

ESG LEGAL OUTLOOK 2023

SOUTH AFRICA



“Sustainable finance continues to be on the rise”



ESG developments in 2022 **conscientised corporations and financial institutions** in South Africa. These important developments have paved the way for what promises to be an exhilarating year for ESG in South Africa, as our thinking and actions solidify. Sustainable finance continues to be on the rise, and various regulatory reforms relating to all three pillars of ESG are under way which will embed ESG across sectors. Civil society organisations and shareholder activists continue to **drive accountability for ESG performance failures through legal action.**

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FINANCIAL REGULATORY DEVELOPMENTS DRIVE THE PACE

A prolific document was published by South Africa's National Treasury in October 2021 entitled "Financing a Sustainable Economy". It contained recommendations on reforms required for the financial services sector to enable sustainable finance. Since then, there have been efforts to improve the awareness of the financial services sector (and corporations generally) of sustainability and ESG integration. As a result of these efforts, policy and regulatory developments are being pursued.

THESE INCLUDE:

- The publication in June 2022 of the Johannesburg Stock Exchange's (JSE) voluntary Sustainability Disclosure Guidance and Climate Disclosure Guidance documents. They will assist listed (and non-listed) 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. This guidance serves as a precursor to likely regulatory changes in the future, with the South African Reserve Bank and the South African Financial Sector Conduct Authority, respectively, having announced plans to bolster financial services sector regulation in this

space. This will include an ESG disclosure framework for the financial services sector, as well as specific regulatory guidance on how climate risks should be integrated into supervised institutions' risk management, governance, and reporting processes.

- The launch in September 2022 of the Code for Responsible Investing in South Africa (CRISA 2), which contains the voluntary principles for stewardship and responsible investment that apply to asset owners, asset managers and service providers on an "apply and explain" basis. The effective date for reporting publicly on the application of CRISA 2 is 1 February 2023.
- The launch of South Africa's voluntary Green Finance Taxonomy (GFT), as part of the country's Sustainable Finance Initiative. This is an important tool which will promote sustainable finance and encourage green private sector initiatives. It provides certainty on what qualifies as a 'green' investment, in line with international best practice and South Africa's national policies and priorities.
- The launch by the International Finance Corporation (IFC) of the Integrated ESG programme in South Africa to support and enable pension funds to play a greater developmental role in South Africa. This includes the publication of a Responsible Investment and Active Ownership (RIO) Guide in partnership with the local retirement industry's responsible investing NPO, Batseta. It covers the requirements in Regulation 28 of the Pensions Fund Act, the FSCA Guidance Notice on Sustainability of Investments and Assets in the Context of a Retirement Fund's Investment Policy Statement, as well as CRISA and the UN PRI.

Important plans are in the pipeline, which, if implemented, will establish greater regulatory transparency in the financial services sector. In 2023, we hope to see developments in the anticipated Conduct of Financial Institutions Bill, which would introduce

a holistic, cross-sector, robust and customer-based regulatory framework, as well as other developments discussed in the Financial Sector Conduct Authority's Regulatory Plan for 2022 to 2025.

FURTHER RESOURCES:

- ESG: Reporting & Disclosure in a new era for Companies | Webber Wentzel - [Click here](#)
- ESG disclosure framework in the pipeline for South African financial services companies | Webber Wentzel - [Click here](#)
- Regulators take steps to encourage ESG in the financial services industry | Webber Wentzel - [Click here](#)
- South Africa's Green Finance Taxonomy Project | Webber Wentzel - [Click here](#)
- FSCA's Regulation Plan for 1 April 2022 to 31 March 2025 | Webber Wentzel - [Click here](#)
- Webber Wentzel's 2022 Financial Services round up | Webber Wentzel - [Click here](#)





JUST TRANSITION

The need for South Africa to accelerate its just energy transition has never been more urgent, as South Africans deal with unprecedented load shedding. Important policy and regulatory interventions were initiated and progressed in the latter part of 2022 and the beginning of 2023 to address the crisis and advance a contextual transition to a lower-carbon economy.

THESE INCLUDE:

- The South African Cabinet endorsed the Just Energy Transition Partnership (JETP) and Investment Plan on 19 October 2022, which was presented at COP27 in Sharm El-Sheikh, Egypt. South Africa requires USD 1,5 trillion in the next five years to implement the JETP and Investment Plan.
- The Presidential Climate Commission published the Just Transition Framework for South Africa. It presents an opportunity to start dealing with practical climate justice issues relating to job security, local economies, skills transfer, social support and governance in our key at-risk value chains (coal, automotive, agriculture and tourism). Cabinet approved and adopted the Just Transition Framework on 1 September 2022. A detailed implementation plan must now follow.
- Various amendments (enacted and in draft form) will be made to the Electricity Regulation Act, 2006, paving the way

for greater private sector participation in a future competitive power market in South Africa. These amendments seek to further incentivise private investment in electricity generation and reduce the lead times to commence construction of projects. They will be supported by changes to environmental and infrastructure legislation to streamline and shorten permitting processes associated with strategic development projects.

