conduct may also further result from either a positive act, which is known as a *commissio,* or a negative act or failure to act, which is known as an *omissio*.[34] As Neethling and Potgieter states that 'liability for an omission is in general more restricted than liability for a positive act (a commission).'[35] Van der Walt and Midgley also holds this same opinion.[36] Various situations as well as the use of language to describe a situation may make it difficult in some instances to tell the difference between a *commissio* and an *omissio*.[37]

Natural persons act on behalf of juristic persons, as juristic persons must act through their organs.[38] As Neethling and Potgieter puts it:

> 'It is accepted that a juristic person (such as a company, university, public school, statutory body and so forth) may act through its organs (humans) and may thus be held delictually liable for such actions...An act performed by or at the order of or with the permission of a director, official or servant of a juristic person in the exercise of his duties or function in advancing or attempting to advance the interests of the juristic person, is deemed to have been performed by the juristic person.'[39]

Conduct, causation and damage are three elements that are invariably linked. This is because one has to determine which conduct caused the damage. Any conduct that did not cause the damage would be irrelevant for the purpose of establishing an action founded on delict. Eskom might have decommissioned certain power stations however, it is the load shedding that ultimately causes damage to the consumer. The act of load shedding would

[31] Neethling J and Potgieter JM, (2010) at 4.
[32] Neethling J and Potgieter JM, (2010) at 25; Van der Walt JC and Midgley JR, (2005) at par 58.
[33] Neethling J and Potgieter JM, (2010) at 26; Van der Walt JC and Midgley JR, (2005) at par 58; see also *S v Johnson* 1969 (1) SA 201 (A) at 204E – F and *S v Chretien* 1981 (1) SA 1097 (A) at 1104E – F both of which dealt with voluntariness under criminal law, such statements being equally applicable under delict.
[34] Neethling J and Potgieter JM, (2010) at 26 and 30; Van der Walt JC and Midgley JR, (2005) at par 58.
[35] Neethling J and Potgieter JM, (2010) at 30.
[36] Van der Walt JC and Midgley JR, (2005) at par 58.
[37] Van der Walt JC and Midgley JR, (2005) at par 58 where they state that an event where someone driving a car over a stop street may be described as a failure to stop (omission) or the driving of a vehicle over a stop street (commission); Neethling J and Potgieter JM, (2010) at 30.
[38] Neethling J and Potgieter JM, (2010) at 25; Van der Walt JC and Midgley JR, (2005) at par 58.
[39] Neethling J and Potgieter JM, (2010) at 25 – 26.

thus be the relevant conduct. Neglecting to generate enough electricity or to expand South Africa's electricity generating capacity might be a relevant omission on the part of Eskom.

3.3 Wrongfulness

When applying the criterion of wrongfulness, complications usually become apparent which lead to confusion. One merely has to note the extensive number of journal articles published on the relationship between wrongfulness and negligence in order to realise that this is indeed a very complex subject matter.[40] As it is possible to write a separate dissertation merely on wrongfulness and fault, this study will merely focus on the basic principles as outlined in Neethling *et al*[41] and Van der Walt and Midgley[42] within the context of liability of Eskom and municipalities. An in-depth discussion of the different opinions of authors on the relationship between the two elements cannot be included.

Conduct must be wrongful for delictual liability to arise. Absence of wrongfulness would have to effect that compensation cannot be claimable.[43] Wrongfulness means that the conduct must be legally reprehensible or unreasonable. Neethling *et al* states that the test for wrongfulness requires a dual investigation. It states that one must determine 'whether a legally recognisable interest has been infringed, that is, whether an individual interest has *in fact* been encroached upon.' The conduct 'must have caused a *harmful result*.'[44] Once it has been determined that a legal interest has been infringed upon, it must be determined whether such infringement has

> 'occurred in a *legally reprehensible or unreasonable* manner. *Violation of a legal norm* must, therefore, be present; a harmful consequence in itself is insufficient to constitute wrongfulness.'[45]

Van der Walt and Midgley states that '[c]onduct is wrongful if it either infringes a legally-recognized right of the plaintiff or constitutes the breach of a legal duty owed by the defendant to the plaintiff.'[46]

[40] See for instance Neethling J and Potgieter JM, (2004); Knobel, JC, (2005); Neethling, J, (2006); Nugent, RW, (2006); Neethling J and Potgieter JM, (2007); Knobel, JC, (2008); Neethling J and Potgieter JM, (2009); see also *Claassen v Minister of Justice and Constitutional Development and Another* [2010] 4 All SA 197 (WCC) at 203e – f and the cases stated there with regards to the relationship between negligence and wrongfulness.
[41] Neethling J and Potgieter JM, (2010).
[42] Van der Walt JC and Midgley JR, (2005).
[43] Neethling J and Potgieter JM, (2010) at 33 which states that '[a]n act which causes harm to another is in itself insufficient to give rise to delictual liability.'
[44] Neethling J and Potgieter JM, (2010) at 33.
[45] *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) at 387B – C; *Bester v Calitz* 1982 (3) SA 864 (O) at 878H – 879B; see also Neethling J and Potgieter JM, (2010) at 33.
[46] Van der Walt JC and Midgley JR, (2005) at par 60.

Van der Walt and Midgley further states the following which is important to note:

> 'Physical impact on a person or a person's corporeal property is *prima facie* wrongful. In the absence of a defence or any other factor, including social policy, the harm caused by such impact is actionable. On the other hand, causing pure economic loss is not in itself *prima facie* wrongful and, unless other relevant factors favour liability, a defendant will not be liable for the loss.'[47]

3.3.1 The *Boni Mores* Criterion

The basic test for wrongfulness 'is the *legal convictions of the community*: the *boni mores.*'[48] In the words of Van der Walt and Midgley:

> 'Wrongfulness is determined according to the general criterion of reasonableness, sometimes referred to as the criterion of objective reasonableness. Conduct is wrongful or unlawful if it is unreasonable...Courts also refer to concepts such as the *boni mores*, the prevailing conceptions in a particular community at a given time, or the legal convictions of the community. Each of these is merely a different expression of the general criterion of reasonableness.'[49]

Neethling *et al* sets out the test as follows:

> 'The basic question is whether, according to the legal convictions of the community and in light of all the circumstances of the case, the defendant infringed the interests of the plaintiff in a reasonable or unreasonable manner.'[50]

In applying the *boni mores* criterion, the interests of the different parties have to be weighed up.[51] The interest advanced by the infringement is weighed up against the interest actually infringed.[52] Thus, the interests of consumers who have suffered loss are weighed up against the interests of all consumers. Upon weighing up the interests, the question of whether the infringement was reasonable can be answered.[53] In effect the reasonableness criterion is mainly relevant in so far as it would determine whether the infringement of a right could be

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[47] *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) at 27D – F; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 441E - F; *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) at 528F – G; *Fourway Haulage v SA National Roads Agency* [2009] 1 All SA 525 (SCA) at 530e – g; *Haweka Youth Camp and Another v Byrne* [2010] 2 All SA 312 (SCA) at 321e; see also Neethling J and Potgieter JM, (2010) at 45; Van der Walt JC and Midgley JR, (2005) at par 60.

[48] *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) at 387B – C; *Steenkamp, NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at 139B – C; see also Neethling J and Potgieter JM, (2010) at 36.

[49] *Marais v Richard* 1981 (1) SA 1157 (A) at 1168; *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at 361G – 362B; *Carmichele v Minister of Safety and Security* 2001 (1) SA 489 (SCA) at 494B – G; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) at 395H – 396B; *Black v Joffe* 2007 (3) SA 171 (C) at 183F – G; see also Van der Walt JC and Midgley JR, (2005) at par 60.

[50] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty)* Ltd 1982 (4) SA 371 (D) at 380E; *Steenkamp, NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at 138F – 139C; see also Neethling J and Potgieter JM, (2010) at 36.

[51] Neethling J and Potgieter JM, (2010) at 37; Van der Walt JC and Midgley JR, (2005) at par 60.

[52] *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) at 387C; *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) at 384E; *Black v Joffe* 2007 (3) SA 171 (C) at 183F – G; see also Neethling J and Potgieter JM, (2010) at 37.

[53] Neethling J and Potgieter JM, (2010) at 37.

justifiable. Public and legal policy considerations are also taken into account when determining whether wrongfulness is present.[54] In *Schultz v Butt*[55] Nicholas AJA agreed with the argument that legal policy-makers, such as judges and legislators, shape the legal convictions of the community.[56] The community's idea of what is delictually wrong is taken into account by way of a judge's interpretation of those convictions.[57] Some members of the community might feel that Eskom and municipalities should be held delictually liable while others might not feel the need to hold these entities accountable. However, a judge has to interpret the legal convictions of the community and then decide whether the conduct was wrongful. The judge must, however, not promote his personal ideas of what is right and wrong in the interpretation of legal policy.[58]

Neethling *et al* states the following:

> 'Although the legal convictions or *boni mores* of a community constitute the basic norm for wrongfulness in our law, it is seldom necessary to make direct use of the general and comparatively vague test to determine wrongfulness.'[59]

Certain other indicators of wrongfulness also exist, such as whether there is an infringement of an interest.[60]

South Africa as a society has become so accustomed to the poor level of service in general that it would be interesting to see whether the *boni mores* would in fact classify load shedding as wrongful. With the anger and frustration a distant memory, would society still regard load shedding as legally reprehensible conduct? Perhaps South African consumers expect a higher level of service and a higher standard of care post-FIFA World Cup. If anything, the FIFA World Cup showed South African consumers what could be achieved in the realm of service. It remains to be seen and the courts would have to interpret the *boni mores* on behalf of South African consumers.

3.3.2 The Doctrine of Subjective Rights

The basic premise of the doctrine of subjective rights is that wrongfulness consists of the infringement of a subjective right.[61] This doctrine was accepted in the *locus classicus Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk*.[62]

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[54] Van der Walt JC and Midgley JR, (2005) at par 60.
[55] 1986 (3) SA 667 (A).
[56] *Schultz v Butt* 1986 (3) SA 667 (A) at 679D – E.
[57] *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) at 396C – D; see also Neethling J and Potgieter JM, (2010) at 41 – 43; Van der Walt JC and Midgley JR, (2005) at par 60.
[58] Neethling J and Potgieter JM, (2010) at 41 – 43.
[59] Neethling J and Potgieter JM, (2010) at 44.
[60] See Neethling J and Potgieter JM, (2010) at 44 – 46 for a discussion.
[61] *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) at 386H – 387C; see also Neethling J and Potgieter JM, (2010) at 50.

Van der Walt and Midgley states the following:

> 'In principle, the wrongful character of an act is constituted by the infringement of a subjective right in the case of wrongful infliction of patrimonial harm as well as in the case of wrongful injury to an aspect of personality.'[63]

A subjective right is a right a person has to something, such right being enforceable against anyone.[64]

There are two requirements to determine whether an infringement of a subjective right occurs. Firstly, the subject-object relationship of the holder of the right should have been impaired, in other words, the use and enjoyment of the holder's right should have been infringed. Secondly, the infringement should have taken place in a legally reprehensible manner. This is mainly done by employing the *boni mores* criterion. Once both these requirements have been met, it can be said that wrongfulness is present.[65]

An example of a relevant subjective right would be a farmer's subjective right in respect of his chickens. A farmer would also have a right to sell his chickens which affects his right to earning capacity. Some of the chicks might die if he does not have electricity, which causes loss.

3.3.3 Breach of Legal Duty

The presence of wrongfulness can also be determined by the presence of a breach of a legal duty.[66] Van der Walt and Midgley specifically states that '[t]he existence of the legal duty and its breach render the defendant's conduct wrongful.'[67] This is most notably helpful where no positive act was committed or where there has been no physical harm.[68] Neethling *et al* specifically states that in cases of pure economic loss and omissions, it would be more appropriate to determine whether there was a breach of a legal duty than it would be to

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[62] 1977 (4) SA 376 (T).
[63] Van der Walt JC and Midgley JR, (2005) at par 62.
[64] Neethling J and Potgieter JM, (2010) at 50; A discussion of the different types of subjective rights as well as the different relationships which exist can be found at Van der Walt JC and Midgley JR, (2005) at par 62 and Neethling J and Potgieter JM, (2010) at 51 – 53.
[65] Neethling J and Potgieter JM, (2010) at 53.
[66] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 596H; *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 833A; *Osborne Panama SA v Shell & BP SA Petroleum Refineries (Pty) Ltd* 1982 (4) SA 890 (A) at 901A; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) at 797F; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 769I; *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) at 317B – F; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 441F; see also Neethling J and Potgieter JM, (2010) at 54; Van der Walt JC and Midgley JR, (2005) at par 63.
[67] Van der Walt JC and Midgley JR, (2005) at par 63.
[68] *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) where an omission was dealt with; see also Neethling J and Potgieter JM, (2010) at 54 fn 115.

determine whether a subjective right had been infringed.[69] What is specifically asked is whether in light of the *boni mores*, 'the defendant had a legal duty to prevent harm, in other words whether the defendant could reasonably (according to the *boni mores*) have been expected to act positively.'[70] It thus has to be assessed, in relation to each consumer, if Eskom and municipalities have a legal duty to supply electricity to consumers. Municipalities might operate under a greater legal duty to supply electricity to consumers than Eskom, since the supply of electricity is what they are mandated to do in terms of legislation,[71] and in terms of the provisions of the Constitution of the Republic of South Africa, 1996.

3.3.4 Liability in cases of *Omissio*

The accepted view in the law of delict regarding omissions is that a person is generally not liable for another's harm where he failed to prevent it.[72] This is so because an omission will generally not be seen as wrongful for the purposes of delict.[73] An omission can only be classified as wrongful when 'a *legal duty* rested on the defendant to act positively to prevent harm from occurring and he failed to comply with that duty.'[74] Whether such a duty exists in any set of given facts is determined according to the legal convictions of the community and legal policy.[75] An objective test is applied in order to see whether an omission was contrary to the legal convictions of the community.[76] All relevant circumstances, even those that the defendant was not aware of, are taken into account.[77] Consumers might feel that it is

[69] Neethling J and Potgieter JM, (2010) at 54.
[70] *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) at 395H – J; see also Neethling J and Potgieter JM, (2010) at 54.
[71] See for example the Local Government: Municipal Systems Act 32 of 2000.
[72] *Swinburne v Newbee Investments (Pty) Ltd* [2010] 4 All SA 96 (KZD) at 101d; see also Neethling J and Potgieter JM, (2010) at 57.
[73] *BOE Bank v Ries* 2002 (2) SA 39 (SCA) at 46G; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 441E; *ABSA Bank Ltd v Fouche* 2003 (1) SA 176 (SCA) at 181A; *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) at 528F; *Haweka Youth Camp and Another v Byrne* [2010] 2 All SA 312 (SCA) at 321e; see also Neethling J and Potgieter JM, (2010) at 57; Van der Walt JC and Midgley JR, (2005) at par 65 where the authors state that an omission is *prima facie* lawful.
[74] *McCann v Goodall Group Operations (Pty) Ltd* 1995 (2) SA 718 (C) at 722F – 723A; *Moses v Minister of Safety and Security* 2000 (3) SA 106 (C) at 113G; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 441F; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) at 395H – 396C; *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) at 229E where *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) is quoted; *Local Transitional Council of Delmas v Boshoff* [2005] 4 All SA 175 (SCA) at 180h – 181b; *Minister of Water Affairs and Forestry v Durr* [2007] 1 All SA 337 (SCA) at 341a – c; *Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* [2007] 1 All SA 240 (SCA) at 244c – 245f; *Haweka Youth Camp and Another v Byrne* [2010] 2 All SA 312 (SCA) at 321e; *Swinburne v Newbee Investments (Pty) Ltd* [2010] 4 All SA 96 (KZD) at 101c; see also Neethling J and Potgieter JM, (2010) at 57; also see Van der Walt JC and Midgley JR, (2005) at par 65.
[75] *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) at 395H – 396D; *Minister of Safety and Security v Rudman and Another* [2004] 3 All SA 667 (SCA) at 682; see also Neethling J and Potgieter JM, (2010) at 57; Van der Walt JC and Midgley JR, (2005) at par 65.
[76] *Moses v Minister of Safety and Security* 2000 (3) SA 106 (C) at 113G – H; *Haweka Youth Camp and Another v Byrne* [2010] 2 All SA 312 (SCA) at 321e; *Swinburne v Newbee Investments (Pty) Ltd* [2010] 4 All SA 96 (KZD) at 101f – 102b; see also Neethling J and Potgieter JM, (2010) at 58.
[77] *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at 359I – 360H; *Faiga v Body Corporate of Dumbarton Oaks* 1997 (2) SA 651 (W) at 665H; *Mpongwana v Minister of Saftey and Security* 1999 (2) SA 794 (C) at 803H – 804C; *Carmichele v Minister of Safety and Security* 2001 (1) SA 489 (SCA) at 494C; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at444E – G; *Van Eeden v Minister of Safety and*

legally reprehensible to interrupt the supply of electricity to a person. Whether fair warning of interruption was given to consumers, might play a part in the general feeling amongst most consumers. If the damage could easily have been prevented by consumers, it could prove difficult to hold Eskom or a municipality liable.

Prior conduct that creates a harmful situation which is then subsequently not prevented, serves as a strong indication that the omission is *prima facie* wrongful. This is because the prior conduct acts as a good indicator that a legal duty to act exists.[78] Previously prior conduct was a requisite in order to hold a municipality liable for an omission, especially in cases where such liability was founded on the municipality's failure to maintain a road.[79] This is however not the case anymore.[80] In the present set of circumstances, omitting to expand, irrespective of fair warnings that demand will outstrip supply might be classified as wrongful. Decommissioning certain power plants might qualify as prior conduct and in turn might be a strong indicator of wrongfulness in omitting to generate sufficient electricity.

The law in itself can also place a duty on persons to act in certain ways thereby creating a legal duty to act in certain circumstances.[81] Van der Walt and Midgley notes the following:

> 'Whether a particular statute was intended to give a person a civil remedy is a question of interpretation... A breach of a statutory duty *per se* which causes harm to a person is not *prima facie* wrongful for delictual purposes. Wrongfulness lies in the infringement of a *prima facie* right and the conduct is wrongful, not because of the breach of the statutory duty *per se*, but because it is reasonable in the circumstances to compensate the plaintiff for the infringement of his or her legal right.'[82]

Although the law does not expressly place on Eskom a duty to supply electricity, the opinion is held that because of the fact that Eskom is wholly owned by government, has a practical monopoly and is in the business of supplying electricity, there is an inherent legal duty on Eskom to supply electricity.

Security 2003 (1) SA 389 (SCA) at 396G – 397B; *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA) at 32C – H; see also Neethling J and Potgieter JM, (2010) at 59; Van der Walt JC and Midgley JR, (2005) at par 65 where certain considerations which are taken into account are listed. It is clear from these considerations that such a test is an objective test.

[78] Neethling J and Potgieter JM, (2010) at 58; Van der Walt JC and Midgley JR, (2005) at par 65.

[79] *Halliwell v Johannesburg Municipal Council* 1912 AD 659 at 672 – 673 and it was also later applied in a string of cases that can be found in *Van der Merwe Burger v Munisipaliteit van Warrenton* 1987 (1) SA 899 (NC) at 904A – C where these cases were also discussed; see also Van der Walt JC and Midgley JR, (2005) at par 65.

[80] *Van der Merwe Burger v Munisipaliteit van Warrenton* 1987 (1) SA 899 (NC) at 908D where Steenkamp J states that in his view the *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) case brought an end to *omissio per commissionem* cases; *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) at 1059A – 1060D.

[81] Neethling J and Potgieter JM, (2010) at 65; Van der Walt JC and Midgley JR, (2005) at par 74.

[82] Van der Walt JC and Midgley JR, (2005) at par 74; also see Neethling J and Potgieter JM, (2010) at 76.

3.3.5 Pure Economic Loss

Pure economic loss is loss which manifests itself in one of three ways. It is loss which is not caused by the damage to property or a personality interest, or where the plaintiff's personality or property was not injured by the defendant, or it was not the plaintiff's personality or property that was injured but the plaintiff sustained loss. It is loss of a financial or economic nature and not of a physical nature.[83] This is relevant in the current set of circumstances because numerous consumers will suffer loss which is purely economic in nature. This type of loss will be most prevalent in industries which rely on electricity for the provision of services to customers. Van der Walt and Midgley describes it as 'loss unconnected or unassociated with physical lesion to a plaintiff's person or property'.[84] Here one might be dealing with instances where a consumer cannot do business because the area in which the business is located is being subjected to load shedding. Consumers might have a claim for the loss of profit, or for the salaries they had to pay employees who were subsequently unable to work.

In the case of pure economic loss, policy considerations have to be taken into account.[85] Neethling *et al* states that pure economic loss will most frequently spring from a legal duty that has been breached.[86] So the most logical way to establish whether there is wrongfulness in such cases is to establish whether there was in fact a legal duty to prevent this type of loss to others. Neethling *et al* states that the method used to determine whether there was a legal duty is once again the *boni mores*.[87] The important factors that the court takes into account are stated in Neethling *et al* as follows:

'(i) *Knowledge* – the fact that the defendant *knew or subjectively foresaw* that his negligent conduct would cause damage to the plaintiff...

