

# TOP LEGAL ISSUES FOR THE **SA MINING SECTOR** IN 2021



2020 was a year of many firsts with countless lessons learnt across the board. For the mining sector – key issues for 2021 will be on adopting lessons from the successful response to the pandemic to other aspects of risk management within their businesses; continuing to build a culture of sustainability and managing the risks of environmental pollution.

## Adapting the lessons learnt from Covid-19

Kate Collier, Lize Louw

The mining industry's response to Covid-19 in helping employees to cope has largely been lauded.

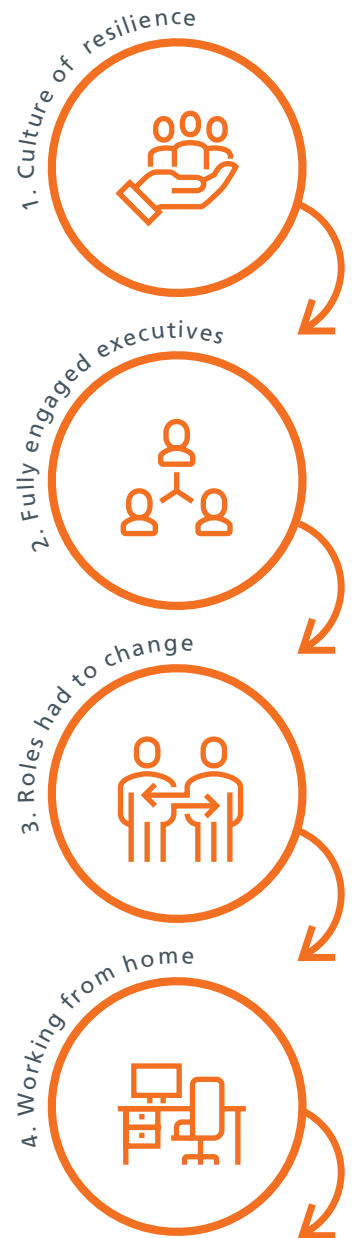
Although key lessons learnt from the approach to managing the risks posed by the pandemic relate primarily to employee and public health, these can be applied to other areas of business.



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1. Organisations that coped best were those which already had a culture of resilience and adaptability and communicated with their employees, making them feel valued.
2. The most effective responses were those led by the most senior executives in a company, and mining companies showed how fully engaged executives were able to bring employees back to work, safely and as soon as permitted and practicable.
3. Key roleplayers and decisionmakers had to identify where their roles had to change and take on new roles, either as the law or their internal risk strategies changed.
4. In future, the lines between work and home will continue to be blurred and the Labour Court has indicated that occupational health cannot necessarily be separated from public health issues.
  1. The understanding of a workplace has to be reimagined and employers should adapt their health and safety policies and systems for different workplaces which now are likely to include private homes
  2. Working from home requires a new approach to managing employee performance, productivity, and defining which categories of employees can work from home.
  3. In mining, there is often a clear distinction between those who can perform their duties from home and those who cannot, but in other sectors there could be a risk of unfair discrimination. Work from home policies must take this into account.



The occupational medical practitioner (OMP), in addition, to issuing all employees with a certificate of fitness before they could work at a mine also had to consider potential vulnerability to employees to a possible future event Will this become a standard for all possible future vulnerabilities, or be limited to COVID-19? This has certain consequences:

1. Employers will have to consider whether and how to terminate employment of vulnerable employees who cannot obtain a certificate of fitness because of possible future health complications. SA labour law allows incapacity as a reason for termination, but traditionally it referred to poor work performance or medical incapacity.

However, there are also broader categories of incapacity (e.g. a driver that loses a driving licence) and the lack of a certificate of fitness falls into this category.

