Empowering ESG:
The Strategic Role of Boards and Senior Leaders

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INTRODUCTION

- At the African Mining Indaba, Minister of Mineral Resources and Energy Gwede Mantashe referred to a renewed focus on sustainability by the investment community and the developed world, which is driving the development of ESG assets –
  - estimated to exceed **$50 trillion by 2025**
  - representing more than a third of the projected **$140.5 trillion in global assets under management**

ENVIRONMENTAL

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NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998

- The National Environmental Management Act, 1998 (“**NEMA**”) regulates all environmental matters and provides for environmental protection and conservation in South Africa.
- Section 24(2) of NEMA empowers the Minister of Environmental Affairs to list activities which may not commence without an environmental authorisation.
- These are activities which have significant impacts on the environment.

EIA REGULATIONS

- These listed activities have been published as Listing Notices 1, 2 and 3 of Government Gazette 38282 on 4 December 2014.
- In line with these empowering provisions, the Minister published the Environmental Impact Assessment Regulations (the "**EIA Regulations**"). and three Listing Notices. These EIA Regulations list prospecting and mining projects as activities which may not begin without an environmental authorisation.
- The EIA Regulations provide for two processes to be undertaken depending on the significance of the environmental impact of the specific listed activity, namely: a shorter **basic assessment process** and a lengthier full **environmental impact assessment process** and the completion of a scoping report.

BAR vs EIAR & SCOPING

BASIC ASSESSMENT

- Shorter process
- Less environmental impacts
- Approximately 6 months to complete

ENVIRONMENTAL IMPACT ASSESSMENT

- Longer process
- Significant environmental impacts
- 6 to 18 months to complete
- List of specialist studies required to be undertaken

SPECIALIST STUDIES AND CASE LAW

- Certain specialist studies must be undertaken as part of the application process for an environmental authorisation.
- In a recent judgment of *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others*, the High Court held that the specialist studies to be undertaken may include climate change impact assessments in line with South Africa's commitments under international treaties such as the **Paris Agreement** and **Kyoto Protocol**.

CARBON TAX ACT 15 OF 2019

- The President also signed the Carbon Tax Act 15 of 2019 into law on 22 May 2019, which legislation imposes a carbon tax on emitters of greenhouse gases, which may include certain mining operations.

CLIMATE CHANGE ACT 22 OF 2024

On 18 July 2024, the President signed into law the Climate Change Act 22 of 2024.

- The Act aims to enable the development of an effective **climate change response** and a long-term, **just transition to a low carbon** and climate-resilient **economy** and society for South Africa.
- Broadley speaking, the Act introduces the following primary concepts –
  - the listing of **greenhouse gas emitting activities**;
  - the assigning or allocation of **carbon budgets** to persons conducting listed activities; and
  - the preparation of **greenhouse gas mitigation plans**.

OTHER ENVIRONMENTAL ACTS

- Mining companies must be aware of the provisions of the **National Water Act, 1998** which require a water use licence for the undertaking of water uses for mining activities which impact on water resources.

- Other environmental acts include –
  - National Environmental Management: Protected Areas Act, 2003
  - National Environmental Management: Biodiversity Act, 2004
  - National Environmental Management: Air Quality Act, 2004
  - National Environmental Management: Integrated Coastal Management Act, 2008
  - National Environmental Management: Waste Act, 2008

SOCIAL

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IMPACT ON COMMUNITIES

- ESG also requires mining companies to take cognisance of the importance of the "***social licence to operate***" which requires mining projects to ensure that their activities are not undertaken to the detriment of the livelihoods of surrounding mining communities.
- Mining communities are often the most affected by mining activities. It is these communities which are most impacted by noise, vibrations and blasting activities which emanate from mining projects. These communities are also the most impacted by any environmental pollution or degradation which originates at mines.
- However, a *lacuna* (or gap) still exists in the legal framework regarding which communities should be consulted by mining companies.

CONSULTATION – WHICH COMMUNITY?

- Mining communities may group themselves in a number of formal structures, which include: the registration of community trusts, community companies or communal property associations (or CPAs).
- There may also be traditional authorities, traditional leaders or traditional councils who have jurisdiction over a particular mining community.
- Lastly, there may be divisions or factions within the community itself - with part of the community supporting a mining project and another portion of the community opposing the mining project.

WHICH COMMUNITY?

- This often gives rise to the question: to what extent should a mining company undertake consultation with a community and most importantly, with whom?
- This issue of community consultation should be considered in light of the developing jurisprudence around community consultations, with the courts in the ***Baleni and Others v Minister of Mineral Resources and Others*** and ***Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another*** cases deciding that in addition to consultation, the consent of the community must be obtained by mining title applicants where the community holds informal land rights under the Interim Protection of Informal Land Rights Act, 1996.
- A difficulty then arises regarding whose consents should be obtained for purposes of complying with this requirement, in light of the diverse nature of mining communities.

GOVERNANCE

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GOVERNANCE

- There is a shift in thinking and leadership on ESG – should boards lead this shift, and if so, should they lead by **empowering ESG**?
- Without governance the framework created to **enforce the "E" and the "S"** would not come to life - thus the foundation tool to actualising ESG
- **Role of the board** - as the governing body, to strategically direct the empowerment of ESG as a tool for the sustainability of the organisation and its stakeholders.
- Any board would be foolish not to consider ESG
- **Why?**

GOVERNANCE TOOLS

- Giving **expression to ESG principles**, foundation to the realisation of the "E" and the "S"
  - beyond risk management to ESG being a driver of business, setting broad strategies
  - social legislation (e.g. B-BBEE, NEMA) moving into public interest considerations
  - shift to a more stakeholder inclusive capitalism
  - ESG-related shareholder activism (at AGMs) and economic activists (Just Share)
  - Key themes: transparency and accountability
- **Key tool of the board** is the Social and Ethics Committee ("SEC")
- Recognised by the changes brought about by the **Companies Amendment Bill** (signed by the President, yet to be effective)

GOVERNANCE TOOLS

- Companies Amendment Bill: changes brought about, centering on **4 key themes**:
  - **Accountability**
    - strengthening of SEC via composition, through change in composition
    - increase in task allocation
  - **Transparency**
    - companies to publish requests for exemption
  - **Reporting-** what doesn't get measured, doesn't get done
    - SEC report
  - **Stakeholder** economy
    - members appointed by shareholders
  - **Easing the burden** of doing business
    - clarified and extended basis for exemptions
    - encouraging substantial compliance

GOVERNANCE TOOLS

- **Practical steps**
  - Establish **beyond the regulatory requirements** - no company can avoid to have sero ESG governance
  - Adopt an **ESG strategy**
  - Include ESG considerations in a **due diligence**, whether of a transaction or a business partner
  - Appoint an **ESG Champion**
  - **Employee training** on ESG
  - **Publish ESG or SEC report**, both internally (to change culture) and externally (to enforce culture)
  - Keep in mind: **ESG is a doing requirement, not a reporting requirement**

Q&A

Thank You!

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