(ii) *Reasonable foreseeability* – the fact that the defendant should have foreseen that negligent conduct on his part would harm the plaintiff...

(iii) *Practical measures* – whether practical steps could have been taken by the defendant to prevent the economic loss. In this regard, the *probable success* of such steps, the reasonableness of *expenses involved* in taking such steps in proportion to the damage the plaintiff suffered, and the *relative ease* with which the steps could have been taken, are also taken into account.

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[83] Neethling J and Potgieter JM, (2010) at 220; Visser PJ and Potgieter JM, (2003) at 58.
[84] Van der Walt JC and Midgley JR, (2005) at par 37.
[85] *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 474B; *Fourway Haulage v SA National Roads Agency* [2009] 1 All SA 525 (SCA) at 537e – f; *Stewart and Another v Botha and Others* [2009] 4 All SA 338 (SCA) at 491f – 492b.
[86] Neethling J and Potgieter JM, (2010) at 291.
[87] *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 877H – 878H; *Santam Bpk v Henery* 1999 (3) SA 421 (SCA) at 430D – F; see also Neethling J and Potgieter JM, (2010) at 292.

(iv) *Professional knowledge and competence* – the fact that the defendant exercises a certain calling and thereby possesses or professes to possess special skill, competence and knowledge...

(v) *Extent of risk* – the degree or extent of the risk of economic loss being suffered by the plaintiff...

(vi) *Extent of the loss* – the fact that the situation can lead to *indeterminate liability* or is "one fraught with overwhelming potential liability"...

(vii) *Statutory provision* – the fact that a statutory provision expressly or by implication prescribes that the defendant must prevent (economic) loss...

(viii) *Miscellaneous* – other factors which have also been taken into account by courts are, *inter alia*, that the plaintiff is unable to protect himself from the economic loss involved; that the defendant can protect himself against such loss eg by obtaining insurance cover, or, in a contractual "setting", by contractual provisions; the extent of the duty which would be placed on other persons who find themselves in the position of the defendant; an unacceptable additional burden that would be placed on the defendant, or that his activities would be restrained unfairly; and that the non-recognition of a legal duty will leave a serious lacuna in the law.'[88] [89]

A consumer will thus have to prove that there was a legal duty on Eskom or a municipality to supply it with electricity. The consumer will also have to prove that it suffered loss as a result of the breach of this legal duty.

3.3.6 Grounds of Justification

Grounds of justification are defences that exclude wrongfulness.[90] Only grounds of justification which are relevant for the purposes of this dissertation will be discussed.[91] The onus of proving the presence of a ground of justification rests on the defendant.[92]

[88] Neethling J and Potgieter JM, (2010) at 293 – 297; see also *Delphisure Group Insurance Brokers Cape v Dippenaar and Others* 2010 (5) SA 499 (SCA) at 508G – 509E where the court gave a list of factors to take into account so as not to create "boundless liability".
[89] A discussion on the applicability of each consideration in the current set of circumstances can be found at 6.1.5 Damage below.
[90] Neethling J and Potgieter JM, (2010) at 82; Van der Walt JC and Midgley JR, (2005) at par 85.
[91] For a more complete discussion on the grounds of justification see Neethling J and Potgieter JM, (2010) at 82 – 116 and Van der Walt JC and Midgley JR, (2005) at par 85 – par 102.
[92] *Mabaso v Felix* 1981 (3) SA 865 (A) at 871G – 874D; *Kgaleng v Minister of Safety and Security* 2001 (4) SA 854 (W) at 856G – I; see also Neethling J and Potgieter JM, (2010) at 83; Van der Walt JC and Midgley JR, (2005) at par 86.

3.3.6.1 Necessity

When a defendant acts in necessity the act becomes lawful.[93] The act of necessity can be described as follows:

> 'A state of necessity ("noodtoestand") exists when the defendant is placed in such a position by superior force (*vis maior*) that he is able to protect his interests (or those of someone else) only by reasonably violating the interests of an innocent third party.'[94]

The test to determine whether a situation of necessity existed is objective in nature, and should be determined by whether the state of necessity actually existed and not whether the defendant thought that a state of necessity existed.[95]

Neethling *et al* furthermore observes that there is uncertainty over whether a person

> 'may rely on a state of necessity which he himself has created. There is authority for both the view that a state of necessity created by the defendant excludes a plea of necessity, and for the view that a person may rely on necessity even though he has himself created the state of necessity.'[96]

If one considers that there might have been a legal duty on Eskom to pursue funding for the expansion of its generating capacity, it might be concluded that in the present set of circumstances Eskom has created its own state of necessity whereas municipalities have not. This view is supported by the argument that Eskom was a parastatal entity at the time that a future lack of generating capacity was raised as a problem. This would lead to the defence of necessity failing. It could also be argued that government had caused the state of necessity by denying Eskom the requested funds in which case such a defence would succeed. It would thus be interesting to see how courts deal with the defence of necessity, were it to be raised by Eskom. What is very important is that '[t]he state of necessity must be present or imminent. In other words, it must not have terminated, or be expected only in future.'[97] The different interests affected must once again be weighed up and the interest which is infringed upon must generally be worth less than the interest which is being advanced. In addition to this, the defendant must merely cause the amount or degree of harm necessary

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[93] Van der Walt JC and Midgley JR, (2005) at par 87.
[94] *Petersen v Minister of Safety and Security* [2010] 1 All SA 19 (SCA) at 23b – c where the court states that the defence of necessity need not be directed at the person infringing the interest; see also Neethling J and Potgieter JM, (2010) at 92; see also Van der Walt JC and Midgley JR, (2005) at par 87.
[95] *S v Adams; S v Werner* 1981 (1) SA 187 (A) at 220A – C; *Crown Chickens (Pty) Ltd v Rocklands Poultry v Rieck* 2007 (2) SA 118 (SCA) at 122C – D; see also Neethling J and Potgieter JM, (2010) at 95; Van der Walt JC and Midgley JR, (2005) at par 87.
[96] Neethling J and Potgieter JM, (2010) at 94; see also Van der Walt JC and Midgley JR, (2005) at par 87; *S v Kibi* 1978 (4) SA 173 (E) at 178H – 179H and *S v Bradbury* 1967 (1) SA 387 (A) where the situation of necessity was self-created and subsequently the defence failed; *R v Mahomed* 1938 AD 30 and *S v Pretorius* 1975 (2) SA 85 (SWA) at 90A – F where even though the situation of necessity was self-created, the defence was allowed.
[97] Neethling J and Potgieter JM, (2010) at 95; Van der Walt JC and Midgley JR, (2005) at par 87; *Crown Chickens (Pty) Ltd v Rocklands Poultry v Rieck* 2007 (2) SA 118 (SCA) at 123B – D.

to protect the interest.[98] The harm caused must thus not be excessive. Finally, Neethling *et al* states that '[t]he act of necessity must be the only reasonably possible means of escaping the danger'.[99]

It might be argued that Eskom and municipalities found themselves in a state of necessity. After all, had they not implemented load shedding, the whole country might have suffered black-outs all at once. The question begs whether experts could propose alternative measures which would have had less damaging consequences.

3.4 Fault

As mentioned earlier,[100] it is possible to write extensively on wrongfulness and fault and their relationship with one another and with the other elements of a delict. This discussion will not delve in greater detail into that area of the law of delict (although one is tempted to do so). This discussion will purely focus on the basic principles of fault.

Fault can take two forms, namely intent or negligence. As an element of delict, fault refers to the reprehensible state of mind of the defendant. Both Neethling *et al* and Van der Walt and Midgley describe fault as the subjective element in delict.[101] Van der Walt and Midgley then goes on to state that two factors are taken into account when assessing fault. These are 'the defendant's state of mind or mental disposition and the degree of care exercised at the time of the wrongful conduct.'[102]

When looking at Eskom's or municipalities' state of mind, one would probably have to look at the decisions taken by management in the organisational structures. One would thus have to investigate the rationale behind decisions made by those who determine the direction of Eskom or the municipality in question.

3.4.1 Intent

Neethling *et al* defines intent as follows: 'An *accountable* person acts intentionally if his will is directed at a result which he causes while conscious of the wrongfulness of his conduct.'[103] However,

[98] Neethling J and Potgieter JM, (2010) at 96; Van der Walt JC and Midgley JR, (2005) at par 87; *Crown Chickens (Pty) Ltd v Rocklands Poultry v Rieck* 2007 (2) SA 118 (SCA) at 123D – F.
[99] Neethling J and Potgieter JM, (2010) at 98; *S v Bradbury* 1967 (1) SA 387 (A).
[100] See 3.3 Wrongfulness.
[101] Neethling J and Potgieter JM, (2010) at 123; Van der Walt JC and Midgley JR, (2005) at par 103.
[102] Van der Walt JC and Midgley JR, (2005) at par 103.
[103] Neethling J and Potgieter JM, (2010) at 104; see also Van der Walt JC and Midgley JR, (2005) at par 105 which also uses a very similar definition for intent; *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 (1) SA 390 (A) at 396D; *Minister for Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA) at 64c – e.

in *Le Roux and Others v Dey*[104] it was decided that consciousness of wrongfulness was not required for the presence of intent.[105] Regarding intent by Eskom, one would have to focus on the intent to load shed and not on the intent to cause damage. Three distinct forms of intent can be identified.[106]

Dolus directus is also known as direct intent. It is present in the event where the defendant wanted the particular result to flow from his conduct.[107]

Dolus indirectus is also known as indirect intent.[108] This occurs where the defendant directs his will at one consequence while aware that another consequence will also inevitably flow from his conduct. The person will then have *dolus indirectus* with regard to the second consequence mentioned and *dolus directus* with regard to the primary objective of his conduct.

The third form of intent is known as *dolus eventualis*.[109] Van der Walt and Midgley defines *dolus eventualis* as follows:

> 'Where one acts with the intention of attaining a particular object, and at the same time subjectively realises or appreciates that another consequence may possibly result from one's conduct, and one reconciles oneself to this possibility, one's intent in relation to the possible consequence takes the form of *dolus eventualis*. It is not enough that one should reasonably have foreseen the possibility of other consequences ensuing; one must actually and subjectively have foreseen this possibility.'[110]

While it is certain that direct intent will be present in the current circumstances, it is doubtful that indirect intent and *dolus eventualis* will be present. Eskom or municipalities might have the direct intent to load shed in that their only intention is to load shed. They might also have indirect intent with regard to load shedding where they have the direct intent to prevent failure of the electrical grid. This is however doubtful since it is thought that preventing failure of the electrical grid points to a reason for load shedding rather than an act. It will

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[104] 2010 (4) SA 210.
[105] *Le Roux and Others v Dey* 2010 (4) SA 210 (SCA) at 219H – 221G.
[106] *SA Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) at 402H and 409C and G where *dolus directus* and *dolus eventualis* were relevant; see also Neethling J and Potgieter JM, (2010) at 127; Van der Walt JC and Midgley JR, (2005) at par 105.
[107] Neethling J and Potgieter JM, (2010) at 127; Van der Walt JC and Midgley JR, (2005) at par 105.
[108] *Nasionale Pers Bepk v Long* 1930 AD 87 where the defendant had also defamed others in defaming the person who he had the direct intention of defaming; *Maisel v Van Naeren* 1960 (4) SA 836 (C) at 840F; see also Neethling J and Potgieter JM, (2010) at 127; Van der Walt JC and Midgley JR, (2005) at par 105.
[109] Neethling J and Potgieter JM, (2010) at 127; Van der Walt JC and Midgley JR, (2005) at par 105.
[110] Van der Walt JC and Midgley JR, (2005) at par 105; see also Neethling J and Potgieter JM, (2010) at 127 – 128; *Nasionale Pers Bepk v Long* 1930 AD 87 at 100; *S v Sigwahla* 1967 (4) SA 566 (A) at 570A – E; *S v Ngubane* 1985 (3) SA 677 (A) at 685A – I; *Frankel Pollak Vinderine Inc v Stanton* 2000 (1) SA 425 (W) at 839D – H; *Rudolph v Minister of Safety and Security* 2009 (5) SA 94 (SCA) at 100E – G.

also not be necessary to prove that Eskom and Municipalities were aware of the wrongfulness of the act of load shedding in order to prove intent.

3.4.2 Negligence

A person's conduct is found to be negligent when he does not observe the reasonable standard of care the law imposes.[111] The test for negligence is the standard of care and skill taken by the reasonable person and it is also known as the *diligens paterfamilias* test.[112]

Holmes JA's much cited statement in *Kruger v Coetzee*[113] explains the test succinctly. The test is formulated as follows:

> 'For the purposes of liability *culpa* arises if –
>
> (a) a *diligens paterfamilias* in the position of the defendant –
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> (b) the defendant failed to take such steps.'[114]

Van der Walt and Midgley states that the word "property" as used in this test should be taken to include property of a purely economic sense and consequently, pure economic loss should not be excluded.[115] This is important in the context of the liability of Eskom and municipalities as discussed in 3.3.5 below.

The reasonable person may be described as follows:

> '[T]he reasonable person is not an exceptionally gifted, careful or developed person; neither is he underdeveloped, nor someone who recklessly takes chances or who has no prudence. The qualities of the reasonable person are found between these two extremes. It must be emphasised that the reasonable person serves as the *legal personification* of those qualities which the community expects from its members in their daily contact with one another.'[116]

A higher degree of skill would be expected from someone with expertise in a certain field.[117] For example, if the negligence of a municipal manager or engineer were to be assessed, the

[111] Neethling J and Potgieter JM, (2010) at 131; Van der Walt JC and Midgley JR, (2005) at par 116.
[112] This test was laid down in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E – G and later again in *Minister of Safety and Security v Rudman and Another* [2004] 3 All SA 667 (SCA) at 686b – d; *Local Transitional Council of Delmas v Boshoff* [2005] 4 All SA 175 (SCA) at 181e – g; *Flanders v Trans Zambezi Express (Pty) Ltd* 2009 (4) SA 192 (SCA) at 197F; *Haweka Youth Camp and Another v Byrne* [2010] 2 All SA 312 (SCA) at 321g – i; *Skead and Others v Melco Elevator (South Africa) (Pty) Ltd and Another* [2010] 3 All SA 445 (GSJ) at 457f – i; *Swinburne v Newbee Investments (Pty) Ltd* [2010] 4 All SA 96 (KZD) at 103d – e.
[113] 1966 (2) SA 428 (A).
[114] *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E – F.
[115] Van der Walt JC and Midgley JR, (2005) at par 119.
[116] Neethling J and Potgieter JM, (2010) at 135; see also Van der Walt JC and Midgley JR, (2005) at par 121; *Transvaal and Rhodesian Estates Ltd v Golding* 1917 AD 18 at 30; *Herschel v Mrupe* 1954 (3) SA 464 (A) at 490E – F; *McMurray v H L & H (Pty) Ltd* 2000 (4) SA 887 (N) at 903E – 904H.
[117] Neethling J and Potgieter JM, (2010) at 139, especially fn 110 where various examples of cases in which expertise was a factor are mentioned; Van der Walt JC and Midgley JR, (2005) at par 116 and also see par 125.

reasonable person they would be compared to would be the reasonable municipal manager or engineer. In the current context, one might look at the behaviour of the reasonable electricity supplier or municipality.

There are two approaches with regard to foreseeability when looking at the foreseeability leg of the negligence test. Firstly, the abstract approach takes the view that harm has to be generally foreseeable.[118] It is thus irrelevant what form the particular harm in question took and to what extent it occurred. The reasonable person should just have foreseen harm in general. Neethling *et al* states that this view is generally not applied by the courts and enjoys little support amongst academics.[119]

The second approach takes a more limited view. In terms of the concrete approach, negligence may only be described in relation to specific consequences.[120] Thus, a specific harm needs to be foreseeable before a person can be held to be negligent. In effect the question that needs to be asked is whether these types of harm or these general consequences are reasonably expected to flow from this type of conduct. This is also the approach that the authors of Neethling *et al* prefer and is also endorsed.[121]

The preventability leg of the test determines whether the reasonable person would have prevented the harm. Van der Walt and Midgley lists four things that are taken into consideration when looking at whether the reasonable person would have prevented harm.[122] These considerations are:

- '[T]he degree or extent of the risk created by the actor's conduct';
- '[T]he gravity of the possible consequences if the risk of harm materialises';
- '[T]he utility of the actor's conduct'; and
- '[T]he burden of eliminating the risk of harm.'

Once one has ascertained whether the reasonable person would have foreseen the harm and taken steps to prevent it, one can look at the last part of the test for negligence

[118] *Botes v Van Deventer* 1966 (3) SA 182 (A) at 191A – F; see also Neethling J and Potgieter JM, (2010) at 141.
[119] Neethling J and Potgieter JM, (2010) at 142.
[120] *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) at 1077E – G; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA) at 840A – G, 841E – F and 843A – B; *Van der Spuy v Minister of Correctional Services* 2004 (2) SA 463 (SE) at 472E – 473B; *Haweka Youth Camp and Another v Byrne* [2010] 2 All SA 312 (SCA) at 322f – h; see also Neethling J and Potgieter JM, (2010) at 142.
[121] Neethling J and Potgieter JM, (2010) at 142.
[122] *Herschel v Mrupe* 1954 (3) SA 464 (A) at 477A – D; *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) at 766H – 767B; *Minister of Safety and Security v Mohofe* 2007 (4) SA 214 (SCA) at 220D – H; *McIntosh v Premier, KwaZulu-Natal* 2008 (6) SA 1 (SCA) at 9E – H; see also Van der Walt JC and Midgley JR, (2005) at par 122.

according to *Kruger v Coetzee*[123]. This is whether the defendant failed to take the reasonable steps to prevent the foreseen harm. The defendant could, in other words, have taken the steps and failed. It is not whether he failed to prevent damage which is the last requirement but whether he failed to take the reasonable steps to prevent the damage. Eskom might not have been able to prevent harm as a result of government refusing to fund the expansion of Eskom's generating capacity. This view can, however, not be supported in light of recent events. It seems as though funding has suddenly appeared out of thin air. Eskom is currently expanding its generating capacity with fervour. It is thus believed that Eskom might be negligent with regard to its failure to provide sufficient generating capacity. It is however not believed that municipalities are negligent.

Van der Walt and Midgley states that the negligence test is not to be applied strictly and should be viewed as a guide.[124] Where someone is negligent, such negligence is not actionable unless wrongfulness and all the other elements of a delict are present.[125] Negligence on its own is thus not enough to hold a defendant delictually liable.

Negligence is probably the form of fault most relevant to the current discussion. It is not an easy thing to prove and one would have to be careful not to apply these tests with the clarity of hindsight. An extensive discussion of the laws regulating negligence in the current set of circumstances can be found at 6.1.3.2 Negligence and 6.2 Contractual Liability below.

3.5 Causation

Causation is the element of delict which serves the purpose of showing that the damage was caused by the conduct in question.[126] The causation element has two legs. Factual causation assesses whether, on a purely factual level, the harm was caused by the conduct.[127] Legal causation seeks to limit the liability by assessing whether the harm was linked sufficiently close to the conduct.[128] Brand JA described causation very clearly in *mCubed International (Pty) Ltd v Singer and Others NNO*[129]. He said:

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[123] 1966 (2) SA 428 (A).
[124] Van der Walt JC and Midgley JR, (2005) at par 117.
[125] *Gouda Boerdery BK v Transnet Ltd* [2004] 4 All SA 500 (SCA) at 506h; *Local Transitional Council of Delmas v Boshoff* [2005] 4 All SA 175 (SCA) at 180h.
[126] *First National Bank of South Africa Ltd v Duvenhage* 2006 (5) SA 319 (SCA) at 320F; *mCubed International (Pty) Ltd v Singer and Others NNO* 2009 (4) SA 471 (SCA) at 479E – 482G where Brand JA discusses causation in general; see also Neethling J and Potgieter JM, (2010) at 175; Van der Walt JC and Midgley JR, (2005) at par 128.
[127] *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34E – 35D; see also Neethling J and Potgieter JM, (2010) at 175; Van der Walt JC and Midgley JR, (2005) at par 129.
[128] *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34F – 35D; see also Neethling J and Potgieter JM, (2010) at 175; Van der Walt JC and Midgley JR, (2005) at par 129.
[129] 2009 (4) SA 471 (SCA).

> 'With regard to the element of causation, it has now become well established in the law of delict, that it involves two distinct enquiries. First there is the enquiry into factual causation which is generally conducted by applying what has been described as the 'but for' test. Lack of factual causation is the end of the matter. No legal liability can follow. But, if factual causation has been established, the second enquiry arises, namely, whether the wrongful act is linked sufficiently closely or directly to the loss concerned for legal liability to ensue. This issue is referred to by some as 'remoteness of damage' and by others as 'legal causation'.'[130]

As a result of the sheer number of different plaintiffs and types of claims that might be present in this set of facts, creating a cookie cutter rule for the establishment of causation is impossible. One would have to establish causation in each case. In some cases it might be more difficult than others.

One would easily be able to prove that a lack of generating capacity led to load shedding being implemented. Every case would have to be assessed individually in proving that load shedding caused the damage in question. This is important in the context of possible class actions since one would just have to look at the causal link between load shedding and the type of damage suffered to establish whether plaintiffs can be placed in the same groups.