- The City of Cape Town recently obtained an exemption from National Treasury from the competitive bidding process to enable energy procurement from independent power producers. This will allow the municipality to purchase excess power from self-generating homes and businesses. Other municipalities are likely to follow suit.
- The Climate Change Bill was re-tabled in Parliament in February 2022. It is expected that this Bill, which aims (among other objectives) to formalise South Africa's carbon budget market and establish sectoral emission targets linked to the country's NDCs under the UNFCCC Paris Agreement, will be enacted in 2023.
- Eskom will re-purpose the retired Komati coal-fired power station with 220MW of renewables and a 150MW battery energy storage project. The Komati Just Energy Transition Project will be financed jointly through a USD 439,5 million World Bank loan, a USD 47,5 million concessional loan from the Canadian Clean Energy and Forest Climate Facility and a USD 10 million grant from the Energy Sector Management Assistance Program.
- The Department of Public Works and Infrastructure published the "National Infrastructure Plan 2050 Phase 2" for public comments (due by 9 December 2022). It aims to create a foundation for achieving the National Development Plan's vision of inclusive growth. While Phase 1 focused on bulk infrastructure related to water, energy, freight transport, telecommunications and strengthening institutional capabilities for delivery and infrastructure, Phase 2 focuses on 'distributed infrastructure' which includes municipal electricity, water and sanitation, solid waste, road

infrastructure, digital infrastructure and governance of distributed infrastructure delivery.

- In 2022, government announced its intention to ramp up the carbon price and strengthen the price signals to promote behaviour changes over the short, medium and long term. The Carbon Tax Act, 2019 was amended by the Taxation Laws Amendment Act, 2022, on 5 January 2023 (changes with effect from 1 January 2023) to provide for a gradual USD-denominated carbon tax rate adjustment for the 2023, 2024, and 2025 tax periods, increasing to at least USD30/tCO₂e in 2030.
- In December 2022, the draft Green Hydrogen Commercialisation Strategy was released for public comment, to create an attractive and enabling investment environment. The Green Hydrogen Commercialisation Strategy sets out a commercial framework for the strategic objectives and demand drivers for a green hydrogen sector, as well as the technical value chain and related delivery supply chain options, and opportunities to embed local manufacturing and local content.

A key challenge in 2023 will be for the government to act cohesively and decisively on energy policy. As civil society organisations have highlighted, while emergency legislation may be required to address the energy crisis in South Africa, it should not compromise other constitutionally-enshrined rights, such as the right to a healthy environment. An equitable balance will need to be struck between the pillars of sustainable development (the economy, society and the environment).

In 2023, we are also likely to see increased litigation in the energy sector. In January 2023, two civil society organisations launched legal proceedings against the President of South Africa and the Minister of Mineral Resources and Energy for alleged failures relating to energy planning. Legal proceedings have also been initiated against Eskom and the Public Enterprises Minister, seeking to stop the 18.65% tariff increase by the National Energy Regulator.



ESG LITIGATION

Environmental enforcement remains a priority on the Department of Forestry, Fisheries and Environment’s agenda, with recent changes to umbrella environmental legislation – under the National Environmental Management Laws Amendment Act, 2022 – seeking to further extend enforcement powers to enable more widespread enforcement of environmental laws (see further below). In November 2022, the Department of Water and Sanitation announced that it would open a criminal case against the Jagersfontein Development Mine for allegedly contravening provisions of the National Water Act, 1998. The criminal proceedings will run in parallel to administrative enforcement proceedings which were issued in the aftermath of the disastrous tailings facility collapse in September 2022.