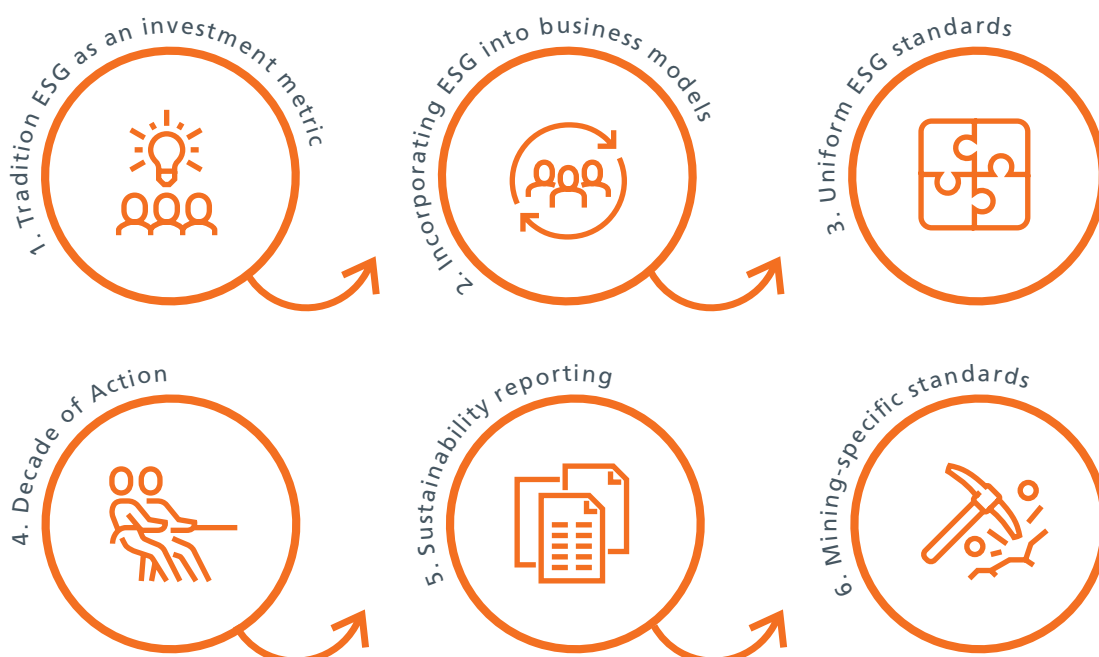
2. Some employers have approached the pension funds to pay disability benefits to those employees who cannot work because they are vulnerable to Covid-19. The response across the board has been “no”. Employer can take the following steps:

- assist employees to file a claim on the basis they cannot work;
- ask the funds to amend their rules;
- engage with the Financial Sector Conduct Authority to issue a circular on how these claims should be processed.

# Building a corporate culture of sustainability

Jonathan Veeran, Paula-Ann Novotny

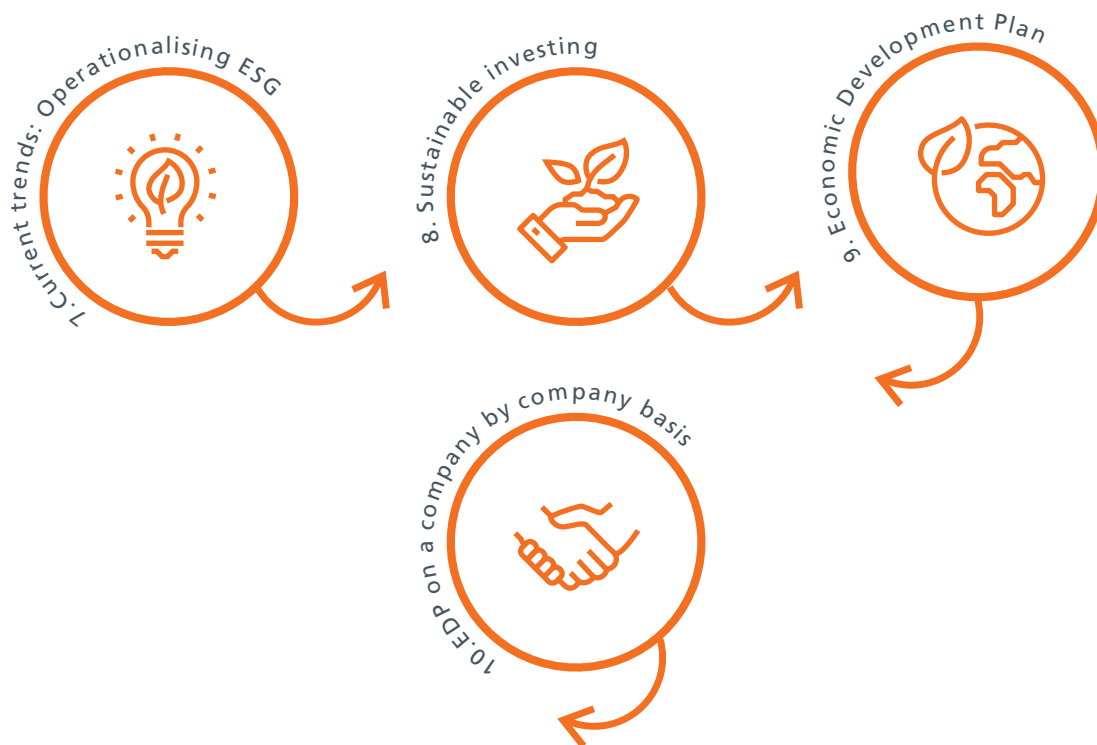
1. Environmental, Social and Governance (ESG) standards are a set of non-financial performance indicators. Investors typically use them to assess a company's performance from a sustainability and societal impact perspective, in order to inform investment decisions, and companies typically use them to de-risk a project and measure their risk profile for investors.
2. To standardise the ESG narrative, Companies can start by incorporating ESG into their core business model and decision-making. This will assist to set qualitative disclosures and quantitative metrics (KPIs) and report on them transparently.
3. There are various international efforts for uniform ESG standards, eg the SASB (industry-focussed) and TFCFD (pillar-focussed).
4. Linking back to the UN's 2030 Sustainable Development Goal Agenda and contributing to the Sustainable Development Goals, we are now in the "Decade of Action" which makes it more imperative for businesses to focus on ESG and which drives the "actionable impact" that the ESG standards have.
5. There are some 400 sustainability reporting instruments in different countries, the majority of which are mandatory. Most recently, in 2019 the European Union passed a law requiring disclosures on sustainable investment and sustainability risks. The European Parliament will be the first supranational regulator that will establish a common set of standards for determining whether an economic activity is environmentally sustainable or not.
6. SA's mining industry is moving in the direction of developing mining-specific standards on ESG to guide monitoring and disclosures, beyond the current independent reporting requirements under current legal frameworks (e.g. Mining Charter, procurement spend, environmental permitting compliance and Social and Labour Plans).