3.5.1 Factual Causation

Neethling *et al* provides a very good definition of factual causation, namely that: '[f]actual causation concerns a particular kind of link or connection between at least two facts or sets of facts, ie the link existing when, stated succinctly, one fact arises out of another.'[131]

3.5.1.1 *Conditio sine qua non* test

The *conditio sine qua non* test (or "but-for" test as it is also known)[132] is applied to determine the presence of a factually causal link between the conduct and the damage caused. Neethling *et al* states that the *conditio sine qua non* method is merely a way of describing the causal nexus and that in practice factual causation is determined by looking at whether one fact logically flows from another.[133] It is conceded that it is not so much a test as a statement of fact. Nonetheless it is a convenient way of expressing and showing the causal connection between the conduct and the damage. In terms of this test, it is asked whether

[130] *mCubed International (Pty) Ltd v Singer and Others NNO* 2009 (4) SA 471 (SCA) at 479E – F.
[131] Neethling J and Potgieter JM, (2010) at 185.
[132] Neethling J and Potgieter JM, (2010) at 178.
[133] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E – 701A; *Harrington NO v Transnet Ltd t/a Metrorail* [2007] 2 All SA 386 (C) at 399i – 400c; *Minister of Safety and Security and Others v W H* 2009 (4) SA 213 (E) at 220C – E and 221A; see also Neethling J and Potgieter JM, (2010) at 177 and 186; Van der Walt JC and Midgley JR, (2005) at par 130.

the same result would have occurred had the conduct not taken place.[134] It is thus a hypothetical elimination of the damage-causing conduct. Where the harmful result would still have occurred, it is usually a good indication that the conduct was not the cause of the harmful result. However, if the result is also eliminated, one can assume that the conduct was the cause of the harmful result.

Whereas one has to hypothetically remove conduct in cases of commissions, one has to hypothetically insert conduct in cases of omissions.[135] If the harmful consequence is eliminated by the hypothetical insertion of conduct, then the omission was probably the cause of the harmful consequence. The *conditio sine qua non* theory is not without criticism but this will not be discussed in this dissertation.[136]

However, this test does become complicated in cases where concurrent acts or omissions have contributed to the same damage.[137] The *conditio sine qua non test* will not function in cases where two or more facts cause the same harm. Van der Walt and Midgley states that in such cases 'a common-sense approach is more appropriate.'[138] Eskom's omission to generate enough electricity, the act of load shedding and municipalities' omission of supplying constant electricity to consumers might qualify as three concurrent acts which illustrate this point and which could pose a problem for the defendant(s).

3.5.2 Legal Causation

The function of legal causation is to limit endless liability factually caused by the conduct. Neethling *et al* states that

> '[t]he question of legal causation arises when determining which harmful consequences actually caused by the wrongdoer's wrongful, culpable act he should be held liable for; in other words, which consequences should be imputed to him. It is sometimes stated in general terms that the wrongdoer is not liable for harm which is "too remote" from the

[134] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700F – H; *First National Bank of South Africa Ltd v Duvenhage* 2006 (5) SA 319 (SCA) at 324I – 325B; see also Neethling J and Potgieter JM, (2010) at 178 – 179; Van der Walt JC and Midgley JR, (2005) at par 130.
[135] *S v Van As* 1967 (4) SA 594 (A); *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 915B – G; *Moses v Minister of Safety and Security* 2000 (3) SA 106 (C) at 117F – 118A; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 449A – F; *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA) at 239H – 240C; *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA) at 531I – 532C; *Minister of Finance v Gore* 2007 (1) SA 111 (SCA) at 125A – C; *Skead and Others v Melco Elevator (South Africa) (Pty) Ltd and Another* [2010] 3 All SA 445 (GSJ) at 456e; see also Neethling J and Potgieter JM, (2010) at 179; Van der Walt JC and Midgley JR, (2005) at par 130.
[136] However, see Neethling J and Potgieter JM, (2010) at 180 – 184 for a discussion on various criticisms levelled against the theory.
[137] *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 914H – 915A; *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) at 1077I – J; see also Van der Walt JC and Midgley JR, (2005) at par 130 where the authors state that the *conditio sine qua non* test has been accepted by the courts as the general test to be used in determining whether there was factual causation present, especially in uncomplicated cases where concurrent or supervening causes are absent.
[138] Van der Walt JC and Midgley JR, (2005) at par 131.

> conduct; hence the term "remoteness of damage" for legal causation or the problem of imputability of harm.'[139]

Van der Walt and Midgley states it concisely that the purpose of legal causation 'is to fix the outer limit of liability by determining whether or not a factual link between conduct and consequence should be recognised in law.'[140] The court takes into account policy considerations in order to determine whether or not the damage might be too remote in light of the conduct.[141] In *Standard Chartered Bank of Canada v Nedperm Bank Ltd*[142] the court stated that the test for legal causation is a flexible test where concepts 'such as reasonable foreseeability, directness, the absence of presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part.'[143] Legal causation might be the Achilles heel in claims against Eskom or municipalities. This is the element where courts can deny a claim for fear of "opening the floodgates". No company is too big to fail. Thousands of legal claims can have a devastating effect on a company. This will probably be the focal point in any future litigation.

It is not thought that a *novus actus interveniens* could be present in the circumstances relevant to this dissertation, however; one should note that a new unforeseen act would break the chain of causation.[144]

Another occurrence that one should take note of is the *talem qualem* rule. A plaintiff, because of a psychological, physical or financial weakness, might suffer more damage than he would have suffered if he had not been the victim of such weakness. It is a well known principle that "you should take your victim as you find him". This is relevant in cases where a consumer might not be insured, is already in a financially precarious position or where a business is already struggling. Potential cases will be as numerous as the different consumers who would want to institute claims. Whether the harm would be imputed to the wrongdoer is considered in the same way as legal causation. This is done by applying an elastic criterion and taking into account policy considerations based on considerations of fairness, reasonableness and justice.[145]

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[139] Neethling J and Potgieter JM, (2010) at 188; see also *Tuck v Commissioner for Inland Revenue* 1988 (3) SA 819 (A) at 832H – 833B; *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E – G; *Fourway Haulage v SA National Roads Agency* [2009] 1 All SA 525 (SCA) at 537a – f.
[140] Van der Walt JC and Midgley JR, (2005) at par 132; see also *Smit v Abrahams* 1992 (3) SA 158 (C) at 162E – 163A.
[141] *S v Mokgheti* 1990 (1) SA 32 (A) at 40G – 41A; *Fourway Haulage v SA National Roads Agency* [2009] 1 All SA 525 (SCA) at 537a – f; Neethling J and Potgieter JM, (2010) at 191; Van der Walt JC and Midgley JR, (2005) at par 132.
[142] 1994 (4) SA 747 (A).
[143] *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 765A.
[144] General discussions can be found in Neethling J and Potgieter JM, (2010) at 206 – 208 and in Van der Walt JC and Midgley JR, (2005) at par 135.
[145] Neethling J and Potgieter JM, (2010) at 208- 210 and Van der Walt JC and Midgley JR, (2005) at par 136 where more in depth discussions on the *talem qualem* rule are available; see also *Masiba v Constantia Insurance Co Ltd* 1982 (4) SA 333 (C); *Smit v Abrahams* 1992 (3) SA 158 (C) at 171A – 172B.

3.6 Damage

The concepts of 'damage' and 'damages' are often confused with one another. Whereas damage refers to the reduction in a person's patrimony or personality interest,[146] damages refers to a remedy with which such a reduction is compensated for.[147] Only patrimonial damage will be discussed for the purpose of this dissertation. Patrimonial loss may be described as:

> 'the detrimental impact on any patrimonial interest deemed worthy of protection by the law. Patrimonial loss may also be seen as the loss or reduction in value of a positive asset in someone's patrimony or the creation or increase of a negative element of such patrimony (a patrimonial debt).'[148]

Patrimonial loss may not only include losses which have already been suffered, but also losses which have yet to be suffered.[149] Furthermore, it also includes pure economic loss which is highly relevant since large numbers of consumers might experience this type of loss. Neethling *et al* further states that a person's patrimony consists of 'all his patrimonial rights (namely subjective rights with a monetary value), his expectations to acquire patrimonial rights and all legally enforceable obligations (or expectations) with a monetary value.'[150]

When determining whether damage is present, a comparative method is unavoidable.[151] One would either have to compare the present patrimonial position to the position prior to the damage-causing event[152] or one would have to compare the present position to the hypothetical future patrimonial position. The latter is the method used in the sum-formula approach to determine the presence of damage.[153] Still, it would be ludicrous not to apply a method of comparison where the current position is compared to the position prior to the

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[146] Neethling J and Potgieter JM, (2010) at 212 where the authors state that '[d]amage is the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law.'; Van der Walt JC and Midgley JR, (2005) at par 36 where the authors refer to this element as harm, which might go some way to curb confusion.
[147] Neethling J and Potgieter JM, (2010) at 211.
[148] Neethling J and Potgieter JM, (2010) at 218; see also Van der Walt JC and Midgley JR, (2005) at par 37; Visser PJ and Potgieter JM, (2003) at 45.
[149] Neethling J and Potgieter JM, (2010) at 220; Van der Walt JC and Midgley JR, (2005) at par 37; Visser PJ and Potgieter JM, (2003) at 58.
[150] Neethling J and Potgieter JM, (2010) at 219, see also Van der Walt JC and Midgley JR, (2005) at par 37; Visser PJ and Potgieter JM, (2003) at 46 – 55 and *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 665 where patrimony was described as the *universitas* of a person's rights and duties.
[151] Neethling J and Potgieter JM, (2010) at 221; Visser PJ and Potgieter JM, (2003) at 64.
[152] *Santam Versekeringsmaatsakkpy Bpk v Byleveldt* 1973 (2) SA 146 (A) at 150; *Kantey & Templer (Pty) Ltd v Van Zyl NO* 2007 (1) SA 610 (C) at 625; see also Van der Walt JC and Midgley JR, (2005) at par 37; Visser PJ and Potgieter JM, (2003) at 64 where Reinecke's position with regards to what should be compared is mentioned.
[153] *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 665; *Oslo Land Co Ltd v The Union Government* 1938 AD 584 at 590; *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) at 8D – 9D; *De Vos v SA Eagle Versekeringsmaatskappy Bpk* 1985 (3) SA 429 (A) at 451I – 452E; *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) at 240G – 241H; see also Neethling J and Potgieter JM, (2010) at 221; Van der Walt JC and Midgley JR, (2005) at par 37; Visser PJ and Potgieter JM, (2003) at 20.

damage-causing event in cases where all the damage has manifested itself. However, this becomes impossible in cases where some damage is yet to manifest itself. Here, a comparison with the hypothetical patrimonial position the plaintiff would have occupied, becomes unavoidable.

The sum-formula approach is the generally accepted method of assessing the presence of loss,[154] [155] and is described as follows:

> 'According to the sum-formula doctrine damage consists of the negative difference between the relevant person's current patrimonial position (after the event complained of) and his hypothetical patrimonial position that would have been the current position if the event had not taken place. It therefore entails a comparison of an actual current patrimonial *sum* with a hypothetical current patrimonial *sum* – and hence the name: sum formula doctrine.'[156]

In the current set of circumstances, the damage-causing event might be the power switching off regardless of whether it was as a result of load shedding or whether it was as a result of lack of generating capacity. It is interesting to note that the damage-causing event is not necessarily the same as the conduct. The patrimonial value of a consumer's *universitas* is calculated and it is then determined whether there was a decrease in value, denoting damage. What one is likely to find is that a lot of consumers will not suffer any damage at all or will only suffer negligible damage.

3.7 Conclusion

As has been seen, all five elements of a delict need to be proven before a claim can be established. One cannot merely prove the one element without proving all the others. The elements of delict are also all connected and related. The view is held that there is no particular sequence in which these elements should be proven. Admittedly, proving some elements before others might make the whole process of proving a delict a bit easier. Establishing legal causation and especially wrongfulness might be the hardest part in the present set of circumstances. Although it can also be argued that proving negligence would be problematic as a result of the preventability leg of the test, this view cannot be supported.

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[154] *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA); see also Neethling J and Potgieter JM, (2010) at 221.

[155] See 5.2.1 Damages in terms of the actio *legis Aquiliae* and 5.3.1 Damages in terms of Contract respectively. The opinion is held that this relates more to quantification and the claim for damages than it does to the element of damage.

[156] Neethling J and Potgieter JM, (2010) at 221 where the authors have translated a definition from Van der Walt, CFC, (1980); see also Van der Walt JC and Midgley JR, (2005) at par 37; Visser PJ and Potgieter JM, (2003) at 20.

It would be interesting to see how courts go about interpreting these two elements in light of these special circumstances.

Chapter 4: Relevant Aspects of General Breach of Contract

4.1 Introduction

Breach of contract occurs where a party to a contract performs contrary to a contract. This occurs when a party performs late, incorrectly or not at all.[157] According to Kerr, breach can be classified in terms of its nature as well as time. In terms of time, it can be defined as either ordinary or anticipatory. In terms of nature it can be classified as major or minor.[158] A major breach

> '"goes to the root of the contract", or affects a "vital part" of the obligations or means that there is no "substantial performance". It amounts to saying that the breach must be so serious that it cannot reasonably be expected of the other party that he should continue with the contract and content himself with an eventual claim for damages.'[159]

Breach of contract occurs at the place where proper performance should have been performed.[160] Even though Eskom or a municipality breaches a contract, for example, the contract will still be valid and a consumer will still be entitled to claim for all his rights under the contract.

4.2 Different forms of Breach of Contract

Van der Merwe *et al* states that there are mainly five forms of breach of contract. These are: *mora debitoris*; *mora creditoris*; positive malperformance; impossibility of performance and repudiation.[161] It also states that these forms of breach should by no means be considered a *numerus clausus* and that it is entirely possible that other forms of breach may be defined in future.[162]

Mora creditoris will not be discussed because there is generally nothing the creditor (consumer for the purposes of supply of electricity) does that prevents the debtor (Eskom or municipalities) from supply the service (electricity).

[157] *Ally v Courtesy Wholesalers (Pty) Ltd* 1996 (3) SA (N) at 149F-150H where Magid J quoted Christie on this topic; see also Christie RH, (2006) at 495.
[158] Kerr, AJ, (2002) at 575.
[159] *Swartz & Son (Pty) Ltd v Wolmaransstad Town Council* 1960 (2) SA 1 (T) at 4 which was then quoted with approval by Nicholas AJA in *Culverwell and Another v Brown* 1990 (1) SA 7 (A) at 14A; see also Kerr, AJ, (2002) at 602.
[160] *Myerson v Hack* 1969 (4) SA 521 (SWA); see also Christie RH, (2006) at 496.
[161] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 336; see also Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C & Naudé T, (2010) at 276.
[162] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 337.

4.2.1 *Mora*

Christie states that: 'Time is an element common to all contracts, and to decide the consequences of failure to perform a contractual obligation within the appropriate time, our law employs the concept of *mora*.'[163] In Kerr's words:

> '[I]n all contracts, even those in which nothing is said on the point, there is a time when, or a period within which, performance is due... [o]n general principle, failure to perform at the time when, or during the period within which, performance is due is, in the absence of a lawful excuse, a breach of contract because it is failure to do what one has contracted to do.' [164]

Thus, one can conclude that Eskom or a municipality is *prima facie in mora* for every hour, minute, second or even millisecond which they do not perform. This is because performance in this case is meant to be continuous. It might thus amount to thousands of instances of *mora* or even just a couple of continuous instances of *mora*.

4.2.1.1 *Mora Debitoris*

A debtor is said to be in *mora debitoris* if he does not perform timeously in terms of the contract.[165]

According to Christie, three requirements must be met before a debtor can be said to be in *mora*.[166] Firstly, the obligation must be enforceable against the debtor.[167] Secondly, performance by the debtor must be due. Performance can be due in three different ways. The performance can be due by operation of the contract (*ex re*), or by operation of law (*ex lege*) or by a demand made by the creditor (*ex persona*).[168] *Mora ex re* is discussed in more detail below[169] as it is most relevant to the current set of facts. Thirdly, the debtor must be aware of the nature of the performance that needs to be tendered to the creditor as well as the fact that such performance is due, or the debtor must be deemed to be aware of such facts.

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[163] Christie RH, (2006) at 497; see also *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 where Innes CJ stated that '*[m]ora* was a wrongful default in making (or accepting) payment or delivery'.
[164] Kerr, AJ, (2002) at 607 and 608.
[165] Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C & Naudé T, (2010) at 278; Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 337.
[166] Christie RH, (2006) at 497 – 498; see also Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C & Naudé T, (2010) at 279 – 283.
[167] Christie RH, (2006) at 497.
[168] Christie RH, (2006) at 498.
[169] See 4.2.1.1.1 on *Mora ex re*.

Christie states that '[i]t is not necessary to show that his default is wilful or negligent.'[170] Du Plessis *et al* states that fault is a requirement for *mora debitoris*.[171] Van Rensburg *et al* in LAWSA further states that

> 'the debtor only falls into *mora* if he or she *culpably* fails to perform timeously, that is if the delay is due to his or her *fault*... In determining whether a debtor was at fault in failing to perform timeously, the court will judge his or her conduct in the light of the conduct that could be expected from a reasonable person in similar circumstances.'[172]

The opinion is held that it merely has to be proven that the party *in mora* was aware of his obligations under the contract. This is also the view held by Van der Merwe *et al* which states that it is only a requirement in so far as the plaintiff needs to prove that the debtor knew of the extent of his performance with regard to when performance should have been made and what needed to be performed.[173]

Van der Merwe *et al* seem to state the requirements in a slightly different way. It states that there needs to be conduct, which in the case of *mora,* is an omission to perform. It also states that this conduct must be wrongful. It states that '[b]efore one can speak of the wrongfulness of a failure to perform the debt must be due and enforceable.'[174] Thus, in the case of *mora,* it would mean an omission to perform *timeously*.

When a consumer buys electricity from Eskom, there are two performances due. Eskom has to perform by supplying the consumer with electricity, and the consumer has to perform reciprocally by paying Eskom for the electricity which it used. When the consumer buys prepaid electricity, he pays for the electricity and Eskom has the reciprocal duty of supplying the consumer with the amount of electricity purchased. The consumer and Eskom are thus both debtors and creditors when the transaction as a whole is taken into account.

Van der Merwe *et al* go on to state that: '[e]ven if the debt is enforceable, a failure to tender performance can only be typified as wrongful and therefore breach of contract if there was a legal duty on the debtor to tender performance at a specific time.'[175] It thus seems as though Van der Merwe *et al*'s requirement for wrongfulness rests on two legs, enforceability and 'a legal duty on the debtor to tender performance at a specific time.' The view is held that this statement is somewhat superfluous as a debt can only become enforceable once the time for the debtor

[170] *Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co* 1970 (1) SA 584 (T) at 587B – F; see also Christie RH, (2006) at 498.
[171] Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C & Naudé T, (2010) at 282 and 283.
[172] Van Rensburg ADJ, Lotz JG and Van Rhijn TAR 'Contract' LAWSA (2004) vol 5, Part 1, 2nd Edition Durban: LexisNexis Butterworths. at par 223; cf *Nel v Cloete* 1972 (2) SA 150 (A) at 166H – 167A.
[173] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 346.
[174] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 339.
[175] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 340.

to tender performance has arrived. A legal duty is also present by virtue of the conclusion of a contract.

Van der Merwe *et al* states that the performance must still be possible regardless of the fact that it has been delayed, which in this case it usually is.[176]

Mora debitoris is breach of a continuous nature. Every month, week, day, hour, second or even millisecond a debtor does not perform, he will be *in mora*. Thus, if a debtor has been *in mora* for some time and then decides to perform, he will still be liable for any loss caused by the breach up until the point of performance. Marais JA stated that '[w]here a breach consists of *delay* in the performance of an obligation, it is writ in stone and cannot be obliterated *ex post facto* by the "timeous" performance of the selfsame act.'[177] A creditor will also not be deprived of his right to resile from the contract where a debtor tenders performance.[178] Thus Eskom or a municipality will be *in mora* for the period that they did not supply the consumer with electricity, regardless of the fact that the supply of electricity was later resumed.

