

ESG-related litigation looms for mining, oil, and gas companies

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In the near future, companies operating in the mining, oil and gas sectors are likely to feel the brunt of the increasing prominence of ESG issues and the recalibration of societal norms towards sustainability.



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In South Africa, the energy sector is adapting to significant change and market turbulence. At the same time, it is in the crosshairs of political, legislative, and judicial scrutiny, as attention turns to corporate performance in the context of sustainability and climate impact.

For example, in the coal sector, government faces a difficult task in managing the just transition away from Eskom's coal-powered generation, given that the country was at one point the world's fifth-biggest coal producer, the provision of electricity to the citizens of SA is a duty of government and, in the words of the minister of mineral resources and energy: "We are not a developed economy, we do not have all alternative sources".

But coal is a significant contributor to greenhouse gas emissions and climate change and the country's reliance on coal for electricity is unsustainable.

Apart from Eskom, other South African companies that could be at risk of ESG-related litigation are Sasol and Seriti Resources.

Sasol has been found to fall short on some climate disclosure requirements aimed at aligning the company with the goals of the Paris Agreement on climate change. A global report, which benchmarks corporates against nine key indicators, found that Sasol's emission reduction targets did not meet appropriate standards.

Seriti Resources recently became Eskom's biggest coal supplier and has been warned that it could soon find itself in a class action lawsuit storm. The litigation would aim to secure compensation for occupational diseases suffered by more than 1,000 retired coal mineworkers.



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Managing exposure to climate change litigation

Companies such as these must proactively take steps to limit their exposure to climate change-related claims. In doing so, they must:

- ensure that all ESG / sustainability targets are backed up with baseline data and that any reporting against achieving these targets can be supported by hard evidence;
- ensure that boards understand the risks of climate change and that they can defend any claims of breach of fiduciary duties / duty of care provisions for failing to take the effects of climate change on the business seriously;
- involve legal counsel at an early stage to ensure ESG compliance with reporting and disclosure requirements and to avoid any ESG-related disputes;
- conduct environmental and human rights due diligences;
- point out possible exposure to liability under a changing ESG regulatory landscape and involve legal counsel at this stage to mitigate such exposure;
- beef up standard-form contracts to include climate change and sustainability linked clauses. Should any disputes be foreseen at this stage it will be beneficial to involve legal counsel to manage them;
- in the event of a breach, involve legal counsel in crisis management and to assist in the resolution of any ESG-related disputes;
- undertake a feasibility study to see whether corporate structures and operations have the necessary resources and expertise to handle any ESG matters that may arise; and
- move beyond treating ESG as a tick-the-box exercise to ensuring robust governance and accountability at board, management and operational level and integrating material ESG factors into strategic decision-making.

South African courts uphold ESG principles

The recent rulings on *EarthLife Africa Johannesburg v Minister of Environmental Affairs and Others*, relating to the Thabametsi Power Project, and the High Court's setting aside of the environmental approval for the Khanyisa coal-fired power station, show that South Africa's courts have taken a strict approach towards upholding the requirement for regulatory approvals to meet the requirements of the Constitution and the Bill of Rights. In doing so, the courts have taken a robust prospective approach to the environmental aspect of ESG. What remains to be seen is ESG-related social and governance litigation and how courts will deal with those issues in the context of ESG.

We expect test "S" and "G" cases to be brought in the near future.

From our observation, the willingness of courts to embrace new arguments and establish new precedents in climate change

litigation should be closely monitored and balanced against the rights and protections already afforded by both domestic and international law, given that such claims could be a precursor for action against private sector parties.



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Balancing ESG, economy

A balance must also be struck between ESG and the economy. Without an economy to fund ESG initiatives and to support a government in regulating ESG, ESG becomes nothing more than a buzzword. Ultimately, companies, including state-owned entities, should maintain a cautious approach to ESG and should involve legal counsel at every step of the way.

Companies should involve legal counsel (1) when attempting to comply with their ESG requirements with a specific view to avoid disputes; (2) when ESG-related disputes are foreseen or threatened, to manage such risk; (3) when ESG-related disputes are brought to the attention of such companies with a view to resolving such disputes; and, most importantly, (4) when an ESG-related dispute has been resolved, in order to ensure that such a dispute never recurs.

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