

DISPUTE RESOLUTION OUTLOOK 2023



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INTRODUCTION

In 2022, there were significant changes in the South African dispute resolution landscape. New legislation and regulations were introduced on cryptocurrency and ESG disclosures by listed companies, paving the way for developments in commercial litigation and arbitration in these sectors. There was also a significant focus on enforcement action against

business/economic crime after the Judicial Commission of Inquiry of South Africa concluded its investigation into allegations of state capture, corruption and fraud in the public sector (which included organs of state) and regulators concluded their investigations into private fraud matters, such as the collapse of Steinhoff International Holdings NV.

FOR MORE INFORMATION ON DISPUTE OUTLOOK
FOR 2023, PLEASE CONTACT OUR CONTRIBUTORS BELOW.



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Our leading cross-disciplinary teams of experts advise clients on ESG and sustainability linked issues across all sectors. We help clients to navigate regulatory developments, and policy and tax drivers in pursuit of sustainable growth in the long term whilst obtaining tax benefits. We guide clients on the relevant industry standards and risks, and bring a laser focus on supporting our clients to know their business, know their supply chain, their social responsibilities, as well as the broader ecosystem. Find out more about our expertise and services [here](#)



ARBITRATION

COURTS' APPROACH BUILDS SOUTH AFRICA AS A SEAT FOR INTERNATIONAL ARBITRATIONS

The enactment of the International Arbitration Act, No 15 of 2017 laid the foundation for South Africa to establish itself as an attractive seat for international arbitrations on the continent. Since the enactment of this Act, South Africa's courts have generally shown a reluctance to intervene in arbitral proceedings, review arbitral decisions and refuse the enforcement of arbitral awards when called upon to do so on questionable grounds. Recent judgments demonstrate that the South African courts are giving effect to Article 5 of Schedule 1 to the Act which contains the UNCITRAL Model Law on International Commercial Arbitration, providing that "In matters governed by this Law, no court shall intervene except where so provided in this Law". At the same time, parties to international arbitrations can take comfort from the courts' willingness to perform their supervisory role under the International Arbitration Act when South Africa is selected as a neutral arbitral seat.

Read more about international arbitrations and recent judgments that have applied the International Arbitration Act in South Africa [here](#) and learn more about international arbitrations on the African continent [here](#).



INCREASED ENFORCEMENT IN BUSINESS/ECONOMIC CRIME

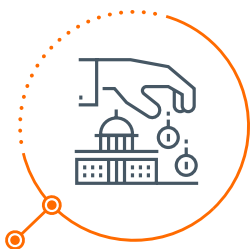
THE IMPLEMENTATION OF THE NEW GENERAL LAWS AMENDMENT ACT

In 2023, the South African government announced the implementation of the new General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act, No 22 of 2022. The primary objective of this legislation is to address deficiencies identified by the Financial Action Task Force (FATF) in South Africa's anti-money laundering regime and terrorist financing. It will also enable law enforcement agencies to better access information that would greatly assist in the investigation and prosecution of financial crimes. This Act amends several other Acts.

This Act is understood to be a response to South Africa's potential grey listing by the FATF. The FATF is an international independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF, following its Mutual Evaluation Report of 2021 which assessed South Africa's system for anti-money laundering, counter-financing of terrorism and counter-financing of proliferation, has threatened to grey list South Africa.

These higher standards may result in more prosecutions of financial crimes, corruption and non-compliance with the Act.





STATE CAPTURE

In 2022, the Judicial Commission of Inquiry into Allegations of State Capture concluded its work and published the multi-volume State Capture Report at the Union Building.

In April 2022, the Investigating Directorate (ID) was established as a temporary directorate within the National Prosecuting Authority to pursue those involved in state capture. Since then, it has enrolled nine seminal prosecutions. In October 2022, President Cyril Ramaphosa announced the ID would become a permanent entity.

It is expected that disputes and consequently litigation proceedings involving the people named in the Report and transactions influenced by State Capture will follow.



COMPETITION – MARKET CONDUCT

For the first time in almost five years, the South African Competition Commission (SACC) conducted dawn raids at the premises of eight large insurance companies in August 2022. Post-pandemic, it appears that the SACC is building up its resources to pursue prohibited practice cases more aggressively and there may be an increase in dawn raids across a range of industries in 2023.

The final report in the SACC's Online Intermediation Platforms Market Inquiry is expected to be published in 2023. It will be important to monitor how the SACC's recommendations (relating to self-preferencing, the regulation of commission fees etc.) will be implemented. The decision in the prohibited practice matter against Meta (brought by a local chat platform used by citizens to engage with government) is expected this year. There is also likely to be further progress on the challenge by local publishers to be compensated for their content used on digital platforms.



CRYPTO ASSET LITIGATION

2022 was a defining year for cryptocurrencies and crypto assets. As valuations plummeted, litigation proliferated, and there were several high-profile crypto bankruptcies. For example, FTX, one of the world's largest cryptocurrency exchanges, collapsed in a matter of days. Meanwhile, government regulators moved from watch-and-wait to a more active enforcement role.

In South Africa, Ameer and Raees Cajee, who managed Africrypt, a crypto trading platform, vanished in 2021 with ZAR 51 billion worth of Bitcoin. At the time, the Financial Sector Conduct Authority (FSCA) said that, while it was aware of investor complaints against Africrypt, it was not in a position to take any regulatory action against the platform because crypto assets were not regulated by any financial sector law in South Africa. Accordingly, no financial product or service had been offered to the public and Africrypt was not required to be licensed or registered.