4.2.1.1.1 *Mora ex re*

A debtor will be in *mora ex re* when the contract contains a time of performance and the debtor does not perform by that time.[179] In such a case, the creditor need not make a demand (*interpellatio*) as the fixed time as stated in the contract acts as the demand needed.[180] A consumer will thus not have to make demand to Eskom or a municipality to supply him with electricity. Innes CJ refers to *mora ex re* as the

> 'principle which applies when a debtor undertakes to discharge an obligation on a specified date; the creditor need make no demand: *dies interpellat pro homine*, and the debtor is *in mora* if he fails to pay [or perform] on the appointed day.'[181]

Christie states that '[t]he court has no dispensing power to extend the time fixed by the contract to meet a hard case'.[182] The time of performance set in the contract needs to be ascertainable with precision.[183] It should be certain that the time will arrive as well as when it will arrive.[184]

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[176] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 338; cf *Tweedie and Another v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W) where because of the presence of *mora* the respondent was not excused from the contract by supervening impossibility of performance.
[177] *Minister of Public Works & Land Affairs v Group Five Building Ltd* 1996 (4) SA 280 (A) at 289F.
[178] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 338 – 339.
[179] *Birkenruth Estates (Pty) Ltd v Unitrans Motors (Pty) Ltd and Others* [2005] 3 All SA 128 (W) at 134b.
[180] *Birkenruth Estates (Pty) Ltd v Unitrans Motors (Pty) Ltd and Others* [2005] 3 All SA 128 (W) at 134b; *Laws v Rutherfurd* 1924 AD 261 at 262; *Firstrand Bank Ltd v Soni* 2008 (4) SA 71 (N) at 76I – 77A; see also Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C & Naudé T, (2010) at 280; Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 340.
[181] *Laws v Rutherfurd* 1924 AD 261 at 262; see also Christie RH, (2006) at 498.
[182] Christie RH, (2006) at 498.
[183] *Van der Merwe v Reynolds* 1972 (3) SA 740 (A) 747D; see also Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C & Naudé T, (2010) at 280; Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 340 – 341.

Since the supply of electricity is of a continuous nature, this might be relevant to the initial connection of the consumer to the electricity grid. However, continuous would also qualify as a "date of performance" as it is ascertainable with precision. It is certain that the time will arrive and it is also certain as to when the time will arrive. There can be no confusion as to what "continuous" means. Thus the current set of circumstances would most likely be a case of *mora ex re*.

However, in *Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co*[185], Viljoen J states that the mere fact that the parties insert a date of performance in the contract does not necessarily indicate conclusively that the parties intended performance before or on that date as being essential to the operation of the contract.[186] The opinion is held that it is highly unlikely, in the present set of circumstances, that the court would find that the date of performance in the contract does not reflect the intended date of performance.

It is relatively easy to ascertain when a debtor is in breach where the contract stipulates when a debtor is expected to perform. However, in cases where no time for performance has been explicitly mentioned, things become a little more complicated. The words of Kerr more clearly express this opinion:

> 'On general principle, failure to perform at the time when, or during the period within which, performance is due is, in the absence of a lawful excuse, a breach of contract because it is failure to do what one has contracted to do. No-one questions this, so far as I am aware, if the parties themselves, expressly or impliedly, agree upon a fixed time. But if the parties expressly or impliedly agree that performance is "urgent" or is to be made "immediately" or "within a reasonable time" or if, the parties not having agreed on any provision as to time, the contract contains a residual provision to the effect that performance is to take place within a reasonable time, there is controversy concerning the question whether the contract is breached if it is not performed within what is, in the circumstances of the particular contract in question, a reasonable time.'[187]

What is important to mention, is what Kerr regards as a "fixed time". It is safe to say that he would mean an easily ascertainable point in time or period in time. This is important, because he specifically distinguishes the case of "immediate" performance from cases where a "fixed time" has been given. However, the view is held that "immediately" is also a "fixed time" as there can be no ambiguity as to what is meant by immediate performance.

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[184] *LTA Construction Ltd v Minister of Public Works & Land Affairs* 1995 (1) SA 585 (C) at 590I; see also Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 341.
[185] 1970 (1) SA 584 (T).
[186] *Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co* 1970 (1) SA 584 (T) at 589D.
[187] Kerr, AJ, (2002) at 608.

There is very clearly only one meaning to the word "immediately" and the parties to the contract can thus not have separate ideas of what is meant. On the other hand, terms such as "urgent" or "within a reasonable time" can have very different meanings to the different parties. In the present circumstances there is no question that electricity is required immediately. The same interpretation can be attributed to the word "continuous" as can be attributed to the word "immediate". Its meaning cannot be described as ambiguous. This would then cement the fact that under the current set of facts, we are dealing with a case of *mora ex re*.

4.2.2 Positive Malperformance

Positive malperformance is a form of breach which pertains to the content or the quality of the performance tendered.[188] In the case of *Sweet v Ragerguhara*[189] Kumbleen J described positive malperformance as 'timeous performance not in accordance with the contract'.[190] Christie states that positive malperformance arises when a debtor performs 'in the wrong manner'.[191] A debtor can also perform contrary to an *ex lege* term of the contract which could then result in positive malperformance.[192] One must take, as an example, contracts for the supply of electricity by municipalities. These contracts are almost entirely regulated by the electricity supply by-laws of the relevant municipality.

Positive malperformance can take two forms. Firstly, where the debtor has to perform positively and the performance is faulty or defective. Secondly, where the debtor performs in a manner or does something which he is prohibited from doing in terms of the contract.[193]

It is understood that the debtor has thus performed where the creditor accepts the debtor's tender of performance. The creditor thus does not necessarily accept the quality of the performance but merely accepts the fact that the debtor has now tendered performance. It thus does not at all mean the creditor deems the debtor's performance as acceptable. In the case of supply of electricity this principle becomes very important. This is because a

[188] Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C & Naudé T, (2010) at 292; Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 349 where it is stated that it 'relates to the manner in which an obligation is executed.'
[189] 1978 (1) SA 131 (D); also see *Cladall Roofing (Pty) Ltd v SS Profiling (Pty) Ltd* [2010] 1 All SA 114 (SCA) as a recent example of a case where positive malperformance was present. The goods received were completely different from the goods ordered.
[190] *Sweet v Ragerguhara* 1978 (1) SA 131 (D) at 138C.
[191] Christie RH, (2006) at 495; see also *A A Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA) which dealt with the breach of warranty which had the effect that copper parts were not supplied according to the agreed upon standard.
[192] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 349; Van Rensburg ADJ, Lotz JG and Van Rhijn TAR 'Contract' LAWSA (2004) vol 5, Part 1, 2nd Edition Durban: LexisNexis Butterworths at par 235.
[193] Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C & Naudé T, (2010) at 292; Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 349.

consumer has no choice but to accept the interrupted and erratic supply of electricity. The quality of the electricity and the quality of the supply can only be assessed *ex post facto*.

It would seem that the presence of fault is assumed.[194] Du Plessis *et al* states that

> '[i]t is unclear whether or not fault is an element of positive malperformance. By their silence on the point, most cases and writers create the impression that fault is not required, but this tacit assumption of strict liability is challenged in LAWSA.'[195]

Van Rensburg *et al* in LAWSA states that it is possible for the debtor to avoid liability by showing that malperformance had occurred as a result of circumstances beyond his control. However, the onus of proving that there was no fault rests on the debtor.[196] It will be almost impossible for Eskom to prove that it was not at fault. This is, however, not the case with municipalities who will be able to prove more easily that they were not at fault since they rely on electricity supplied by Eskom.

It also becomes important to judge whether performance can be divided. Since if performance is divisible in seconds or minutes, for instance, there can be no positive malperformance where there is no performance at all. However, if the period is divisible in days or months, for instance, and supply is interrupted for a few hours a day or a week, there can be positive malperformance since there has been some performance.

4.2.3 Repudiation

Van der Merwe *et al* provides the following definition of repudiation:

> 'Repudiation is any conduct by a contractant from which a reasonable person in the position of the innocent contractant would infer that the first contractant, without lawful grounds, does not intend to comply with his duties in terms of the contract.'[197]

In *South African Forestry Co Ltd v York Timbers Ltd*[198] it was stated that non-compliance could relate to 'all or some of the obligations'.[199] From these definitions various observations can be made. Firstly, the impression is created by any conduct, thus it can be created by a

[194] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 354; Van Rensburg ADJ, Lotz JG and Van Rhijn TAR 'Contract' LAWSA (2004) vol 5, Part 1, 2nd Edition Durban: LexisNexis Butterworths at par 237.
[195] Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C & Naudé T, (2010) at 292 and 293.
[196] Van Rensburg ADJ, Lotz JG and Van Rhijn TAR 'Contract' LAWSA (2004) vol 5, Part 1, 2nd Edition Durban: LexisNexis Butterworths at par 237.
[197] *Culverwell and Another v Brown* 1990 (1) SA 7 (A) at 14B – E; *Atteridgeville Town Council v Livanos t/a Livanos Brothers* 1992 (1) SA 296 (A) at 304B; *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 342E; *BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd* [2010] 2 All SA 295 (SCA) at 303h – i; see also Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 362; also see Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C & Naudé T, (2010) at 295.
[198] 2005 (3) SA 323 (SCA).
[199] *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 342E – F.

statement to that effect or by action or omission.[200] The view is held that an omission might merely amount to *mora* and it is highly doubted that an omission on its own could correctly amount to repudiation. Van der Merwe *et al* states that 'mere failure to perform does not justify a treasonable conclusion that performance is being refused or that it will be defective. There must at least be words or other conduct that can reasonably be interpreted as anticipating malperformance.'[201] Respectful disagreement must be expressed with regards to Van der Merwe *et al*'s statement. The opinion is held that the words or other conduct would act as the repudiatory action and not the omission to perform. Had Eskom or municipalities just interrupted the supply of electricity without any warning, such breach would have been classified as *mora debitoris* or positive malperformance and not repudiation.

Secondly, such conduct must be 'without lawful grounds'. For the conduct to be wrongful, it must come to the attention of the innocent party and also leave the impression that malperformance by the guilty party might ensue.[202] If a company like Eskom makes a statement to the effect that electricity demand exceeds supply and they will be instituting a system of load shedding, one cannot but draw the conclusion that malperformance will ensue.

Thirdly, the statement must be of such a nature that the reasonable person in the position of the innocent party would come to the conclusion that the guilty party no longer wishes to be bound by some of the obligations or all of the obligations created by the contract.[203] Thus, the guilty party need not have the intention of repudiating, he must merely create the impression that he is repudiating.[204] Nienaber JA formulated this in the following way in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd*:[205]

> 'Repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party. The

[200] *Tuckers Land and Development Corporation v Hovis* 1980 (1) SA 645 (A) at 653A; see also Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 362; Christie RH, (2006) at 517.
[201] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 362.
[202] *Ponisammy and Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) at 373F; *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) at 845A – C; *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd* 1985 (3) SA 633 (D); *Metamil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) at 685E; see also Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 363.
[203] *Tuckers Land and Development Corporation v Hovis* 1980 (1) SA 645 (A) at 653B – F; *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22D; *Highveld 7 Properties (Pty) Ltd and Others v Bailes* 1999 (4) SA 1307 (SCA) at 1315A – C; *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at 294H; *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 342E – F.
[204] *Ponisammy and Another v Versailles Estates (Pty) Ltd* 1973 (1) SA 372 (A) at 387B; *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1978 (2) SA 835 (A) at 846A; see also Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 364.
[205] 2001 (2) SA 284 (SCA).

> test is whether such notional reasonable person would conclude that proper performance (in accordance with a true interpretation of the agreement) will not be forthcoming.'[206]

Nienaber JA then goes on to say:

> 'As such a repudiatory breach may be typified as an intimation by or on behalf of the repudiating party, by word or conduct and without lawful excuse, that all or some of the obligations arising from the agreement will not be performed according to their true tenor. Whether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance.'[207]

The test for repudiation is thus objective in nature.[208] In the current set of circumstances the only reasonable conclusion that can be drawn is that Eskom or municipalities will in future load shed when they need to, and thus do not intend to provide a constant supply of electricity at all times.

4.2.4 Prevention of Performance

Prevention of performance can be described as follows: 'Prevention of performance consists in conduct after the conclusion of the contract by which the debtor makes it impossible for himself to perform.'[209] Prevention of performance may be present as a result of either legal or physical impossibility – a physical impossibility being as a result of some physical impediment or a legal impossibility being as a result of some legal impediment.[210] Van der Merwe *et al* further states that prevention of performance can be divided into absolute prevention of performance where it can be said that malperformance is predicted with absolute certainty and relative prevention of performance where it can be said that malperformance is only predicted with reasonable certainty.[211] It can be said that in decommissioning certain power stations, Eskom made it impossible for itself to perform, albeit years later. This form of breach would only apply to consumers who concluded contracts with Eskom prior to the decommissioning of power stations.

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[206] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at 294F – G; see also Christie RH, (2006) at 518.
[207] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at 294H – I.
[208] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at 295B.
[209] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 366; see also Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C & Naudé T, (2010) at 301; *Benjamin v Myers* 1946 CPD 655 at 662 – 663 where it was stated that a defendant cannot rely on self-created impossibility of performance in order to excuse himself from a contract; see also *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA).
[210] *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) where because of legislation enacted by a party to the contract, after the conclusion of the contract, part of the contract had become impossible; see also Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 366.
[211] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 366.

The important element here is fault. Fault needs to be present in prevention of performance as this distinguishes it from impossibility of performance.[212]

4.3 Conclusion

Not all forms of breach will be present for all consumers. Prevention of performance might only be a form of breach that could occur in terms of contracts concluded directly with Eskom, and where they were concluded before a certain date. It would also be interesting to see how courts interpret the divisibility of performance for purposes of acknowledging positive malperformance as a form of breach. Each contract will have to be assessed individually and each consumer's case needs to be assessed separately.

[212] *Grobbelaar, NO v Bosch* 1964 (3) SA 687 (E) at 691C – D which states that 'where a person seeks to escape liability for a failure to implement a promise for the delivery of a specific thing, it is for him to prove that there was no fault on his part – Pothier.'; see also Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C & Naudé T, (2010) at 302; Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 367.

Chapter 5: Remedies

5.1 General Remedies

5.1.1 Interdict

An interdict may prohibit Eskom or a municipality from load shedding, and is concerned with the protection of future or present rights. It is not the appropriate remedy in the case that a right has already been infringed upon.[213]

A final interdict is requires:[214]

- that the applicant has a clear right;
- the infringement of a right or the reasonable threat of infringement of a right; and
- the absence of a remedy which offers similar protection.

For the purposes of a final interdict, irreparable injury does not serve as a requirement.[215]

Harms states that

> '[a]n interim interdict is a court order preserving or restoring the *status quo* pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.'[216]

The following needs to be proved in order to obtain an interim interdict:[217]

- The existence of a *prima facie* right;
- that there is the possibility of irreparable harm being suffered in the event that the interdict is not granted;
- 'that the balance of convenience favours the granting of an interim interdict'[218];
- and that no other satisfactory remedy is available to the applicant.

An interdict is a very convenient and effective remedy, especially when load shedding is involved. It allows the consumer to force Eskom or the municipality to stop load shedding in a specific area, thus preventing further damage. A final interdict might not always be

[213] Harms, LTC 'Interdict' LAWSA (2004) vol 11, 2nd Edition Durban: LexisNexis Butterworths at par 390.
[214] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Minister of Law and Order, Bophuthatswana v Committee of the Church Summit of Bophuthatswana* 1994 (3) SA 89 (BG) at 97H – 98G; see also *Starke v Shreiber* [2001] 1 All SA 167 (C); *Ladychin Investment (Pty) Ltd v South African National Roads Agency Ltd and Others* 2001 (3) SA 344 (N) at 353E.
[215] *Setlogelo v Setlogelo* 1914 AD 221 at 227; see also *Hydro Holdings (Edms) Bpk v Minister of Public Works and Another* 1977 (2) SA 778 (T) at 785H.
[216] *Apleni v Minister of Law and Order and Others* 1989 (1) SA 195 (AD) at 201B – C; *National Gambling Board v Premier of Kwazulu-Natal and Others* 2002 (2) SA 715 (CC) at 731B – C; see also Harms, LTC 'Interdict' LAWSA (2004) vol 11, 2nd Edition Durban: LexisNexis Butterworths at par 401.
[217] *Setlogelo v Setlogelo* 1914 AD 221 at 227; see also *Aranda Textile Mills (Pty) Ltd v Hurn and Another* [2000] 2 All SA 530 (E); *Johannesburg Municipal Pension Fund v City of Johannesburg* 2005 (6) SA 273 (W).
[218] Harms, LTC 'Interdict' LAWSA (2004) vol 11, 2nd Edition Durban: LexisNexis Butterworths at par 403 and discussed further at par 406 where it is then stated that the interests of the parties are weighed up against one another, i.e. the interest of the respondent that would be infringed if the interim interdict were to be granted against the applicant's interest that would be infringed if the interim interdict were not granted

available to the consumer since other remedies might be available. It can be argued that these other remedies might be too difficult to exercise or that once the damage is done, it cannot be undone. This might reflect on the actual viability of those other remedies.

5.1.2 Declaration of Rights

In terms of the Supreme Court Act,[219] the provincial or local division is given the power to give a declaration of rights. According to this section, the application must be made by an 'interested person' and entitles the court 'to enquire into and determine any existing, future or contingent right or obligation'. Christie states that a person must have a real interest in the right or obligation and not merely an intellectual or abstract interest.[220] After a court has granted a declaratory order, the consumer can use the appropriate remedies, in relation to his rights, to seek relief.

5.2 Delictual Remedies

5.2.1 Damages in terms of the actio *legis Aquiliae*

The *actio legis Aquiliae* is the appropriate remedy in this instance for claiming patrimonial loss.[221] The party suffering damage is entitled to be placed in the patrimonial position he would have been in had the wrongful conduct never occurred.[222] It is compensatory in nature and not punitive.[223] The date when the delict is committed is said to be the date at which damage is assessed.[224] This merely means that when all the other elements of a delict are present, and the first damage manifests itself, damage can be assessed.[225] There are different types of damage that damages may then be claimed for.

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[219] S 19 (1) (a) (iii) of Act 59 of 1959.
[220] Christie RH, (2006) at 537; see also *Durban City Council v Association of Building Societies* 1942 AD 27 at 32 – 33; *J T Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 515 (CC) at 525A – B; *Tri-Cor Industries (Pty) Ltd v Chairman of the Mpumalanga Tender Board and Others* [1997] 4 All SA 414 (T); *Sebenza Kahle Trade CC v Emalahleni Local Municipal Council and Another* [2003] 2 All SA 340 (T) at 349i – 351a.
[221] *Matthews and Others v Young* 1922 AD 492 at 504; *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) at 377; *Kellerman v South African Transport Services* 1993 (4) SA 872 (C) at 877H – I; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) at 395 H – I where wrongfulness in the case of an omission is also dealt with; *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) at 468A – C; cf *First National Bank of South Africa Ltd v Duvenhage* 2006 (5) SA 319 (W) at 320E – F and *Black v Joffe* 2007 (3) SA 171 (C) at 183A – B; see also Neethling J and Potgieter JM, (2010) at 5 and 10; Visser PJ and Potgieter JM, (2003) at 6; Van der Walt JC and Midgley JR, (2005) at par 36.
[222] *First National Bank of South Africa Ltd v Duvenhage* 2006 (5) SA 319 (SCA) at 324H – I; *Singh and Another v Ebrahim (1)* [2010] 3 All SA 187 (D) at 192c; see also Van der Walt JC and Midgley JR, (2005) at par 143.
[223] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at 822B – 823A; see also Neethling J and Potgieter JM, (2010) at 220; Van der Walt JC and Midgley JR, (2005) at par 143; Visser PJ and Potgieter JM, (2003) at 22.
[224] *General Accident Insurance Co SA Ltd v Summers; Southern Versekeringsassosiasie Bpk v Carstens NO; General Accident Insurance Co SA Ltd v Nhlumayo* 1987 (3) SA 577 (A) at 612A – B; see also Neethling J and Potgieter JM, (2010) at 222.
[225] *Oslo Land Co Ltd v The Union Government* 1938 AD 584; see also Neethling J and Potgieter JM, (2010) at 222.

Damnum emergens refers to the actual losses and expenses incurred up to the date of trial. The actual amount to be claimed and paid is assessed in terms of the sum-formula approach.[226] *Lucrum cessans* means the loss of profit.[227] It is, however, also used to describe prospective loss as well as the loss of a patrimonial expectancy.[228] Prospective damage is damage which will materialise 'with a sufficient degree of probability' only after the date of assessment of damage which was caused by the damage-causing event.[229] Van der Walt and Midgley states that '[a] plaintiff may claim compensation for loss actually incurred or for prospective loss including, for example, loss of earning capacity, future profits or income and future expenses.'[230] Some damage must have been caused in order for a person to claim for prospective loss since damage is needed for the presence of a delict.[231] Once the consumer suffers his first loss he will have to claim for all prospective losses. The date of assessment for prospective loss is also the date on which the delict was committed.[232] The relevant types of prospective loss as far as a claim against Eskom or a municipality is concerned, are as follows:[233]

- Future expenses as a result of the damage-causing event: This might be the replacement of equipment because of a shortened life-span or the cost of employing employees to work over-time in order to finish work.[234]
- Loss of future income: This might be where equipment cannot be used as a result of damage and can therefore not be used to generate an income in future.[235]

Damage may also be distinguished by means of the manner in which it manifests itself. Damage to property occurs where there is an 'impairment of the object of a real right.'[236] In the

[226] *Hendricks v President Insurance Co Ltd* 1993 (3) SA 158 (C) at 164E – I; *Singh and Another v Ebrahim (1)* [2010] 3 All SA 187 (D) at 192f where *damnum emergens* is described as 'direct positive losses'; see also Van der Walt JC and Midgley JR, (2005) at par 145.
[227] *Singh and Another v Ebrahim (1)* [2010] 3 All SA 187 (D) at 192f where *lucrum cessans* is described as 'negative losses'; see also Neethling J and Potgieter JM, (2010) at 220; Van der Walt JC and Midgley JR, (2005) at par 37; Visser PJ and Potgieter JM, (2003) at 22, 58 and 116.
[228] Neethling J and Potgieter JM, (2010) at 220; Van der Walt JC and Midgley JR, (2005) at par 37; Visser PJ and Potgieter JM, (2003) at 22, 58 and 116.
[229] *Oslo Land Co Ltd v The Union Government* 1938 AD 584 at 590 – 591; *Whitfield v Phillips and Another* 1957 (3) SA 318 (A) at 328H – 329A; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835G – H; see also Neethling J and Potgieter JM, (2010) at 223.
[230] *Santam Insurance v Bailey* 1984 (1) SA 98 (A); *Guardian National Insurance Co Ltd v Van Gool* 1992 (4) SA 61 (A); see also Van der Walt JC and Midgley JR, (2005) at par 36.
[231] *Coetzee v SA Railways & Harbours* 1933 CPD 565; *Millward v Glaser* 1949 (4) SA 931 (A) at 942; *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W); see also Neethling J and Potgieter JM, (2010) at 224; Van der Walt JC and Midgley JR, (2005) at par 41.
[232] Neethling J and Potgieter JM, (2010) at 222.
[233] Neethling J and Potgieter JM, (2010) at 223 and 224 where more forms of prospective loss are mentioned. These include the following:
- 'Loss of business profit and professional profit.'
- 'Loss of prospective support.'
- 'Loss of a chance to gain a benefit.'; see also Visser PJ and Potgieter JM, (2003) at 120 – 122.