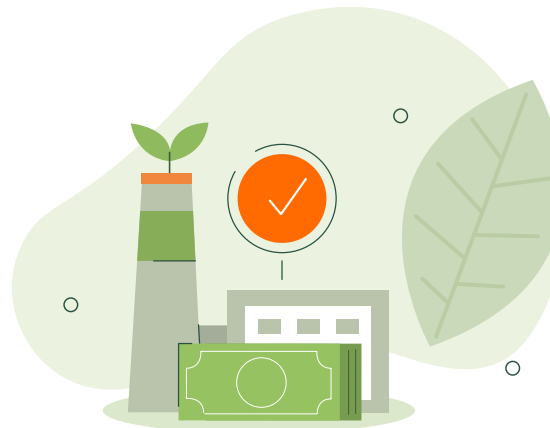
The National Prosecuting Authority recently declined the request by the Green Scorpions to prosecute the environmental consultants who assisted Karpowership South Africa to obtain exemptions from certain environmental regulatory requirements. This decision is unlikely to halt the momentum in criminal enforcement actions being investigated and/or instituted by various government departments. Criminal charges were also laid against multinational agrochemicals company

UPL Limited, in the aftermath of the arson attack on its pesticide and chemicals warehouse in Durban, which resulted in a major chemical fire. Allegations of “greenwashing” have also surfaced for the first time at the sentencing stage of an ongoing private prosecution of an oil company. If successful, the novel use of the provisions of South African environmental legislation in this case are likely to be emulated in other litigation. We are also seeing increased reliance on the provisions of the National Environmental Management Act, 1998 to hold directors accountable for environmental harms perpetrated by the company for which those directors act.

Class action ESG litigation has also taken off in South Africa. In what is arguably a first of its kind case in the ‘Global South’, a group of Zambian women and children have launched a class action in the High Court (Johannesburg) to seek compensation for alleged lead poisoning from Anglo American for its alleged historic role in the Kabwe Mine. The case will set an important precedent.

FURTHER RESOURCES:

Greenwashing and the role of the Advertising Regulatory Board in South Africa | Webber Wentzel - [Click here](#)



THE “S” IN ESG BECOMES MORE PRONOUNCED IN REGULATION – FOCUS ON GBV, EMPLOYMENT EQUITY AND TRANSFORMATION

There have been important updates to South African legislation that regulate social impacts.

THESE INCLUDE:

- Changes to South Africa’s sexual offences legislation came into effect last year. They attempt to address some of the legal obstacles that contribute to the high prevalence of gender-based violence in South Africa. Changes to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, the Criminal and Related Matters Amendment Act and the Domestic Violence Amendment Act include: (i) the expansion of the scope of the National Register of Sex Offenders and the extension of the period for which a sex offender’s details must remain on the Register; (ii) stricter bail provisions for offences related to domestic violence; and (iii) introduction of a new offence of “sexual intimidation”.
- The publication on 30 September 2022 by the Minister of Women, Youth and Persons with Disabilities of the National Council on Gender-Based Violence Femicide Bill, which seeks to establish an independent, multi-

sectoral council to co-ordinate and implement a coherent national strategic plan to end gender-based violence and femicide.

- There will be significant changes to transformation in the workplace from 1 September 2023, when the Employment Equity Amendment Bill comes into effect. The Bill, which is awaiting assent and signature by the President, proposes wide-reaching changes to the regulation of transformation in the workplace. The Bill proposes that economic sectors may be identified and that numerical targets for employment of employees from designated groups, determined by gender, race and disability, may be set per sector.
- A new Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (Code) in terms of the Employment Equity Act, 1998 became effective on 18 March 2022. The Code consolidates previously fragmented legislation on harassment in the workplace. Positive obligations are imposed on employers with respect to harassment, and external third parties are recognised as potential perpetrators or victims of harassment (not only employees).

FURTHER RESOURCES:

- GBV: Bill establishing the National Council on GBV and Femicide to be introduced to parliament | Webber Wentzel - [Click here](#)
- Significant changes to transformation in the workplace set for 1 September 2023 | Webber Wentzel - [Click here](#)
- Amended EE Bill tightens up on transformation targets | Webber Wentzel - [Click here](#)



GOVERNANCE DEVELOPMENTS

On 22 December 2022, the General Laws (Anti-Money Laundering and Combatting Terrorism Financing) Amendment Act, 2022, was signed into law. The Amendment Act amends five pieces of legislation.

THESE INCLUDE:

- the Companies Act, 2008;
- the Financial Intelligence Centre Act, 2001;
- the Financial Sector Regulation Act, 2017;
- the Nonprofit Organisations Act, 1997; and
- the Trust Property Control Act, 1988.