With effect from 19 October 2022, the FSCA has declared crypto assets to be a financial product in terms of section 1(h) of the Financial Advisory and Intermediary Services Act (FAIS Act). That will require any person providing financial services related to crypto assets to apply for a licence between 1 June 2023 and 30 November 2023, and to comply with the regulatory requirements placed on financial service providers (FSPs).

Now that crypto assets are financial products under South African law, consumers can institute legal proceedings against crypto asset FSPs if they believe that their investment funds have been mismanaged or misappropriated, or that they were deceived into investing in a crypto asset. Consumers can report to the FSCA any unlicensed person or entity claiming to offer crypto asset services, and there is now a regulatory framework to take disciplinary action against that person. The regulation of crypto assets means that South Africa can expect to see a wave of crypto litigation in the coming months, as has occurred around the world.





LITIGATION RISKS FACED BY THE FINANCIAL SECTOR IN RELATION TO ESG STATEMENTS

Under the current regime on disclosures and reporting requirements, there is no explicit duty to provide disclosures on ESG matters, although South Africa's regulators may develop requirements following changes in the international market. There are, however, guiding principles on disclosures required by companies. For example, the Johannesburg Stock Exchange (JSE) launched its Sustainability and Climate Disclosure Guidance documents on 9 December 2021 to inform JSE-listed companies about best practice in ESG and climate disclosures. Importantly, these two documents are not intended to replace global initiatives. They are intended to assist companies to navigate the various and dynamic reporting standards, and provide context for South African businesses, legislative requirements and specific socio-economic and environmental challenges.

One of the principal ESG-related litigation risks faced by the financial sector arises when financial institutions and companies make inaccurate or misleading ESG reports and disclosures, including on climate change, or "greenwashing". There has been no direct or explicit greenwashing litigation in South Africa or ESG-related enforcement action by South African regulators. However, South African legal and regulatory laws create the platform and cater for the possibility of greenwashing claims and litigation. For example, in terms of the Financial Markets Act, 2012, it is an offence to publish, in respect of past or future company performance, any statement, promise or forecast that is, at the time, and in the circumstances in which it is made, false, misleading or deceptive about any material fact and that the person knows, or ought reasonably to know, is false, misleading or deceptive. There are similar provisions in the Consumer Protection Act 68 of 2008, the Competition Act 89 of 1998 and the Code of Advertising Practice administered by the Advertising Regulatory Board.

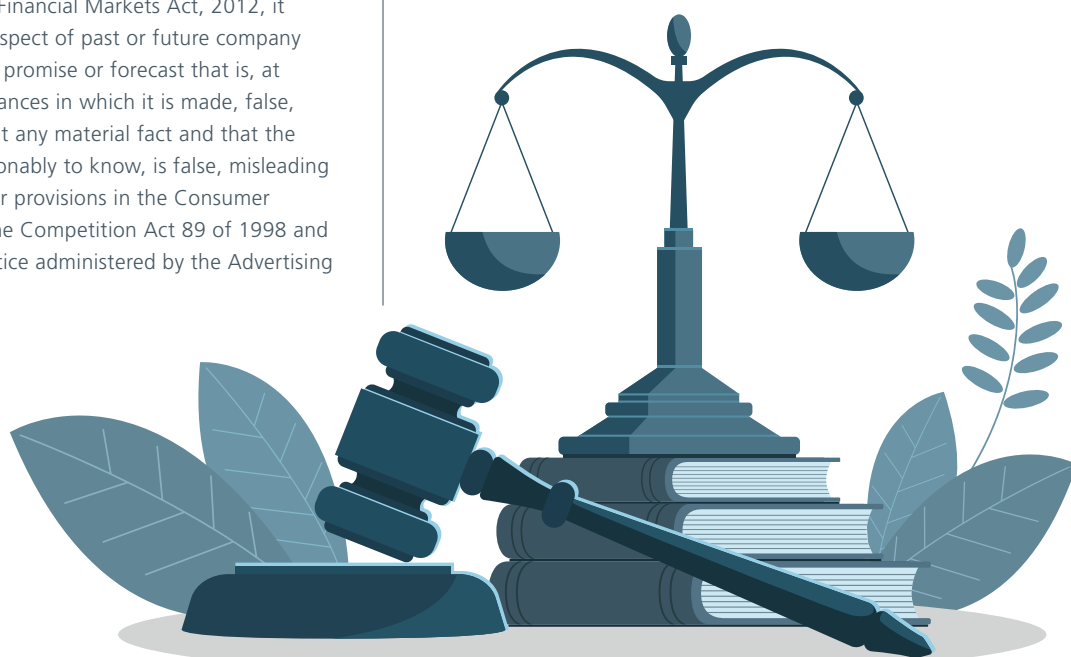


COMMERCIAL LITIGATION

South Africa's commercial courts have continuously adapted to keep pace with global and local circumstances and developments. During the Covid-19 pandemic, the Courts developed an online hearings protocol. Pleadings were filed on the online platform CaseLines, while hearings were conducted on online platforms such as MS-Teams.

Since the Covid-19 pandemic, the South African courts have reverted to in-person hearings, while the online and remote protocols and tools remain accessible for purposes of efficiency. There has recently been a push to revert to online hearings, to overcome South Africa's current energy blackouts at certain periods of the day, which can render the courts inoperable.

To obtain additional information regarding the Global Dispute Resolution Outlook for 2023, click [here](#).



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