[234] *Burger v Union National South British Insurance Co Ltd* 1975 (4) SA 72 (W); *De Jongh v Du Pisanie NO* 2005 (5) SA 457 (SCA).
[235] *Santam Versekeringsmaatsakkpy Bpk v Byleveldt* 1973 (2) SA 146 (A); *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA).

cases where damage has been caused to property, the reasonable market value of the property is normally used as a point of departure in assessing the amount claimable.[237] Where a refrigerator, computer or television of the consumer is damaged by load shedding, a consumer would have a claim for the amount by which the market value has decreased. Thus the amount by which the value of the object has diminished as a result of the damage-causing event is generally claimable.[238] The reasonable cost of repairing the property is also something which is used as an indicator as to how much the plaintiff may claim.[239] Van der Walt and Midgley states that the cost of repairs is only used as the measure of damages if such repairs were 'fair, reasonable and necessary.'[240] Visser and Potgieter states that 'it is simpler and more realistic to rely upon the reasonable cost of necessary repairs as a measure of damages.'[241] Visser and Potgieter also provides three instances in which the cost of repairs cannot serve as the measure for damages. These are as follows:

> '(a) Where the cost of repairs exceeds the pre-accident (market-) value of the property...
>
> (b) Where the cost of repairs exceeds the diminution in value of the property...
>
> (c) Where the repairs, though restoring the property to its pre-accident condition, do not also restore its pre-accident market value...'[242]

Thus the cost of repairing a piece of electronic equipment might serve as an indicator of the damage suffered. If the plaintiff has suffered a loss of profit as a result of damage to his property, such loss has to be proved and the claim will be limited to 'actual lost profits owing to the deprivation of its use, but not for potential profits'.[243] In cases where, for example, a milk farmer's milking equipment is damaged, the cost of repairing such equipment might be an indication of the loss suffered. In addition, the period for which the equipment could not be used to milk cows might qualify as an actual loss of profit since less milk could be sold.

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[236] Visser PJ and Potgieter JM, (2003) at 58; see also Neethling J and Potgieter JM, (2010) at 220 and Van der Walt JC and Midgley JR, (2005) at par 146.
[237] *Witwatersrand Gold Mining Co Ltd v Cowan* 1910 TPD 312 at 314; *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) SA 111 (C) at 118; see also Van der Walt JC and Midgley JR, (2005) at par 146; Visser PJ and Potgieter JM, (2003) at 367.
[238] *Witwatersrand Gold Mining Co Ltd v Cowan* 1910 TPD 312 at 314; *Erasmus v Davis 1969* (2) SA 1 (A) at 5F; *Romansrivier Ko-Operatiewe Wynkelder Bpk v Chemserve Manufacturing (Pty) Ltd 1993* (2) SA 358 (C) at 367 – 368; see also Neethling J and Potgieter JM, (2010) at 235; Van der Walt JC and Midgley JR, (2005) at par 146; Visser PJ and Potgieter JM, (2003) at 367.
[239] *Erasmus v Davis* 1969 (2) SA 1 (A) at 7E – F, 8H – 9B and 17G; see also Neethling J and Potgieter JM, (2010) at 236; Van der Walt JC and Midgley JR, (2005) at par 146; Visser PJ and Potgieter JM, (2003) at 368 – 369.
[240] Van der Walt JC and Midgley JR, (2005) at par 146; see also Neethling J and Potgieter JM, (2010) at 236; *Scrooby v Engelbrecht* 1940 TPD 100 at 102; *Shrog v Valentine* 1949 (3) SA 1228 (T) at 1234 – 1238; *Romansrivier Ko-Operatiewe Wynkelder Bpk v Chemserve Manufacturing (Pty) Ltd* 1993 (2) SA 358 (C) at 367 – 368.
[241] Visser PJ and Potgieter JM, (2003) at 368.
[242] *Botha v Van Zyl* 1955 (3) SA 310 (SWA) at 312F – G; *Enslin v Meyer* 1960 (4) SA 520 (T) at 522H – 523E; *Du Plessis v Nel* 1961 (2) SA 97 (GW) at 101B; *Myburgh v Hanekom* 1966 (2) SA 157 (GW); see also Visser PJ and Potgieter JM, (2003) at 268 – 369.
[243] Van der Walt JC and Midgley JR, (2005) at par 146; see also Visser PJ and Potgieter JM, (2003) at 373 and 374; *Mossel Bay Divisional Council v Oosthuizen* 1933 CPD 509; *Modern Engineering Works v Jacobs* 1949 (3) SA 191 (T); *Shrog v Valentine* 1949 (3) SA 1228 (T) at 1237; *Smit v Abrahams* 1994 (4) SA 1 (A) at 11 – 12.

Where milk goes sour as a result of refrigeration equipment not functioning, the farmer could also claim for loss of profit as a result of the sour milk.

Furthermore, damages may be classified as general or special and as direct loss or consequential loss.[244] General damages are damages which are presumed to flow directly from the damage-causing event.[245] This is relevant because this type of damage only needs to be pleaded generally.[246] A consumer will have to prove that the damage it sustained was as a direct result of Eskom or the municipality's failure to maintain a constant supply of electricity. Conversely, special damages do not flow naturally from the damage-causing event and must be specially pleaded and proved.[247] Here, the consumer will have to prove that the damages it suffered, even though not as a direct result of load shedding, is causally connected to load shedding. The differentiation has been described in *Durban Picture Frame v Jeena*[248] as being 'of limited practical use'.[249] Direct loss is loss which is a direct consequence of the damage-causing event whereas consequential loss normally flows from such general loss.[250] This distinction is made in order to limit liability. Subsequently consequential losses are often not claimable as they are said to be too remote.[251] Very little difference is seen between direct loss and general damages as well as between special damages and consequential loss.

5.3 Contractual Remedies

5.3.1 Damages in terms of Contract

A plaintiff can claim damages as a remedy in the case of breach of contract on its own or in addition to cancellation or specific performance.[252] According to Van der Merwe *et al*, a plaintiff can claim damages based on breach once the following is proved: [253]

- That there was a breach of contract;
- that the plaintiff has suffered loss;

[244] Neethling J and Potgieter JM, (2010) at 220 – 221; Visser PJ and Potgieter JM, (2003) at 59 – 60.
[245] *Graaff v Speedy Transport* 1944 TPD 236; *Durban Picture Frame v Jeena* 1976 (1) SA 329 (D); see also Neethling J and Potgieter JM, (2010) at 221; Visser PJ and Potgieter JM, (2003) at 60.
[246] Neethling J and Potgieter JM, (2010) at 221; Visser PJ and Potgieter JM, (2003) at 60.
[247] *Thompson v Barclays Bank DCO* 1965 (1) SA 365 (W) at 369F – 372B; see also Neethling J and Potgieter JM, (2010) at 221; Visser PJ and Potgieter JM, (2003) at 60.
[248] 1976 (1) SA 329 (D).
[249] *Durban Picture Frame v Jeena* 1976 (1) SA 329 (D) at 335H – 336A.
[250] Neethling J and Potgieter JM, (2010) at 220; Visser PJ and Potgieter JM, (2003) at 59.
[251] *Holmdene Brickworks v Roberts Construction* 1977 (3) SA 670 (A) at 682H – 683C and 687E; see also Neethling J and Potgieter JM, (2010) at 220; Visser PJ and Potgieter JM, (2003) at 59.
[252] Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C & Naudé T, (2010) at 327; Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 387, 400 and 406; Kerr, AJ, (2002) at 697 – 698 and 734; Visser PJ and Potgieter JM, (2003) at 309.
[253] Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C & Naudé T, (2010) at 332; Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 415; see also Kerr, AJ, (2002) at 737; Visser PJ and Potgieter JM, (2003) at 310 – 311.

- that the breach is the cause of the loss; and
- that the damage flows naturally from the breach of contract or that there is an agreement to compensate the party concerned for the damage suffered.

The different types of damage and damages have been discussed above and will not be discussed in detail in this section.[254]

5.3.1.1 Damage

When looking at the measure of assessment of damages in law of contract, one only has to look at the sheer number of articles written on the subject to notice that this is a highly contentious topic.[255]

When one assesses damage as a result of breach of contract, it becomes clear that the breach qualifies as the damage causing event.[256] The damage suffered by a contractant is the difference in value in patrimony between his present patrimonial position and the patrimonial position he would have occupied had the damage-causing event (i.e. the breach of contract) not occurred.[257] The general rule is that the plaintiff should be placed in the position he would have occupied had the contract been performed properly.[258] Thus it has to be asked: "Had Eskom or the municipality performed properly, what patrimonial position would the consumer have been in?"

Thus, unlike in delict where only the actual patrimonial losses are compensated for, contractual damages seeks to put the plaintiff in the position he would have occupied had the contract been performed properly, thereby ensuring that he is entitled to the patrimonial benefits he would have gained from the contract and not only the losses he has suffered as a result of the breach.[259] This is referred to as the positive *interesse*. If the plaintiff was allowed to claim for his negative *interesse* as with delict, he would have claimed damages to put him in the position he would have occupied had the contract never been concluded.[260]

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[254] See 5.2.1 Damages in terms of the actio *legis Aquiliae*.
[255] See for example Joubert, DJ, (1976); Harker, JR, (1994); McLennan, JS, (1999); Floyd, T, (2003); Hutchison, D, (2004); Pelser, F, (2006) to name but a few.
[256] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 416.
[257] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 416; see also Visser PJ and Potgieter JM, (2003) at 311 where the authors state that '[t]he effect of a breach on someone's patrimony is generally assessed through a comparison of his current patrimonial position with his hypothetical patrimonial position had there been proper and timeous performance.'
[258] Christie RH, (2006) at 543 – 544; see also Visser PJ and Potgieter JM, (2003) at 77 who state that positive *interesse* is the traditional measure of contractual damages and that this includes actual as well as prospective losses; *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22 and 46; *Whitfield v Phillips and Another* 1957 (3) SA 318 (A) at 319G; *Mostert, NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) at 187A – E.
[259] *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22; *Trotman v Edwick* 1951 (1) SA 443 (A) at 449B – C; see also Christie RH, (2006) at 544.
[260] Visser PJ and Potgieter JM, (2003) at 311.

In *Probert v Baker*[261] the court stated that the plaintiff could elect to be placed in the patrimonial position he would have occupied had the contract not been concluded. The court stated that the plaintiff could claim for his negative *interesse* if he had already cancelled the contract. Van der Merwe *et al* asserts that by placing the plaintiff in the position he occupied before the conclusion of the contract creates the impression that the contract is in fact the cause of the plaintiff's damage and not the breach.[262]

In the case of *Hamer v Wall*[263] Goldstein J rejected the outcome of *Probert v Baker.*[264] This is because, according to Goldstein J, a contract changes the *patrimonium* of the contractant and this is a fact which cannot be ignored.[265] In effect, granting a plaintiff negative *interesse* would ignore the fact that the contractants' *patrimonia* have changed. It is understood that Visser and Potgieter holds the viewpoint that damages claimed in contract should be claimed in terms of positive *interesse*. This is so even where the contract had been cancelled and restitution has taken place,

> 'because, although no party has to perform and anything already performed must be returned (*restitutio in integrum*), the plaintiff is still entitled to be placed in the position he would have occupied had there been no breach of contract.'[266]

Claiming on the basis of negative *interesse* in light of the current set of facts would be completely illogical since would have to consider that a lot of consumers would not be able to start a business, had the contract not been concluded. The implications of this are quite extensive as one would in effect erase all the patrimonial consequences of the conclusion of the contract. It would thus make sense to avoid claiming in terms of negative *interesse*.

It does however seem as though notice is being taken of the Anglo-American measure of contractual damages, and rightly so. In *Mainline Carriers (Pty) Ltd v Jaad Investments CC*[267] the court investigated the various interest involved according to the Anglo-American system of measuring contractual damages. Accordingly, two relevant interests can be identified:[268]

- The protection of the expectation interest is the amount that the plaintiff can claim from the defendant as a result of the expectation he had that the contract would be properly performed. This, in other words, refers to the benefits he would have gotten in return for his performance.

[261] 1983 (3) SA 229 (D).
[262] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 423.
[263] 1993 (1) SA 235 (T).
[264] 1983 (3) SA 229 (D).
[265] *Hamer v Wall* 1993 (1) SA 235 (T) at 241F – H.
[266] Visser PJ and Potgieter JM, (2003) at 78.
[267] 1998 (2) SA 468 (C) at 484F – 485B.
[268] Christie RH, (2006) at 544; also see Pelser, F, (2006).

- The protection of the reliance interest is the amount that allows the plaintiff to be placed in the patrimonial position he would have occupied had he not entered into the contract.[269] It includes the expenses and costs that the plaintiff had as a result of his reliance on the contract. Any benefits that had to be forfeited as a result of the contract are also included in this interest. The indemnity interest forms part of the reliance interest and includes any liability a plaintiff might have to a third party as a result of the defendant's breach of contract. It is consequential loss.[270]

In the end the court decided that the plaintiff could claim damages in terms of negative *interesse* but that he could not claim more than he would have been able to claim had he claimed in terms of positive *interesse*.[271]

The opinion is held that the Anglo-American measure is a great deal clearer than referring to positive and negative *interesse*. Claiming for a specific interest that has been infringed brings with it its own certainty. The rigidity that comes along with saying that a person may only claim for his positive *interesse* and in exceptional cases for his negative *interesse*, might in some cases cause an unfair situation to arise. In the end, the plaintiff can only claim for loss actually suffered and he still has to prove that he has suffered the relevant loss claimed for. McLennan's view is supported when he says that in the end, labels should be descriptive and not prescriptive.[272]

5.3.1.2 Causation

The question of factual causation is dealt in the same way as the element of factual causation in delict.[273] The discussion on factual causation in delict is thus equally applicable here.[274]

As for the enquiry as to whether the breach can be said to be sufficiently close to the damages – which is comparable to the legal causation enquiry although according to Van der Merwe *et al* this reference is seldom made[275] – one has to distinguish between general damages and special damages. General damages flow naturally from the breach of contract and the parties are presumed to have contemplated that this type of damage would flow from a breach of contract. It is subsequently not necessary to plead these damages.

[269] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 424 states that the plaintiff will be no better off than if the contract had run its course.
[270] Pelser, F, (2006).
[271] *Mainline Carriers (Pty) Ltd v Jaad Investments CC* 1998 (2) SA 468 (C) at 484I – 485A.
[272] McLennan, JS, (1999) at 530.
[273] See Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 418 – 419; Christie RH, (2006) at 542; Kerr, AJ, (2002) at 739 – 740.
[274] See 3.5.1 Factual Causation.
[275] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 426.

Special damages are normally seen as too remote and may only be recoverable if the parties actually or presumably contemplated, at the time of conclusion of the contract that they would result from the breach.[276]

Awarding special damages is made more difficult by the fact that it needed to be evident from the contract that the parties contemplated special damages in the case of breach. Alternatively, the parties should have been aware of special circumstances giving rise to special damages.[277] Curlewis JA stated that the special circumstances should 'have been in the actual contemplation of the parties or may reasonably be supposed to have been in their contemplation'.[278] The latter criterion then broadens the scope for liability somewhat. Van der Merwe *et al* states that this latter criterion gives rise to an enquiry which is objective in nature.[279] Wessels JA, however, gave another requirement that must be met before special damages can be claimed. He stated in his decision that

> '[t]hese special damages can, however, only be recovered if it is clear that both parties and not one party only, knew of the special circumstances, and if it can reasonably be inferred that the contract was entered into with a view to these special circumstances.'[280]

However, the requirements do not stop there. Wessels JA then added that in addition to the aforementioned, the parties should also have contracted that damages of this nature would be paid.[281] Trollip JA later labelled this the convention principle in *Shatz Investments (Pty) Ltd v Kalovyrnas*.[282] This is the law as it stands.[283]

In light of the above it is thus clear that special damages are only claimable if the parties contemplated the possibility of such damages or should reasonably have contemplated the possibility and in addition to that, made provision in the contract for payment of such damages.[284] It is thus very hard to be compensated for special damages. Christie mentions the following:

> 'So the convention principle is presently part of our law. This is not satisfactory because if special damages are to be awarded only on the basis of agreement the normal tests for the

[276] Visser PJ and Potgieter JM, (2003) at 21; see also Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 428 and 429; *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 550B – D and 551A – 555A; *Holmdene Brickworks v Roberts Construction* 1977 (3) SA 670 (A) at 687E.
[277] *Lavery & Co Ltd v Jungheinrich* 1931 AD 156 at 169; *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) at 522B; see also Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 429 and 430; Christie RH, (2006) at 551.
[278] *Lavery & Co Ltd v Jungheinrich* 1931 AD 156 at 169.
[279] *Everett v Marian Heights (Pty) Ltd* 1970 (1) SA 198 (C) at 201C; see also Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 430.
[280] *Lavery & Co Ltd v Jungheinrich* 1931 AD 156 at 175.
[281] *Lavery & Co Ltd v Jungheinrich* 1931 AD 156 at 177.
[282] 1976 (2) SA 545 (A) at 552F.
[283] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 431; Christie RH, (2006) at 552.
[284] *Mia v Verimark Holdings (Pty) Ltd* [2010] 1 All SA 280 (SCA) at 288h – 289b.

> existence of tacit terms ought to be applied, and a normal application of the officious bystander test would result in special damages not being awarded in many cases where it would generally be thought fair to award them.'[285]

He goes on to mention Goldstein J's judgment in *Thoroughbred Breeders' Association of South Africa v Price Waterhouse*[286] as an example of where the concept of formation of a contract had to be stretched so as to accommodate the convention principle.[287] The law as it stands would be very hard to apply in the current set of facts. This is because of the sheer volume of consumers who have contracts with Eskom and municipalities. As a result of this, these contracts are all quite standard in their terms and conditions. This makes it very hard for consumers to claim for special damages which they should be entitled to. Should a consumer have to be limited to relief for general damages merely because no provision for special damages was made in a contract? This situation cannot be supported. The general consumer would not even have known to insert this provision in the contract and it is highly doubtful whether he would have been allowed to insert such a provision even if he had known. How is a consumer then to go about claiming special damages in a situation where a standard contract does not allow for such damages to be claimed?

5.3.2 Specific Performance

Van der Merwe *et al* states that '[s]pecific performance is performance of that on which the contractants agreed.'[288] The learned Innes JA stated in *Farmer's Co-operative Society v Berry*[289] that

> '[*p*]*rima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party as far as is possible, a performance of his undertaking in terms of the contract'[290]

Christie states that '[o]ur law is clear that a plaintiff is always entitled to claim specific performance and, assuming he makes out a case, his claim will be granted, subject only to the court's discretion.'[291] As stated earlier, an order for damages can be granted in addition to specific performance.[292]

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[285] Christie RH, (2006) at 552; see also Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C & Naudé T, (2010) at 336 and 337.
[286] 1999 (4) SA 968 (W).
[287] Christie RH, (2006) at 552.
[288] Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 381; see also Christie RH, (2006) at 522 where he lists three different types of specific performance.
[289] 1912 AD 343.
[290] Kerr, AJ, (2002) at 677; *Farmer's Co-Operative Society v Berry 1912 AD 343* at 350.
[291] Christie RH, (2006) at 523.
[292] See 5.3.1 Damage in terms of Contract and fn 252.