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# Building a corporate culture of sustainability



7. CURRENT TRENDS: Operationalising ESG as a culture: Companies need to move away from seeing ESG as a reporting and data gathering exercise, to extracting value from it. ESG standards need to inform all business decisions and be understood and believed in by all management, supervisors, employees and business units/ functions.

8. Deloitte's 6 recommendations on sustainable investing, and thus incorporating ESG into operational culture are:

- embrace a commitment to value beyond compliance;
- earn investor trust;
- mainstream shared value and shared responsibility;
- anticipate and influence the regulatory environment;

- unlock value beyond compliance (measuring sustainability performance);
- meet market demands for greater disclosure.

9. Webber Wentzel's Economic Development Plan (EDP) can help mining companies to:

- identify the industry, regulatory, geopolitical and social risks they face
- establish reporting metrics
- identify programs to track performance
- advise on data collection and disclosure
- align ESG functions with board oversight
- integrate these goals into every aspect of the business.

10. The EDP must be done on a company by company basis, making ESG goals easier to implement in practice.



# Environmental pollution has far-reaching consequences

Garyn Rapson, Merlita Kennedy

The number of class actions stemming from environmental pollution events is rising internationally, and especially in Africa and SA.

1. These events need not be current. SA law also covers historic pollution or pollution on land that a company owns or controls. Even if the company was not the perpetrator, it has a duty to address it:
  - Under Section 28 of the National Environmental Management Act
  - Under Section 19 of the National Water Act.
2. Addressing this pollution is very complex and requires technical expertise. However, there is a risk that remedial measures could incur liability in the event of a subsequent class action.
3. We advise a company to:
  - appoint these experts under legal privilege
  - ensure all draft reports are written under legal privilege
  - submit reports to government only in final form.
4. There should be a separate technical team for potential future litigation because the team involved in the cleanup will be conflicted.
5. It is necessary to have a co-ordinated action plan, with technical and communications teams working together.
6. There must be very strict document management procedures (including notes and boardroom minutes) and timeline management.
7. Ignoring these steps could result in administrative directives/compliance notices or even criminal liability, up to board level.

Class actions, multi-party actions or representative actions allow a number of individuals bringing an action against the same party to combine in one lawsuit.

1. It is a two-stage process: certification, where a group approaches a court to be certified as a class, followed by action.
2. SA's class actions currently follow common law but given the increase in frequency there may be developments in legislation.
3. The overarching consideration in certifying a group is to serve the interests of justice. Another important factor is that the main action must be try-able.
4. International examples of environmental class actions include *Lungowe vs Vedanta Resources*; the *Bodo community and others vs Shell Petroleum of Nigeria*; *Arica victims KB vs Boliden Mineral AB*.
5. Local examples of general class actions include *De Bruyn vs Steinhoff International*; and *Nkala and others vs Harmony Gold Mining and others* (referred to as the silicosis action). Another class action is looming over black lung disease allegedly contracted by coal miners.
6. SA courts have taken a more liberal approach towards class actions involving members of the public sustaining bodily harm, and a stricter approach in respect of pure economic loss.

