NAVIGATING ESG GOVERNANCE AND CORPORATE LIABILITY IN AFRICA

Aligning standards, policies, and legal requirements in Africa; and understanding the forms of legal and non-legal liability for ESG failures

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Introduction to ESG and Corporate Liability

Growing demand for ESG accountability:

- Companies are facing increasing pressure from investors, governments and regulatory bodies, and consumers to disclose ESG risks and take action.
- Advancements in technology and global connectivity have led to heightened public awareness of ESG failures.
- Directors’ fiduciary duties are expanding in scope to include ESG considerations.
- Companies are realising the tangible differences between strong ESG practices and poor ESG performance.
- The global shift towards a low-carbon economy requires companies to play their part.
- Supply chains, especially in regions where raw materials are sourced (such as Africa), are exposing ESG issues.
- Most international efforts in regulating ESG disclosure and reporting has been to increase transparency and enhance capital flows to sustainable companies/projects.

Challenges in Africa:

- Companies with operations in Africa must navigate complex global ESG standards and laws while aligning with local (often fragmented) legal requirements.
- Region- and context-specific challenges and responses to ESG risk and impact.
- ESG capacity and resource constraints.

ESG Frameworks: The Expanding Alphabet Soup

Proliferation of Standards and Frameworks – examples include:

- Global Reporting Initiative (**GRI**)
- Task Force on Climate-Related Financial Disclosures (**TCFD**)
- Task Force on Nature-Related Financial Disclosures (**TNFD**)
- Proposed Task Force on Inequality and Social-Related Financial Disclosures (**TISFD**)
- Sustainability Accounting Standards Board (**SASB**) and International Sustainability Standards Board (**ISSB**) vs. European Sustainability Reporting Standards (**ESRS**)

Challenges:

- Operational, resourcing, and cost challenges due to multiple overlapping frameworks and data constraints.
- Materiality reporting thresholds (single vs. double materiality assessments).
- Industry efforts to harmonise standards, but new frameworks continue to emerge.
- Local guidance (general and sectoral) may need to be aligned with international requirements (in the context of multinational companies).
- Ensuring disclosures are compliant, but also that disclosures are providing a fair representation and are not likely to mislead.
- Legal and sustainability teams must co-operate, particularly as sustainability reporting evolves.

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Legal Requirements & Extra-Territorial Laws

South Africa:

- Companies Act, 2008 and Companies Regulations > IFRS financial reporting
- King IV Code on Corporate Governance > sustainability/ESG reporting (voluntary, but mandatory for JSE-listed entities)
- JSE issued Sustainability and Climate Disclosure Guidance documents in 2022
- SA's Prudential Authority issued guidance notes to banks and insurers on climate-related disclosures, governance, and risk practices in 2024
- **BUT**: adoption of mandatory ESG disclosures, prepared in accordance with the ISSB Standards, would require changes to the existing regulatory regime.

Key International ESG Regulations:

- EU CSRD and CSDDD
- EU Deforestation Directive
- Modern Slavery Acts (Australia, UK, Canada)
- French Duty of Vigilance Law
- German Supply Chain Due Diligence Act

Impact on Africa countries: Some of these laws have **extra-territorial effect** and **include value chains**.

Stakeholder and Litigation Trends

Stakeholder actions:

- Shareholder activism at AGMs
- Shareholders are asking to vote on ESG responses (e.g., Say on Climate, Say on Pay votes)
- Consumer boycotts
- Class action lawsuits

Litigation and dispute trends:

- Global litigation is driving soft law developments in this area
- Legal claims are evolving in nature
- Increase in greenwashing claims in advertising tribunals and consumer forums
- Multinational disputes through OECD contact points

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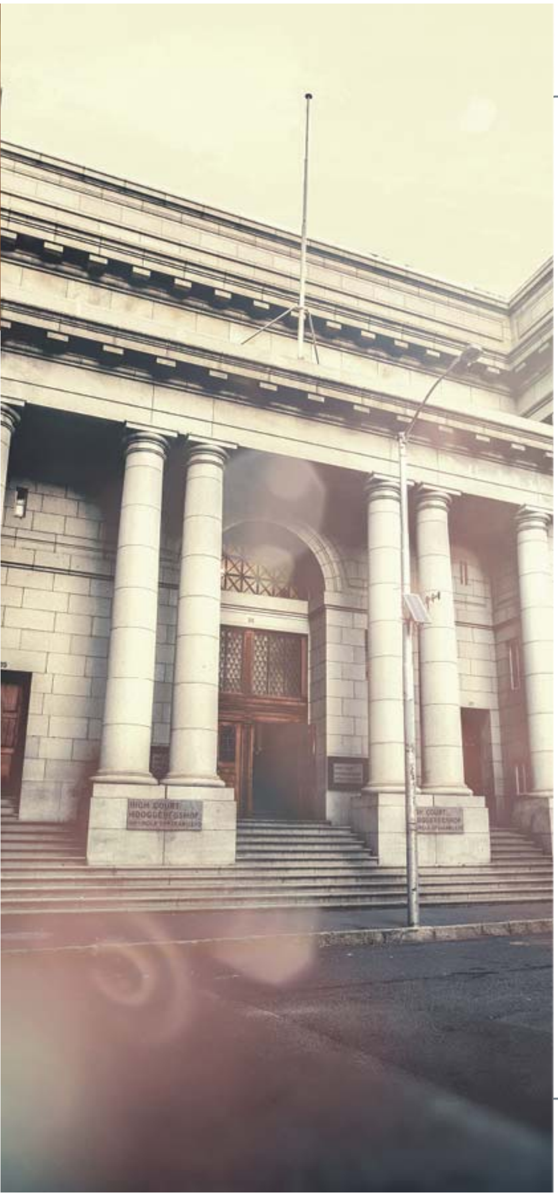

Legal and Non-Legal Liability Sources

Failure to address ESG risks, or misrepresenting ESG data, can result in financial, reputational, and legal consequences.

Legal liability:

- Civil: Contract, delict, common law, constitutional law, statutory, property law, nuisance
- Criminal: Statutory and common law offences

Non-legal / commercial liability:

- De-listing, market fluctuations, loss of geographic footprints, inability to access markets/funding
- Contractual and commercial repercussions (termination of relationship/funding, industry memberships, financial liabilities for breaching ESG covenants in financing agreements)
- Litigation (colourwashing, class actions, shareholder activism, misrepresentations, fraud, evolving legal claims)
- Reputational / brand damage
- Activist and consumer disengagement

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Strategic Recommendations for Companies

- Map ESG Standards: Conduct a thorough mapping of all applicable ESG frameworks and regulations.
- Align with Legal Requirements: Ensure that both legal obligations and stakeholder expectations are met.
- Proactive Governance: Implement robust policies, governance systems, and risk management practices.
- Capacity Building: Invest in ESG training and capacity development for internal teams.
- Adopt Technology: Harness the range of technological/ software solutions which have been and are being created in the ESG reporting and disclosure space.
- Implement Effective Data Gathering Strategies: Data must be verifiable, accurate, comparable.
- Secure Adequate Specialist Support: Consultants, lawyers, assurance providers should be appointed when preparing reports.

The Integrated Reporting Committee (IRC) of South Africa is hosting the IRC Annual Conference 2024 on Wednesday, 30 October 2024 at the JSE, Sandton.

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