The court has the discretion to grant an order for specific performance.[293] Such discretion is exercised judicially and is thus not entirely unfettered.[294] In *Benson v SA Mutual Life Assurance Society*[295] Hefer JA very thoroughly describes the courts discretion to grant an order for specific performance. The discretion is not unfettered since it is exercised judicially, and an order for specific performance needs to be granted or denied in accordance with legal and public policy. An order for specific performance will not be granted where such performance had become impossible.[296] Where such an order would cause undue hardship for the defendant it would also not be granted.[297] Christie provides another instance in which an order for specific performance will not be granted. In cases of imprecise obligations where

> 'a contractual obligation may be of such a nature that a defendant who has been ordered specifically to perform it might genuinely claim to have done so but the plaintiff might equally genuinely claim that he has not.'[298]

A plaintiff who is a contractant to a reciprocal contract can only seek an order for specific performance if he himself has performed in terms of the contract or has tendered performance in terms of the contract.[299] In the current set of circumstances a claim for specific performance would have the same effect as an interdict preventing the supplier from interrupting supply to a consumer by means of load shedding. However, the opionion is held that a claim for specific performance is preferable since it can be claimed in addition to damages. An interdict, on the other hand, can only be instituted if there is no alternative relief available to the plaintiff.

5.4 Miscellaneous topics relating to claims

5.4.1 Duty to mitigate loss

As a general rule, the plaintiff should take all reasonable steps to mitigate his loss, in other words, to minimise the effect of the damage caused to him by the defendant.[300] This

[293] *Farmer's Co-Operative Society v Berry 1912 AD 343* at 350; *Haynes v King William's Town Municipality* 1951 (2) SA 371 (A) at 378G; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 781H; see also Du Plessis J, Eiselen S, Floyd T, Hawthorne L, Kuschke B, Maxwell C & Naudé T, (2010) at 321; Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 383; Christie RH, (2006) at 524; Kerr, AJ, (2002) at 679.
[294] Christie RH, (2006) at 524; *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 782C – 783F.
[295] 1986 (1) SA 776 (A).
[296] *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 782C – 783F.
[297] Kerr, AJ, (2002) at 680; *Haynes v King William's Town Municipality* 1951 (2) SA 371 (A) at 783C – D.
[298] Christie RH, (2006) at 529.
[299] *Farmer's Co-Operative Society v Berry 1912 AD 343* at 350; *Wolpert v Steenkamp* 1917 AD 493 at 499; *R M van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 (1) SA 250 (C) at 252G – 254A; *WD Russel (Pty) Ltd v Witwatersrand Gold Mining Co Ltd* 1981 (2) SA 216 (W) at 219H – 220B; see also Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 388; Christie RH, (2006) at 531; Kerr, AJ, (2002) at 683.
[300] *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *Swart v Provincial Insurance Co Ltd* 1963 (2) SA 630 (A) at 633C – D; De *Pinto and Another v Rensea Investments (Pty) Ltd* 1977 (4) SA 529 (A); *Macs Maritime Carrier AG v Keeley Forwarding & Stevedoring (Pty) Ltd* 1995 (3) SA 377 (D) at

seemingly flows from a duty the plaintiff owes to the defendant not to 'unreasonably burden the duty of the defendant to pay damages.'[301] This is done by either limiting the loss that the plaintiff experiences or by preventing future loss by the plaintiff.[302] The plaintiff must take reasonable steps to achieve this.[303] Visser and Potgieter states that '[t]he duty to mitigate arises as soon as the plaintiff in fact suffers loss and knows or should reasonably be aware that he should mitigate his loss.'[304] The plaintiff is merely expected to act reasonably in the circumstances.[305] Where a contractant as a result of breach of contract had to act urgently, he is not required to take extensive steps to mitigate his loss.[306] Where a plaintiff fails to mitigate his losses, the losses which could have been prevented will not be claimable.[307] Any reasonable expenses incurred in mitigation of loss by the plaintiff are claimable from the defendant.[308]

In light of the current situation, the plaintiff can mitigate his loss in a number of ways. The reasonableness of the mitigation will depend on the circumstances of each case. Depending on the circumstances it might for instance be reasonable to hire or buy a power generator or even build your own power station.[309] The view is held that it would be unthinkable that the court would expect a small business with limited turnover to purchase generators. Similarly, a large consumer of power could also not be expected to build its own independent power plant. Substantial thought and investigation would need to go into the financial means of the consumer concerned along with the loss they would suffer if they did not employ the above-

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381E – 382G; see also Neethling J and Potgieter JM, (2010) at 233; Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 426; Christie RH, (2006) at 553; Van der Walt JC and Midgley JR, (2005) at par 166; Visser PJ and Potgieter JM, (2003) at 259.

[301] Visser PJ and Potgieter JM, (2003) at 259.

[302] *Swart v Provincial Insurance Co Ltd* 1963 (2) SA 630 (A) at 633C – D; *De Pinto and Another v Rensea Investments (Pty) Ltd* 1977 (4) SA 529 (A); see also Neethling J and Potgieter JM, (2010) at 233; Van der Walt JC and Midgley JR, (2005) at par 166.

[303] *Swart v Provincial Insurance Co Ltd* 1963 (2) SA 630 (A) at 633C – D; *Williams v Oosthuizen* 1981 (4) SA 182 (N); see also Neethling J and Potgieter JM, (2010) at 233; Van der Walt JC and Midgley JR, (2005) at par 166; Visser PJ and Potgieter JM, (2003) at 260 – 263.

[304] Visser PJ and Potgieter JM, (2003) at 261; see also Neethling J and Potgieter JM, (2010) at 233.

[305] *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 27; *Hazis v Transvaal and Delagoa Bay Invertment Co Ltd* 1939 AD 372 at 388; *Novick v Benjamin* 1972 (2) SA 842 (A) at 858B; *Modimogale v Zweni* 1990 (4) SA 122 (B) at 135C – F; see also Van der Walt JC and Midgley JR, (2005) at par 166.

[306] *Holmdene Brickworks v Roberts Construction* 1977 (3) SA 670 (A) at 689D; see also Van der Merwe SW, Van Huyssteen LF, Reinecke MFB & Lubbe GF, (2007) at 427.

[307] *Reid v L S Hepker & Sons (Pvt) Ltd* 1971 (2) SA 138 (RAD) at 146E – H; *Williams v Oosthuizen* 1981 (4) SA 182 (N) at 184 – 185; see also Neethling J and Potgieter JM, (2010) at 233; Van der Walt JC and Midgley JR, (2005) at par 166; Visser PJ and Potgieter JM, (2003) at 259.

[308] *Shrog v Valentine* 1949 (3) SA 1228 (T) at 1237; *Reid v L S Hepker & Sons (Pvt) Ltd* 1971 (2) SA 138 (RAD) at 146E – H; *Romansrivier Ko-Operatiewe Wynkelder Bpk v Chemserve Manufacturing (Pty) Ltd* 1993 (2) SA 358 (C) at 367; *Solomon v Spur Cool Co (Pty) Ltd* [2002] 2 All SA 359 (C) at 372 – 373; see also Neethling J and Potgieter JM, (2010) at 233; Van der Walt JC and Midgley JR, (2005) at par 166; Visser PJ and Potgieter JM, (2003) at 263.

[309] Although this sounds outrageous, it is exactly what Exxaro is busy doing. See Chanel de Bruyn (2010) Exxaro may build 13-MW power plant at Namakwa Sands, <http://www.miningweekly.com/article/exxaro-may-build-13-mw-plant-at-namakwa-sands-2010-09-14> (accessed on 12 November 2010).

mentioned plans to mitigate their loss. It is quite fathomable that one could come across a situation where renting equipment that would mitigate the loss would outweigh the loss itself.

It can be said that a plaintiff should be able to show that he has reduced his electricity consumption by employing reasonable means so as to contribute to the overall reduction of electricity consumption in the country. It would after all be in everyone's best interest. The way in which he has reduced his electricity consumption should also then be considered in mitigation of his loss. After all, in reducing overall consumption of electricity, one reduces the frequency with which Eskom needs to interrupt supply, thus reducing the frequency with which one would be left without electricity and reducing one's loss. Thus measures such as installing fluorescent light bulbs which consume little electricity, or installing insulation blankets for geysers or solar geysers would in the end qualify as a mitigation of loss since one is preventing and limiting future loss.

5.4.2 The "once and for all" rule

According to the "once and for all" rule, damage arising from a single cause of action can only be claimed once.[310] In order to see how and when the "once and for all" rule applies, one has to determine what qualifies as a cause of action. A cause of action arises as soon as all the facts needed to prove it are present.[311] It thus follows that a consumer would have to claim for all losses as soon as some damage has manifested itself. These will include any future losses that the consumer might sustain as a result of load shedding. This is difficult in the current situation as the average consumer of electricity is generally not privy to information which might inform him of when Eskom or municipalities intend to load shed. This might be made easier by treating each act of load shedding as a separate act of breach or a separate delict.

5.4.3 Prescription

Prescription is governed by the Prescription Act.[312] A debt becomes prescribed and thus extinguished once the period of prescription has lapsed.[313] Prescription of debts is dealt with in sections 10 to 16 of the Prescription Act. Debts have been deemed to include actions for

[310] *Cape Town Council v Jacobs* 1917 AD 615; *Oslo Land Co Ltd v The Union Government* 1938 AD 584; *Custom Credit Corporation v Shembe* 1972 (3) SA 462 (A) at 472A – D; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835G – H; *Sasfin (Pty) Ltd v Jessop* 1997 (1) SA 675 (W) at 689D – 690D; see also Neethling J and Potgieter JM, (2010) at 225; Van der Walt JC and Midgley JR, (2005) at par 152; Visser PJ and Potgieter JM, (2003) at 135.
[311] *McKenzie v Farmer's Co-Operative Meat Industries Ltd* 1922 AD 16 at 23; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838B – 839F; *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA); *Harker v Fussel and Another* 2002 (1) SA 170 (T) 174H – 176E; see also Neethling J and Potgieter JM, (2010) at 226; Van der Walt JC and Midgley JR, (2005) at par 152; Visser PJ and Potgieter JM, (2003) at 139 – 144.
[312] Act 68 of 1969.
[313] S 10 of the Prescription Act.

compensation.[314] In terms of the Prescription Act, prescription starts to run as soon as a cause of action arises.[315] What is important to note is that prescription is delayed until the creditor knows the identity of the debtor and the facts giving rise to the cause of action, which in the present case is clear. The general term of prescription is three years from date when a cause of action arises.[316]

Prescription is interrupted by the service on the debtor 'of any process whereby any person claims ownership of that thing.'[317] This process is said to include 'any document whereby legal proceedings are commenced.'[318] Prescription is also interrupted by an acknowledgment of liability.[319] Prescription will this be interrupted where the consumer serves upon Eskom or municipalities a legal document which commences legal proceedings. This would be done for each act of load shedding. Care must be taken because over the course of a year, for instance, claims based on earlier acts of load shedding might have prescribed while those based on later acts of load shedding might still be possible.

5.4.4 Concurrent Actions

Situations will arise where the defendant might be liable in terms of delict and in terms of breach of contract. Neethling *et al* states that

> '[t]he *actio legis Aquiliae* and the contractual action concur in circumstances where breach of contract simultaneously also constitutes the delict *damnum iniuria datum* – ie, a wrongful culpable causing of patrimonial damage – against the wronged contracting party.'[320]

A dairy farmer who has an electricity supply agreement with Eskom might be the victim of breach of contract as a result of which he suffers loss. In addition, the mere fact that Eskom generates electricity and implements load shedding might mean that they also have delictual liability towards the farmer who suffers loss as a result of their conduct.

In the case where concurrent actions are available, the plaintiff can elect whether to claim on the basis of breach of contract or delict. The claims may even be instituted in the alternative. What is important is that the facts pleaded need to establish a delictual action independent of the contractual action. The presence of wrongfulness in the form of the infringement of a

[314] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 842E – G; *D & D Deliveries (Pty) Ltd v Pinetown Borough* 1991 (3) SA 250 (D) at 253B – H; see also Visser PJ and Potgieter JM, (2003) at 305.
[315] S 12 (1) of the Prescription Act.
[316] S 11 (d) of the Prescription Act.
[317] S 4 (1) of the Prescription Act.
[318] S 4 (4) of the Prescription Act.
[319] S 14 of the Prescription Act.
[320] Neethling J and Potgieter JM, (2010) at 258.

subjective right or breach of a legal duty is particularly important. It needs to be established independently of the contract.[321]

5.4.5 Constitutional infringements and remedies including class actions

The Bill of Rights[322] binds natural and juristic persons.[323] Although these infringements will not be discussed in depth in this dissertation, it is indeed quite possible that certain infringements in terms of the Bill of Rights may be present. This may include the right to freedom of trade, occupation and profession[324] as infringement of this right may impact the consumer's patrimony. Such a right may be infringed where a consumer is not able to start a business because of the lack of electricity generating capacity in the country. This goes wider as it might affect any potential employees that the consumer wanted to employ.

S 38 of The Constitution of the Republic of South Africa, 1996 makes provision for the institution of class actions, which is a possibility under the current circumstances. S 38 (a) to (e) sets out the persons who may approach the courts alleging that a right contained in the Bill of rights has been infringed. Among these are persons acting on behalf of a class of persons[325] and persons acting in the public interest.[326] Certain objects,[327] duties[328] and functions[329] of local government might also have been breached. A group of dairy farmers may thus be able to institute a class action against Eskom or their municipality.

A person may institute a claim for constitutional damages where a constitutional right has been infringed. This remedy is available where it is necessary for the protection and enforcement of rights contained in the Bill of Rights.[330] The Constitutional Court in *Fose v Minister of Safety and Security*[331] stated that there was however no place for constitutional

[321] *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 496E – H and 499H – 500E; *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) at 1069C – 1070C; *Holtzhausen v Absa Bank Ltd* 2008 (5) SA 630 (SCA); see also Neethling J and Potgieter JM, (2010) at 259; Christie RH, (2006) at 497; Van der Walt JC and Midgley JR, (2005) at par 53; Visser PJ and Potgieter JM, (2003) at 297.
[322] Chapter 2 of The Constitution of the Republic of South Africa, 1996.
[323] S 8 of The Constitution.
[324] S 21 of The Constitution.
[325] S 38 (c) of The Constitution.
[326] S 38 (d) 0f The Constitution.
[327] S 152 of The Constitution.
[328] S 153 of The Constitution.
[329] S 156 of The Constitution.
[330] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at 821B – D; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at 21F – 23A; *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) at 1266E – 1267E; *Dendy v University of the Witwatersrand, Johannesburg* 2005 (5) SA 357 (W) at 368E – 370B and *Dendy v University of the Witwatersrand, Johannesburg* 2007 (5) SA 382 (SCA) where the appeal was dismissed and judgment in the court *a quo* was confirmed; see also Neethling J and Potgieter JM, (2010) at 21 and 22; Van der Walt JC and Midgley JR, (2005) at par 5 and par 54.
[331] 1997 (3) SA 786 (CC).

damages in addition to an award of delictual damages.[332] Thus if a consumer institutes a claim based on his right to freedom of trade, occupation and profession,[333] he may not institute a claim for delictual damages as well.

From the above, the potential application of The Constitution of the Republic of South Africa, 1996 in the current situation is quite wide and potential liability is also an inherent possibility. Further independent study in this area could definitely be of value although it can unfortunately not be included in this study on common law claims.

[332] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at 826B – E and 828G.
[333] S 21 of The Constitution.

Chapter 6: Eskom's Liability

6.1 Delictual Liability

6.1.1 Conduct[334]

All the elements of a delict must be proved when observing Eskom's delictual liability. It is very important to identify the conduct which may result in damage sustained by consumers.

Would it be load shedding or would it be Eskom's inability to supply power that qualifies as the conduct needed to found a claim in delict? On the one hand, it is inevitably the load shedding which is causally closest to the harm suffered by consumers. On the other hand, it cannot be said that load shedding would be necessary had there been sufficient generating capacity. Thus, here we sit with a dilemma. Which is the conduct responsible for harm suffered by consumers? More likely than not, one will sit with a situation in which both Eskom's lack of generating capacity and load shedding are the concurrent causes of harm and as such both will qualify as conduct relevant to found delictual liability.

Load shedding can be seen as a cause of the harm suffered by consumers. Loss is suffered by consumers when Eskom switches off the power in order to provide it somewhere else or to prevent the grid from failing. Although various explanations and causes of load shedding can be given,[335] it is ultimately load shedding which is the cause of damage. This is clearly a *commissio* as Eskom actively manages the system and diverts electricity to different consumers while interrupting the supply to others.[336]

Alternatively, if one avers that the lack of generating capacity is the damage-causing event, one might be dealing with an omission. One would have to prove that there was a legal duty on Eskom to generate sufficient electricity to supply its consumers (including municipalities as they are also supplied with electricity from Eskom). This could prove to be more difficult than proving that the act of load shedding caused damage to consumers.

6.1.2 Wrongfulness[337]

Wrongfulness is a tricky arena that has to be entered before delictual liability can be established. As mentioned earlier, wrongfulness is established when a subjective right is infringed or a legal duty is breached and such infringement or breach is found to be

[334] See 3.2 Conduct.
[335] These causes might include lack of generation capacity or poor quality coal.
[336] What is system management? <http://www.eskom.co.za/live/content.php?Item_ID=5608> (accessed on 9 November 2010).
[337] See 3.3 Wrongfulness.

unreasonable in view of the *boni mores*.[338] In light of what has been discussed above, it can be said that there was a legal duty on Eskom (where an omission is regarded as the damage-causing conduct).

Different subjective rights might be infringed as a result of load shedding. This would depend on the plaintiff in each case. An example of a right that might be infringed is a plaintiff's right to different types of corporeal property that cannot be used or that is damaged as a result of load shedding or a lack of electricity. Lack of electricity or load shedding may also have to effect that the contractual relationship between others is interfered with. An employer may for example not be able to employ his employees because they are unable to work if there is no electricity, or a manufacturer may not be able to deliver the requested products as a result of load shedding. Where one were to allege that Eskom's conduct interfered with the contractual relationships of its consumers, one would have to prove that Eskom had the intention to interfere with these contractual relationships.[339]

6.1.2.1 Legal Duty

As mentioned earlier, in cases of omissions, one would have to establish that the defendant had a legal duty to act.[340] This can be quite difficult and various possibilities are discussed below.

One could argue that because Eskom has a practical monopoly[341] there is an inherent legal duty on them to ensure that sufficient generation capacity exists to meet electricity needs of the country. This coupled with the fact that Eskom would qualify as an organ of state in terms of S 239 of the Constitution of the Republic of South Africa 1996[342] and the fact that electricity has become an indispensible part of modern society which affects all aspects of life, would be quite a strong argument for the presence of a legal duty on Eskom to ensure that it has sufficient generating capacity. In addition to this, when the first whispers of the lack of future generating capacity were uttered, Eskom had not yet been converted to a

[338] See 3.3 Wrongfulness.
[339] Union *Government v Ocean Accident & Guarantee Corporation Ltd* 1956 (1) SA 577 (A); *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 (1) SA 390 (A) at 395D – F; see also Neethling J and Potgieter JM, (2010) at 307.
[340] See 6.1.1 Conduct.
[341] It generates around 95% of South Africa's electricity according to the Department of Minerals and Energy <http://www.energy.gov.za/files/electricity_frame.html> last accessed on 9 November 2010.
[342] Since it is 'any other functionary or institution exercising a public power or performing a public function in terms of any legislation', an example of which might be the Eskom Conversion Act and the Electricity Regulation Act.

public company.[343] [344] In other words, it is thought that a greater duty rested Eskom because it can be assumed to be very much a part of government.

Another way in which the presence of a legal duty can be proved is by looking at S 21 (5) of the Electricity Regulation Act which states that

> '[a] licensee may not reduce or terminate the supply of electricity to a customer, unless-
>
> *(a)* the customer is insolvent;
>
> *(b)* the customer has failed to honour, or refuses to enter into, an agreement for the supply of electricity; or
>
> *(c)* the customer has contravened the payment conditions of that licensee.'[345]

Surely, the interruption of electricity can be interpreted as a reduction since the consumer is forced to reduce his overall electricity usage for the month. This might refer more to a duty not to load shed but it can be argued that such a duty also flows from a duty to generate sufficient electricity since the act of load shedding only becomes necessary upon a failure to generate sufficient electricity. The court would however look at the legal convictions of the community as well as legal policy to establish whether or not there exists a legal duty on Eskom to generate sufficient electricity for its consumers. The crux of the matter is that in order to establish delictual liability where the lack of generation capacity acts as the omission which causes damage, one would have to prove the breach of a legal duty.

6.1.2.2 Reasonableness

The view is held that determining whether a legal duty has been breached or a subjective right has been infringed upon is separate from determining whether such breach or infringement is reasonable. One can only determine whether the breach of a legal duty or the infringement of a subjective right is reasonable once one has determined that such breach or infringement has in fact taken place. Thus, once it has been established that a legal duty has been breached or that a subjective right has been infringed upon, one must determine whether the conduct would be reasonable. As previously stated, the *boni mores* criterion is employed to determine reasonableness.