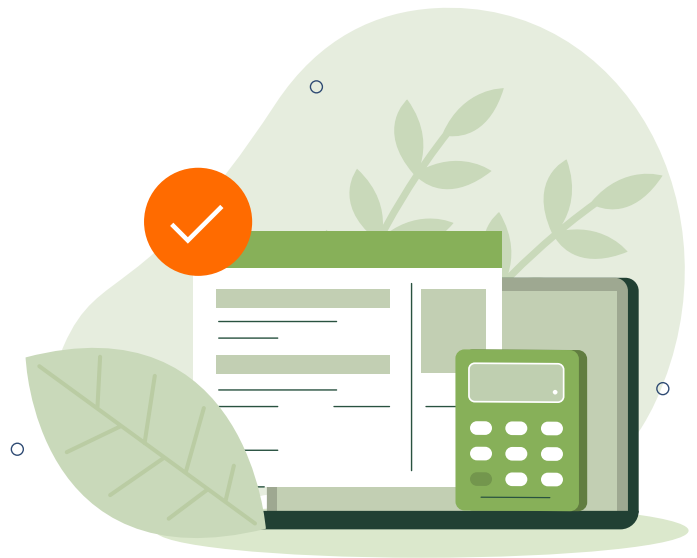
The Amendment Act has cascading commencement dates, with some sections already coming into effect on 31 December 2022. The Omnibus Bill is a response to South Africa's potential greylisting by the Financial Action Task Force (FATF) and is a measure aimed at addressing technical deficiencies in South Africa's legal framework to combat money laundering, corruption and financial crimes, identified by the FATF in October 2021.

Additionally, we note that there has been little movement on the Companies Act Amendment Bill. It is likely to gain momentum again in 2023. The Bill proposes amendments to achieve better disclosure of senior

executive remuneration and the reasonableness of the remuneration, including the introduction of pay gap reporting.

FURTHER RESOURCES:

- Commencement of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act | Webber Wentzel - [Click here](#)
- National Assembly passes a revised version of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill (Omnibus Bill) | Webber Wentzel - [Click here](#)
- An in-depth look at the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill, 2022 | Webber Wentzel - [Click here](#)





ENVIRONMENTAL DEVELOPMENTS

The most significant piece of environmental legislation since the implementation of the One Environmental System (OES) in 2014 is undoubtedly the National Environmental Management Laws Amendment Act, 2022. It has finally been published, but will only become law once it is promulgated on a date to be proclaimed by the President. When the Act comes into operation, it will officially introduce a wholesale shift in South Africa's environmental legislative landscape. Many of these changes are intended to clean up a range of issues associated with the roll-out of the OES – which overhauled the way environmental issues are regulated on mine sites, among other things. Overall, the changes imposed by the Act aim to deter non-compliance with environmental laws by, among other things, introducing new offences and increasing the quantum of fines and administrative penalties where laws or licences have been contravened. It will also introduce changes to key mining-related regulation on the planning and manage of residue stockpiles and residue deposits, and the setting aside of a financial provision to address mine rehabilitation, closure, and post-closure obligations.

In 2022, the circular economy became a focal point in regulating problematic waste sectors under the new Extended Producer Responsibility Regulations. Many producer responsibility organisations issued their first invoices to member producers of

regulated paper, packaging and single-use products; electrical and electronic equipment; and lighting equipment. As these EPR schemes are still in their infancy, many teething issues have arisen, primarily in attributing liability and responsibility across the full product value chain. In 2023, affected sectors hope to see improvements to the administration of the EPR scheme, as well as the regulation of new sectors, such as the portable battery sector.

The Minister of Forestry, Fisheries and the Environment has also published for public consultation draft amendments to the Waste Tyre Regulations. These aim to improve the administration of the waste tyre regime, which has suffered significant burdens until now.

In recognition of global agendas highlighting the increasing risks of biodiversity loss, new policy is being developed on biodiversity conservation in South Africa. The Draft White Paper on Conservation and Sustainable Use of Biodiversity was gazetted in July 2022 for public comment. It aims to address the policy gap that exists due to the lack of an approved, overarching policy on biodiversity in South Africa. It sets out a “new deal” on the conservation and sustainable use of biodiversity.

FURTHER RESOURCES:

Draft White Paper Conservation and Sustainable use of South Africa's Biodiversity | Webber Wentzel - [Click here](#)



In the coming year, developments will occur that will fundamentally shape the trajectory of ESG regulations in South Africa and the embedding of ESG into corporations and organisations. We will be closely monitoring ESG legal developments across sectors in South Africa. It seems that **the just energy transition, sustainable finance, carbon markets and ESG disclosures will continue to dominate ESG developments in South Africa**. As ESG becomes more embedded in legal systems across the globe, the intersection between ESG and other areas of law, such as competition law and dispute resolution, will become important areas to watch.

Explore Linklaters' ESG trends across eight regions [here](#)

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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.

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