The act of load shedding might in some instances be perceived as being reasonable, and yet in others it might not be. If one weighs up the interest infringed (whether that be a loss of profit or damage to equipment) against the interest advanced (the protection of the South

[343] Eskom is still wholly owned by government. The conversion was done in 2002 by means of the Eskom Conversion Act; ownership is cited according to the Department of Minerals and Energy website <http://www.energy.gov.za/files/electricity_frame.html> (accessed on 9 November 2010).
[344] Government was warned in the White Paper on the Energy Policy of the Republic of South Africa. This white paper can be accessed on <http://www.info.gov.za/whitepapers/1998/energywp98.htm> (accessed on 23 November 2010).
[345] S 21 (5) of the Electricity Regulation Act.

African electrical grid as well as the supply of electricity to various different consumers at various different times), then it becomes quite clear that the "greater good", so to speak, is being protected and advanced by load shedding. Considerations of public policy will also have to be taken into account along with considerations of legal policy. On whether there might have been other ways to achieve the same outcome, one can only question whether the following alternatives would be viable:

- Could Eskom not interrupt the supply of electricity in residential areas more than the supply in commercial or industrial areas? The opinion is held that this would minimise the effect on business and industry thereby keeping jobs more secure and minimising the effect on loss of profits.
- Could electricity exports not have been completely halted? This would depend on the content of the agreements that they had with the countries concerned. The opinion is held that it would be unbelievably irresponsible if the contract did not contain a provision placing South Africa's electricity needs above those of the countries to which Eskom exports electricity and also a provision providing for the right to supply South Africa with electricity over the other relevant country.

What can definitely be concluded is that it will depend on the facts of each case. Load shedding in the case of a residential property where the loss sustained might be minimal is, in all probability, not wrongful. However, where load shedding affects a farmer or a manufacturer where the loss sustained might be substantial along with a loss of jobs, it might be wrongful. It would be far more conceivable that the community would regard the latter example as more delictually wrongful than the former example.

Regarding the omission of providing enough generation capacity for its consumers, the situation with regards to wrongfulness becomes a bit clearer. Omitting to ensure adequate generating supply eventually has the effect that Eskom is forced to load shed which then causes damage. It is very clear that it would seem reasonable to provide adequate generating capacity to its customers. It is in the business of supplying and generating electricity for one and secondly, it has got a practical monopoly. One might even sit with a case of *omissio per commissionem* because various power stations were actively decommissioned in the early 1990's. This is a very strong indication of the presence of a legal duty on Eskom.[346]

[346] *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA).

6.1.3 Fault[347]

6.1.3.1 Intention

There is no doubt that one is dealing with intention in the case of load shedding. Intention can easily be inferred by Eskom's statements, especially those on its website, in which it describes the act of load shedding and why it has been implemented. As is evident from recent case law, the wrongdoer need not have knowledge of the wrongfulness of his conduct for intent to be present.[348] Thus, Eskom may be found to have acted intentionally regardless of whether it was conscious of the wrongfulness of its actions. Should it be found that intent is absent, Eskom might be found to have acted negligently.

6.1.3.2 Negligence

However, when one looks at their omission in failing to generate sufficient electricity, one might have to investigate the presence of negligence. There is nothing to suggest that they intended for the country to be plunged into darkness although they certainly intended to load shed. It would be far more profitable for them to keep an adequate supply of electricity on hand. Proving negligence becomes a far more difficult task than proving intention.

One would have to look at the reasonable person test set out in *Kruger v Coetzee*.[349] Firstly, would a *diligens paterfamilias* in the position of Eskom foresee the reasonable possibility of his conduct causing patrimonial loss to the consumer? It can be safely assumed that a reasonable person would have foreseen damage being caused by the omission of providing sufficient generating capacity. This becomes even more apparent if one were to attach the same characteristics to Eskom as one would to an expert. A company with Eskom's history and experience in the electricity industry, along with the knowledge that they have a practical monopoly would reasonably foresee that its conduct would cause damage to its consumers. Under the circumstances the first part of the test for *culpa* is answered in the affirmative with little difficulty.

Secondly, would the reasonable person have taken steps to guard against such damage? Here things become a bit more complex. For one, the possibility that the damage would materialise is practically assured. If one cannot provide consumers with electricity, they will suffer loss.

[347] See 3.44 Fault.
[348] See 3.4.1 Intent.
[349] 1966 (2) SA 428 (A); also see 3.4.2 Negligence.

As for the extent of the damage that might materialise, it is quite foreseeable that these losses might be vast since consumers in most cases do not have viable alternatives. Again, one merely has to take into account that Eskom has a practical monopoly, so on a national scale the losses are substantial. At an individual level it would once again depend on what type of consumer is experiencing the loss. One might even see cases where consumers do not suffer any loss at all and it would also not be foreseeable for them to suffer losses. On the other hand, one might have a case where consumers experience a negligible loss. This is where it would be understandable for the reasonable person not to do anything to prevent that loss. Even though Eskom supplies electricity to millions of consumers and the total loss to the economy of South Africa is substantial, one would have to look at the circumstances in each case.

The view is held that had Eskom actually tried to expand its generating capacity, such action would have been very effective. At the very least, it would have minimised the effect that lack of electricity has on consumers. The effectiveness of their actions over the past two years leads one to realise what could have been achieved in the period preceding that.

The damage that is about to be caused needs to be weighed up against the cost of preventing such damage. One can already appreciate that a sizeable cost is involved in restoring a power plant, let alone in building a new one. However, this could not be used as much of an excuse. Eskom is in the business of supplying and generating electricity. Surely then there should have been a budget allowing for the expansion of its generating capacity. It is unfathomable that this part of the test will be answered in the negative, even though expansion involves the spending of extremely large amounts of money. There are ways and means of raising that kind of capital as Eskom themselves have recently proven.[350]

The view is held that the reasonable person in Eskom's position would have foreseen the loss and would have taken steps to prevent it. It is not thought that Eskom took the reasonable steps to prevent the harm. The general opinion is held that they are negligent. It would however be a whole different story to prove this satisfactorily in a court of law.

Luckily, there is a flickering light at the end of the negligence tunnel and it is powered by the Electricity Regulation Act. Eskom is required to be a licensee in terms of in terms of S 7 of the Electricity Regulation Act. S 25 of the Electricity Regulation Act states that where damage is caused by the generation, transmission or distribution of electricity by a licensee,

[350] Reuters (2010) Eskom secures funds to build plants, 23 November 2010 at 23:53, <http://www.timeslive.co.za /business/article780301.ece/Eskom-secures-funds-to-build-plants> (accessed on 25 November 2010).

such licensee is presumed to be negligent unless there is evidence to the contrary.[351] Thus, the onus is on Eskom to prove that it was not negligent by providing 'credible evidence to the contrary' as S 25 puts it. From the wording of the section, it is quite clear that negligence will be assumed in cases of positive conduct. The words used in the section, especially with regard to the type of damage, are of a general nature and it remains uncertain whether omissions would in fact be included. Omissions will have to be assessed and it would have to be shown that the legislature in fact intended omissions to form part of the scope of the section.

6.1.4 Causation[352]

Causation would have to be established separately for each and every case. This is because every consumer's situation might be different and the type of damage suffered would also vary. However, there are definitely consumers who have suffered loss as a result of load shedding or as a result of Eskom's lack of generating capacity. It would also not be a problem to prove that damage flows from Eskom's conduct.

6.1.4.1 Legal Causation

What could become problematic in the sphere of causation is the area of legal causation. This is because the court could in some instances seek to limit Eskom's liability by declaring that the damage would be too remote. What is an even more important consideration is the possibility of the court denying a claim for fear of "opening the flood gates." Since the court takes policy considerations into account when determining whether legal causation is present, it is possible that it might not want to impose liability on Eskom for fear of the wider consequences.

Consider the following. If a judgment against Eskom is granted and a multitude of other plaintiffs in similar circumstances institute action on the same grounds, how will Eskom generate the funds in order to cover the potentially high cost of paying damages? That would lead to an internalisation of costs and would find its way into the consumer's pockets. So if the court takes public policy considerations into account it is plausible that they might sacrifice one to save many. The courts might get caught up in a very difficult situation where they might have to choose the lesser of two evils.

[351] See 6.2 Contractual Liability.
[352] See 3.5 Causation.

6.1.5 Damage[353]

One would have to ascertain whether any damage has been suffered by the plaintiff and whether such damage was caused by the damage-causing event.[354] After that, one would have to establish whether the plaintiff can in fact claim for the damage suffered.[355] As has been stated before, the different types of damage manifesting themselves will be vastly diverse.[356] It could be anything from food products being spoiled, to electronic devices being damaged, or loss of trading profit. Proving physical damage to property as a result of load shedding could be much simpler than proving a loss of profit and the extent thereof.

One can be certain that there will be many claims that are purely economic in nature. As previously expressed, pure economic loss can be claimed if a legal duty has been breached. Various factors are considered to determine whether pure economic loss claimed should be awarded.[357] The factors can be considered in light of the present set of facts.

- Knowledge – It is quite obvious that the conduct of Eskom would cause damage to consumers and it would be almost impossible for Eskom to deny that they had this knowledge. The mere fact that their consumers are of such a diverse nature (with regard to their reasons for using electricity) means that the possibility of pure economic loss – to at least some of their consumers – is almost guaranteed.
- Reasonable foreseeability – Even in the unlikely event that they did not foresee this damage to at least some of their consumers, they should have. This is for exactly the same reason as stated above at "Knowledge", i.e. the diversity of their consumers with regard to their reasons for using electricity.
- Practical measures – Here is the first element which might be problematic. There were steps Eskom could have taken to prevent this type of damage. When looking at their omission in having sufficient generating capacity; they could have built more power plants sooner. When looking at load shedding the alternative measures available are a bit more doubtful. Eskom might have been able to halt the export of electricity. With all these measures the costs involved need to be weighed up against the damage suffered. The ease with which the damage could have been prevented also needs to be considered.
- Professional knowledge and competence – This is where Eskom can be said to be guilty as sin. Their primary business is the supply of electricity, for which they have access to a wide array of experts. They thus have a definite knowledge of the

[353] See 3.6 Damage.
[354] See 3.6 Damage.
[355] See 5.2.1 Damages in terms of the actio *legis Aquiliae*.
[356] See 6.1.4 Causation.
[357] See 5.2.1 Damages in terms of the actio *legis Aquiliae*.

industry and what it involves. With this in mind, it is quite shocking that this loss could not have been prevented.

- Degree or extent of risk – The vast numbers of consumers using electricity mean that the extent of the risk is quite vast and it is practically guaranteed that someone will suffer economic loss. The need to prevent this risk is thus very high.
- Extent of the loss – This aspect could prove to be the downfall in a claim for pure economic loss. This is because where the liability is indeterminate, and could amount to 'multiplicity of claims' the courts might not allow a claim for pure economic loss.[358]
- Statutory provision – There is no statutory provision, to my knowledge, that excludes liability for pure economic loss in this situation.

Assessed with the above in mind, it does not bode well for those wanting to claim damages for pure economic loss. This is mainly due to the extent of the loss. Damages in a purely economic sense might be found to be too remote because they might be consequential in nature.

For example, a chicken farmer who loses a thousand hatchlings as a result of the fact that the heat lamps which kept them alive could not operate as a result of load shedding, might only be able to claim for the present value of the hatchlings. Any profit he might have made through the selling of the chickens later on would possibly not be claimable. This is because there is no way of saying how many would have died in any event, or at exactly what price he would have been able to sell them or in that case, whether he would have been able to sell them at all. On the other hand, had there been a contract in place to buy the hatchlings at a certain age and at a certain price, we might be looking at a different scenario. One can then determine the average number of hatchlings that would normally die and base one's calculations on that.

The same applies to a restaurant which cannot operate as a result of load shedding or Eskom's lack of generating capacity – both eventualities having the same results. Would they then be able to claim for the profits lost as a result of them having to close their doors or would it be too remote? It is not thought that it would be too remote. The opinion is held that it is a direct consequence of the damage-causing event. The quantification of such damage would, as with all losses of this nature, be very difficult. As anyone who has spoken to a restaurant owner would have gathered, knowing how busy the restaurant is going to be on

[358] Neethling J and Potgieter JM, (2010) at 295 and 296 where the authors state that a claim for pure economic loss will fail in the case where there is indeterminate liability. In fn 172 and fn 173 Neethling *et al*. also discusses this criterion further and refers to various cases.

any given day is not what one would call an exact science. Anything from the weather, to the time of the month or day of the week, to traffic on the way to the venue could affect how many customers the restaurant might serve on any given day. So while it definitely flows directly from the damage-causing event, quantification will prove to be problematic. What would be claimable in all probability is the amount of money that they would have lost where they've had to cancel any bookings. This is more certain and much easier to quantify.

What is evident is that one would have to look at the damage sustained in each case. Direct loss would definitely be claimable whereas consequential loss might be too remote.[359] One would have to ascertain whether the loss is consequential or direct in nature and the extent to which damage has been caused. In the end, the main principle is that one would have to prove that the damage was caused by the damage-causing event and if it cannot be proved then it cannot be claimed.

6.1.6 General

The provisions of the Prescription Act have to be examined to see whether one's claim might have already prescribed. One also has to determine whether in a particular case the period of prescription might not already have been interrupted.[360]

Furthermore, one also needs to take cognisance of the "once and for all" rule and note that a single claim has to be instituted for all damage that flows from the same cause of action. The view is held that every continuous period where the plaintiff would not have access to electricity and where he suffers damage as a result, would constitute a single cause of action. Consequently, he would thus have to prove all losses relating to that cause of action in a single claim.[361]

6.2 Contractual Liability

Before the issue of contractual liability can be addressed, one must first make sure that a contract with Eskom actually exists. Eskom must be the supplier of the consumer's electricity. If the consumer's electricity is supplied by a municipality he will have no contractual claim against Eskom and his contractual claim will in all probability be against the municipality.

[359] See 5.2.1 Damages in terms of the actio *legis Aquiliae*.
[360] See 5.4.3 **Error! Reference source not found.**.
[361] See 5.4.2 Prescription.

Clause 19 of Eskom's Standard Conditions of Supply for Small Supplies with Conventional Metering is titled Continuity, Reduction or Variation of Supply. Clause 19 states that

> 'ESKOM shall take all reasonable precautions to procure and maintain suitable plant for the generation and distribution of electricity calculated to secure to its consumers a constant supply of electricity and shall procure efficient technical staff to control such plant, but ESKOM does not guarantee that the same will always be maintained, and ESKOM shall not be liable for damages, expenses or costs caused to the CUSTOMER from any interruption in the supply, variation of voltage, variation of frequency, any failure to supply a balanced three-phased current or failure to supply electricity unless the said interruption or failure is due to the negligence of ESKOM in failing to carry out its obligations aforesaid.'

There are a couple of undertakings made by Eskom in this clause. Firstly, Eskom undertakes to 'take all reasonable precautions to procure and maintain suitable plant for the generation and distribution of electricity'. Failure of this undertaking could amount to breach in the form prevention of performance with regard to the supply of electricity. However, failure to comply with this provision would in itself constitute positive malperformance. This undertaking affects not only the consumers with whom Eskom has concluded a contract, but also the consumers that are supplied with electricity by municipalities, who in turn receive it from Eskom.

Secondly, the abovementioned is done 'to secure to its consumers a constant supply of electricity'. Depending on how the performance is divisible with regards to time, failure of this undertaking gives rise to more than one form of breach. It gives rise to *mora debitoris*, as an interruption of service is a delay in constant supply from one point in time to another by Eskom. Thus each and every second or minute that the consumer does not have electricity, Eskom is *in mora*. At every given moment in time there is thus an obligation on Eskom to supply electricity to its customers. For the presence of *mora debitoris* one would clearly have to look at the definition of the words "constant supply" to ascertain whether this would qualify the time of performance with enough certainty as to allow for *mora ex re*. The opinion is held that this might fall into the same category as "immediate" performance.[362] The only other meaning which could be ascribed to it is that the quality of the electricity will be constant. It is highly doubtful that this is the intended meaning as the quality of the electricity generated is described and discussed elsewhere in the Eskom contract.[363] It is thus safe to say that what is meant is the continual supply of electricity, i.e. a supply that is not interrupted.

[362] See 4.2.1.1.1 *Mora ex re*.
[363] Most notably in Clause 2 where there is also reference to NRS 048 which prescribes the quality of supply of electricity in South Africa as determined by the South African Bureau of Standards.

Divisibility of performance becomes very important when one starts to look for the presence of positive malperformance. Positive malperformance will be present when the service is perceived as one continuous act instead of various smaller individual acts which are split up into different undertakings for each second of time during which the contract of service runs. Thus if the service is perceived to be split up into monthly time periods, and there is an interruption in the supply of electricity during any given month, it will be positive malperformance. If performance is taken to be divisible in seconds, for example, there will be no performance during the time when Eskom interrupts supply and thus positive malperformance cannot be present as a form of breach. In the case of the Eskom contract it can be deemed that performance is divisible into months as accounts are rendered on a monthly basis.[364] If this is then read in conjunction with Clause 19, then incomplete or deficient performance is rendered. This is because in the case of load shedding, there is no continuous supply of electricity.

Also if Eskom cannot secure a constant supply of electricity to its consumers, depending on the cause, it could amount to prevention of performance. Prevention of performance will be present where it is proved that due to Eskom's own conduct they have caused a lack of generating capacity which now causes it to breach its obligations under contract.

What must be noted is that Eskom 'does not guarantee that the same will always be maintained'. In Clause 19 Eskom also limits its liability to cases where the customer can prove the presence of negligence. Thus, fault must be present. However, the plot thickens because Section 25 of the Electricity Regulation Act states the following:

> 'In any civil proceedings against a licensee[365] arising out of damage or injury caused by induction or electrolysis or in any other manner by means of electricity generated, transmitted or distributed by a licensee, such damage or injury is deemed to have been caused by the negligence of the licensee, unless there is credible evidence to the contrary.'[366]

Since Eskom is required to be a licensee in terms of S 7 of the Electricity Regulation Act, the onus will be on Eskom to prove that there is no negligence on its part or as S 25 states, to provide 'credible evidence to the contrary.' The provision requiring the customer to prove negligence is thus ineffective and unlawful. A customer would thus not have to prove that Eskom is negligent. In addition, it is thought that the whole provision in the Eskom contract

[364] Clause 15 of the Eskom contract.
[365] Eskom is a licensee as it performs various functions which require a license to be issued by the National Energy Regulator. This is in terms of S 7 of the Electricity Regulation Act.
[366] S 25 of the Electricity Regulation Act.

does not become inoperative by virtue of the fact that the requirement of negligence is easily severable from the rest of the clause. It is very strange that this clause was kept even though the contract was revised after the enactment of the Electricity Regulation Act.[367]

When Eskom communicates to its customers that power supply will be interrupted, repudiation is definitely present. Any reasonable third party in the position of the consumer (being the creditor) would come to the conclusion that Eskom does not intend to fulfil one of its obligations under clause 19 of the Eskom contract, namely the continuous supply of electricity. Whether such repudiation is sufficient for the debtor to resile from the contract in a lawful manner is something which would depend on the circumstances of each individual case. The opinion is held that a homeowner whose power will only be interrupted for relatively short periods of time at various times during the week will not have the right to resile from the contract. However, a milk farmer who might suffer substantial damages as a result of milk going sour due to lack of refrigeration might be able to resile from the contract lawfully. Although, cancelling the contract lawfully as a result of repudiation could be possible, it would not be of any assistance to the vast majority of consumers as they have no access to an alternative supplier. A much more fulfilling remedy is to keep on enforcing the contract and claim damages once the breach, which was anticipated by the repudiation, occurs.

Clause 19 goes on to state that

> '[f]or purpose of the efficient operation and extension of ESKOM's distribution system, or if ESKOM should experience any shortage of generating capacity, ESKOM shall have the right to interrupt supply to the CUSTOMER.'

Read in conjunction with the first part of Clause 19, it can be inferred that even though Eskom may reserve the right to interrupt supply, it will also be liable for damages caused by such interruption where negligence can be proved by the consumer. In light of the aforementioned legislation, it would seem as though this part of clause 19 would have no effect whatsoever and its use in this clause is quite puzzling. Even if Eskom might have intended for the clause to apply in the case of *force majeure* its insertion under Clause 19 is still questionable since Clause 24 deals with *force majeure* events. One can but wonder what the intended purpose of the right to interrupt supply is since it would be completely ineffective.

[367] The revision was done on 21 November 2007 whereas the Electricity Regulation Act has its date of commencement set on the 1st of August 2006.

It would seem to me that the consumer can claim damages although the types of damage that can be claimed for is as diverse as the plaintiffs. As discussed elsewhere,[368] plaintiffs will suffer different types of damages. Whereas it would be quite easy to claim for general damages, it would be a bit harder to claim for special damages.

Special damages, as mentioned earlier,[369] are claimable subject to the convention principle. In the present situation, the criticism of the convention principle becomes extremely justified. Here we have a situation where the same contract is concluded between Eskom and numerous consumers and there is almost no room for negotiation of terms and conditions as it is on a take-it-ro-leave-it basis. It does not then make sense to expect that the parties should have agreed to receive compensation for special damages when there is almost zero room for negotiation. Christie's opinion that the most equitable way of tackling the problem would be to take policy considerations into account in terms of the contemplation principle is supported.[370]

Once again the crux of the matter is that the plaintiff has to be able to prove that his damage exists. Once this has been proven one can investigate whether it is claimable or whether it is too far removed from the breach. The circumstances of each case will determine whether damages of a particular nature will be awarded.

The plaintiff may also claim specific performance. The effect of this is that Eskom would have to comply with the contract and maintain a constant supply of electricity for use by the plaintiff. The granting of an order of specific performance is subject to the discretion of the court as discussed above.[371] The consumer may also succeed in his application for an interdict against Eskom which might stop them from interrupting the electricity supply to the consumer. The opinion is held that this is a very good way of ensuring that the supply of electricity to the consumer is not interrupted. An interim interdict to this effect has recently been granted in our law in favour of a plastics manufacturer who suffered tremendous damage whenever its supply of electricity was interrupted.[372]

6.3 Conclusion

One might very well be able to hold Eskom either delictually or contractually liable. Each case would have to be determined in light of its own circumstances. The possibility of not

[368] See 5.3.1 Damages in terms of Contract.
[369] See 5.3.1.2 Causation.
[370] Christie RH, (2006) at 552.
[371] See 5.3.2 Specific Performance.
[372] Tania Broughton (2008) Court tells Eskom to keep firm plugged in, 18 April 2008 at 08:37, <http://www.iol.co.za/news/south-africa/court-tells-eskom-to-keep-firm-plugged-in-1.397042> (accessed on 25 November 2010).

having to prove negligence may improve the success rate for a successful contractual or delictual claim. In the end it might be easier to sue in contract. This claim will however only be available to consumers who have a contract with Eskom. Consumers who do not have a contract with Eskom would have to be satisfied by founding their claims in delict.

Chapter 7: Liability of Municipalities

7.1 Delictual Liability

7.1.1 Wrongfulness[373]

Lastly, claims against municipalities are for the sake of a comprehensive discussion, briefly examined. Since municipalities are only involved in the distribution of electricity they cannot be held delictually liable for omitting to generate enough electricity or acting by way of load shedding. However, one might still be able to hold them delictually liable on the basis of a duty to ensure that Eskom provides electricity to their customers. One would first have to establish such a duty. This general duty exists in terms of S 81 (1) (e) of the Local Government: Municipal Systems Act.[374] This section states that

> '[i]f a municipal service is provided through a service delivery agreement [with external mechanisms]..., the municipality remains responsible for ensuring that that service is provided to the local community in terms of the provisions of this Act, and accordingly must...generally exercise its service authority so as to ensure uninterrupted delivery of the service in the best interest of the local community.'[375]

Thereafter one would have to prove the delictual elements in light of the duty to ensure that Eskom provides electricity to the municipality's customers. This would be very difficult and the chances are very slim that one would in fact be able to hold a municipality delictually liable in respects of load shedding. One would have to prove that the municipality was wrongful and also negligent in not ensuring that Eskom did not interrupt supply. Even though one might not have to prove negligence in the end,[376] proving wrongfulness would be problematic as it is thought that even though the municipality might have breached a duty; such breach might not have been unreasonable.

S 21 (5) of the Electricity Regulation Act might also be indicative of a duty on municipalities not to reduce supply to their customers and the breach of such a duty might subsequently be wrongful. Such a reduction can be done by way of interruption of supply, because an interruption has the inevitable effect of reducing a consumer's overall electricity usage. S 21 (5) of the Electricity Regulation Act specifically stipulates that a licensee may not reduce or terminate the supply of electricity to a consumer unless the consumer is insolvent, has contravened the payment conditions or refuses to enter into a supply agreement with the

[373] See 3.3 Wrongfulness.
[374] Act 32 of 2000**.**
[375] S 81 (1) (e) of the Local Government: Municipal Systems Act.
[376] As negligence does not need to be proven in terms of S 25 of the Electricity Regulation Act and from what is understood, municipalities are also licensees in terms of the act as the distribution of electricity is an activity that requires licensing in terms of S 7 of the Electricity Regulation Act; see 6.1.3 Fault and 6.2 Contractual Liability for a discussion on the contents of S 25 of the Electricity Regulation Act.

licensee. The view is held that this creates a legal duty on the municipality to reduce or interrupt supply only if one of the three requirements has been met. However, the breach of a legal duty on its own does not necessarily constitute wrongfulness. Such a breach must also be unreasonable. The opinion is held that it would be unreasonable to expect of municipalities to ensure that Eskom does not interrupt supply when supply is being interrupted nationally and for the protection of the national power grid.

7.1.2 Conduct[377]

The conduct causing damage would be the reduction of supply of electricity by interruption. One would however have to prove that it is in fact the municipality that interrupts supply, thereby reducing it. If it is found that Eskom is responsible for reducing supply then the consumer would not have a delictual claim against the municipality because the municipality would not be responsible for the damage-causing conduct. Alternatively, if one could prove that the municipality breached its duty to ensure that Eskom supplies electricity to its consumers then the conduct causing the damage would be an *omissio* on the municipality's part to ensure that Eskom supplies electricity to its consumers.[378]

7.1.3 Fault[379]

Fault in the form of either intent or negligence would have to be established as one of the elements of a delict. For the presence of *dolus directus*, one would have to prove that the municipality directed its will in the causing of the damage. For the presence of *dolus indirectus* one would have to prove that the municipality intended to load shed and that it had reconciled itself to the fact that load shedding would cause damage to its consumers. Consciousness of wrongfulness need not be present to prove that the municipality had acted intentionally. Although the knowledge of the presence of wrongfulness is irrelevant, one merely has to look at the content of most electricity supply by-laws to see that either no national legislation was consulted during the drafting of the by-law or that national legislation was simply ignored. By ignoring legislation, one merely opens oneself up to other forms of liability. It appears as if it was never consulted in the first place. Whether the municipality ought to have known about the wrongfulness of its conduct is a whole different issue and one which is not relevant to the present enquiry.

[377] See 3.2 Conduct.
[378] The duty in question is in terms of S 81 (1) (e) of the Local Government: Municipal Systems Act as discussed at 7.1.1 Wrongfulness.
[379] See 3.4 Fault.

7.1.3.1 Negligence

One might, in this situation be dealing with a case of negligent conduct. As mentioned previously, the test for the presence of negligence is the test as set out in *Kruger v Coetzee.*[380] One must measure the conduct of the wrongdoer against that of the reasonable person.

Assuming that the municipality is in fact responsible for load shedding, the question begs whether the reasonable person would have foreseen that the load shedding would cause damage to consumers. It is safe to assume that the reasonable person would easily have foreseen that switching off electricity would cause damage to consumers. The type of damage that would ensue and the extent of damage would be a different story. However, the reasonable person would definitely know that it has various different types of consumers whom it provides with electricity and that those consumers would suffer damage in various different ways and to various degrees.

Secondly one would have to ask whether the reasonable person would have done anything to prevent this damage. Here it becomes complicated, because it is uncertain whether the reasonable person would have been able to do something to prevent the damage. If the municipality is forced to interrupt supply, then it does not have any choice since Eskom would definitely hold the municipality liable for damage it sustains as a result of the municipality not interrupting supply. Having this knowledge, it is thought that the reasonable person would not have a choice in the matter and would thus not have done anything to prevent it. The enquiry into negligence thus ends here. Negligence would not have to be proved by the consumer though. S 25 of the Electricity Regulation Act states that negligence of a licensee is assumed unless there is 'compelling evidence to the contrary.' Whether circumstances surrounding the municipality's conduct would be compelling enough, awaits to be seen.

7.1.3.2 *Omissio*

If one considers the *omissio* of not ensuring that Eskom supplies electricity to consumers, one would once again have to establish either intent or negligence. Here it is believed that intention is in fact present. The reason for this is that the Local Government: Municipal Systems Act is a pivotal piece of legislation that every municipality has knowledge of and should comply with. Thus, it is doubtful whether there is any way that municipalities can claim that they did not know that what they were doing was wrongful.

[380] 1966 (2) SA 428 (A).

If however, it does turn out that it was not an intentional omission on their part, one could possibly have a situation where the municipality was negligent. Firstly, one should ask whether the reasonable person would foresee that omitting to ensure that Eskom supplies electricity would cause damage to the consumer. This is quite a thorny issue because there was no way of knowing at the time that damage would be caused had no one followed-up with Eskom. Caution must be taken not to look at the situation with the clarity of hindsight. Therefore, it remains uncertain whether this part of the test for negligence could in fact be answered in the affirmative. Where it could be answered in the affirmative, one would move on to the next part of the test.

One then has to ask whether the reasonable person would have taken steps to prevent such harm. Again, a situation exists where even though the reasonable person would want to prevent the harm, it is uncertain as to how this would be possible. The question begs what a municipality could reasonably do to ensure that Eskom supplies electricity to its consumers when such a supply could cause damage to Eskom. This damage would surely then be claimed from the municipality. The conclusion has to be drawn, once again, that the reasonable person would not have prevented the harm in the current situation. Though the reasonable person might not have been able to prevent the harm, it must have taken reasonable steps to prevent the harm. What might constitute a reasonable step is up for debate. The opinion is held that the test for negligence would fail.

One would have to consider the application of S 25 of the Electricity Regulation Act in the present situation, because the legal duty flows from the Local Government: Municipal Systems Act. Even though the duty flows from this Act, the damage is still caused in the manner contemplated by S 25 of the Electricity Regulation Act and as such the opinion is held that negligence will be assumed. It remains to be seen whether the compelling evidence, as stated in the aforementioned section, could be presented.

7.1.4 Causation[381]

One must consider whether the damage suffered flows from the conduct. In the present case we are dealing with a *commissio* on the part of the municipality in interrupting supply to the consumer. Factually, one would have to consider on a case by case basis whether the damage flows from such an interruption. It is quite evident that there would be damage that will flow from an interruption of the supply of electricity, for if there was no interruption there would be no damage.

[381] See 3.5 Causation.

When considering legal causation one would have to take into account considerations of public policy in order to see whether liability can indeed be imputed to the municipality. The opinion is held that it would be quite unfair to hold the municipality accountable for conduct that was necessitated by a situation which was not within their control, and that was clearly not due to their fault. For this reason, it can be concluded that the municipality's conduct will not pass the test for legal causation, and subsequently the conduct will not be the legal cause of the damage.

Whether the omission to ensure that Eskom supplies electricity to the municipality's consumers is the cause of the damage suffered by the consumers is a much more difficult question to answer. The question to ask is whether the damage would still have been suffered had the municipality ensured that Eskom supply electricity to its consumers. Now, this brings to the fore a whole new scenario. Had the municipality ensured the supply of electricity to its consumers, the whole electrical grid might have failed. It is held that it cannot be said with certainty that different conduct on the part of the municipality would ensure that the consumer does not suffer damage.

Once again, when considering legal causation, this damage cannot be imputed to the municipality. Even when ensuring the supply of electricity to consumers, they are not responsible for its generation and it would be ludicrous to hold them responsible for something which was beyond their control from the start.

7.1.5 Damage[382] and General

The discussion on the type of damage and general considerations to take into account is practically identical to that of Eskom's delictual liability. Discussing it here would thus be unnecessary and the principles remain the same.[383]

In the end the only reason one might hold the municipality in question delictually liable is so that it can be joined as a wrongdoer to a delictual action instituted against Eskom. Eskom does, after all, have deeper pockets than a lot of municipalities.

7.2 Contractual Liability

The terms and conditions of supply by a municipality to a consumer are regulated by the relevant municipal by-laws dealing with the supply of electricity.[384] These by-laws contain

[382] See 3.6 Damage.
[383] See 6.1.5 Damage and 6.1.6 General.
[384] See for example S 4 (1) of the City of Tshwane Metropolitan Municipality Standard Electricity Supply By-Laws contain a provision to this effect.

various undertakings by the municipality and also certain duties that the consumer has to comply with. The terms and conditions of the supply agreement are part of the supply agreement *ex lege*, since the agreement is regulated by a by-law. The main focus of this section will be on the City of Tshwane Metropolitan Municipality Standard Electricity Supply By-Laws, and it has been verified that most other councils have by-laws with similar provisions, yet clearly cannot all be included in this discussion.

S 8 of the City of Tshwane Metropolitan Municipality Standard Electricity Supply By-Laws states that in the event of any dispute arising from the meaning or effect of the by-laws, it will be referred to the National Energy Regulator, failing which, it will be referred for arbitration in terms of the Arbitration Act.[385] S 22 states the following regarding liability of the municipality:

> 'The service authority and the Municipality are not liable for any loss or damage, direct or consequential, suffered or sustained by a consumer as a result of or arising from the cessation, interruption or discontinuance of the supply of electricity, unless the loss or damage is caused by negligence on the part of the service authority or the Municipality.'[386]

As with the Eskom contract, liability is hereby limited to cases where negligence can be proven. However, as discussed earlier,[387] S 25 of the Electricity Regulation Act states that in the event of a claim for damages being instituted against a licensee, the consumer need not prove negligence. Negligence on the part of the licensee is assumed unless there is 'credible evidence to the contrary.'[388] Thus, it follows that since S 22 of the City of Tshwane Metropolitan Municipality Standard Electricity Supply By-Laws contradict S 25 of the Electricity Regulation Act, it is inconsistent with the national legislation and as such becomes inoperative. One then does not need to prove negligence and the onus is on the municipality to prove that they were not negligent or that there was credible evidence indicating that they were not negligent.

These by-laws generally contain a provison regarding load reduction and the municipality's right to interrupt supply to certain appliances such as geysers or even to the whole installation. These provisions also state that the municipality shall not be liable for any damage, whether it is direct or consequential, arising from such an interruption.[389] Contrary to this, S 21 (5) of the Electricity Regulation Act states that a licensee may only reduce the supply if the consumer has contravened a payment condition, refuses to enter into a supply

[385] Act 42 of 1965.
[386] S 22 of the City of Tshwane Metropolitan Municipality Standard Electricity Supply By-Laws.
[387] See 6.1.3 Fault and 6.2 Contractual Liability.
[388] S 25 of the Electricity Regulation Act.
[389] See S 35 of the City of Tshwane Metropolitan Municipality Standard Electricity Supply By-Laws and S 34 of the City of Cape Town Metropolitan Municipality Electricity Suplly By-Law, 2010 as examples.

agreement or is insolvent. Thus, the municipality may not decide on a whim to interrupt supply to the consumer. The provisions regulating the reduction of load contained in the by-laws are thus invalid as they are contrary to national legislation.

Inherent to the supply of electricity is the provision that such an electricity supply needs to be constant. Electricity by its very nature is the flow of electrons thus if one buys electricity, the supply needs to be constant since what one is buying is the effecctive flow of electrons.[390] It can thus be said that this is a fundamental part of the sale of electricity and as such, a tacit term to any electricity supply contract. It then becomes clear that municipalities, by not complying with the above sections of the by-laws, are committing breach in the form of positive malperformance and *mora debitoris*.

As previously explained,[391] the type of breach present will depend on the divisibility of the performance. If the performance is divisible in small pieces of time, then the municipality will be *in mora* since there is a delay in the supply of performance on their part. If one considers the performance to be divisible in larger pieces of time, such as a month considering that payment is due monthly in most cases, then one will have a case of positive malperformance. This is because the municipality is not providing the consumer with a constant supply of electricity. There is performance in that the municipality supplies the consumer with electricity but as soon as this supply is interrupted, the performance is contrary to the very nature of the contract.

As is the case with Eskom, if the municipality expresses its intention to reduce load, it is guilty of repudiation. This is because the reasonable person would easily interpret this to mean that the municipality does not intend to comply with its duty in terms of the contract. Even if the municipality still intends to be bound by the contract, it would not act as an excuse. The mere fact that they express the intention not to comply with even one of the provisions of the contract means that they are committing repudiation. Whether repudiation would allow the consumer to cancel the contract is quite a different matter. The point is quite irrelevant however, since the consumer generally does not have an alternative source of electricity.

The types of damage the consumer may be able to claim for is in most instances identical to the type of damages that a contractant to an Eskom contract can claim. It would have to be proven that the damage flow from the breach of contract. As stated previously, the damage

[390] See Chapter 1: Introduction.
[391] See 6.2 Contractual Liability.

might flow directly from the breach and would be quite easily claimable. It might also be considered to be consequential in nature and would then have to be specially proven and might end up being too remote to claim. It would depend on the type of damage claimed for and the circumstances under which the damage was caused. As has been mentioned before,[392] the plaintiff will be able to claim for all damage generally flowing from the breach of contract. It would all depend on whether the damage can be proved and whether it generally flows from the breach. Any special damages would have to be specially proved and would also have to have been agreed to by the contractants. Any pure economic loss or loss of profits might fall under the definition of general or special damages depending on the circumstances of each case. This is how a restaurant owner may be able to claim for his loss of profit but a chicken farmer might not be able to claim the profit he would have made from selling his chickens.

The criticism levelled at the application of the convention principle regarding Eskom contracts, with regard to the claimability of special damages, also enjoys application here.[393] As with the Eskom contract, one would have to be able to prove the damage suffered. These damages would then have to be assessed in light of the circumstances to see whether they are claimable or not. The circumstances of each case dictate what type of loss may be compensated for.

Besides damages, the plaintiff may also be entitled to an order for specific performance. This would have the effect of forcing the municipality to comply with the agreement. Granting of this order is however subject to the discretion of the court.[394] The consumer may also be entitled to relief in the form of an interdict. This could prevent the municipality from interrupting supply to the consumer. As mentioned previously, an interim interdict to this effect has already been granted in our law.[395] The principles regarding interdicts have been discussed elsewhere in this study.[396]

7.3 Conclusion

It remains more uncertain as to whether a consumer will be able to hold a municipality liable in delict than to hold Eskom liable. The contractual relationship between a municipality and a consumer is generally regulated by by-laws. It might be easier to hold the municipality

[392] See 5.3.1 Damages in terms of Contract.
[393] See 6.2 Contractual Liability.
[394] See 5.3.2 Specific Performance.
[395] See 6.2 Contractual Liability and 5.1.1 Interdict; see also Tania Broughton (2008) Court tells Eskom to keep firm plugged in, 18 April 2008 at 08:37, <http://www.iol.co.za/news/south-africa/court-tells-eskom-to-keep-firm-plugged-in-1.397042> (accessed on 25 November 2010).
[396] See 5.1.1 Interdict.

contractually liable since most, if not all, of these by-laws are in some way inconsistent with national legislation. In the end one would still have to assess each case individually.

Chapter 8: Final Conclusion

Damage caused by load shedding and lack of generating capacity has far-reaching consequences. It does however seem as though one will be able to hold municipalities and Eskom liable in some way or another. It would be very hard to do so and doubts exist as to whether the courts would in the end hold Eskom or municipalities liable. The damages suffered under the present circumstances are however as diverse as the persons claiming them. Each and every case of liability would have to be assessed separately. I cannot help but feel that the consumer will end up getting the short end of the stick either way, whether one can hold Eskom and municipalities liable or not. One thing that is certain is that if Eskom or municipalities are held liable, the costs will be diverted to consumers by an internalisation of costs.

The costs of instituting action need to be weighed up against the losses the consumer has sustained. The opinion is held that a large number of consumers will therefore not institute action. In a lot of cases it would be easier and cheaper to cut one's losses and focus on reducing one's electricity consumption or providing an alternative power source such as a generator. The National Energy Regulator of South Africa is however there to protect the consumer to some extent, and they have various procedures for consumer protection. This would be an alternative to the costly process of instituting civil actions.

One positive thing to come out of the whole problematic situation regarding load shedding is the fact that consumers are taking cognisance of the effect of their electricity consumption on the environment. Whether consumers strive to use less electricity as a result of consideration for the environment or consideration for their wallets is irrelevant. The effect remains the same. It is still a pity that as a country, we are very reliant on coal as a resource to generate electricity. This is also perpetuated by the electricity crisis since coal is the cheapest way of expanding electricity generating capacity in South Africa.[397] Had expansion begun when warnings had been given about the looming electricity crisis, we might have been able to expand into cleaner forms of energy such as solar, nuclear or wind energy.

What also needs to be done is to open the market for independent electricity producers. This should be done in order to escape the stranglehold Eskom's monopoly has on consumers at the moment. Government is currently trying to restructure the electricity

[397] Eskom Website <http://www.eskom.co.za/live/content.php?Category_ID=121> (accessed on 28 November 2010).

industry, although it might take a while.[398] With Eskom attempting to obtain electricity supply from independent suppliers, it would be an ideal time for independent suppliers to enter the market. There might however be various reasons why it is not viable to enter the market at this time.

On a larger scale, the loss to the economy will not easily be recovered, if at all. One can only look to the future to try to prevent this situation from arising again. In any event, consumers need to consume less in order to assist in preventing this from happening again. This can also go a long way for the protection of our natural resources. As has been mentioned previously, we might have to endure load shedding again soon if Eskom does not secure additional generating capacity and electricity timeously.[399] In the unfortunate event that we will have to suffer more load shedding, consumers will have to restrain themselves once more from threatening to kill those responsible.

Word Count: 38 222 words[400]

[398] Department of Minerals and Energy Electricity Overview <http://www.energy.gov.za/files/electricity_frame .html> (accessed on 24 November 2010).
[399] See Chapter 1: Introduction.
[400] Includes footnotes. Excludes Table of Contents and Bibliography.

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