ESG OUTLOOK 2024

SOUTH AFRICA

WEBBER WENTZEL

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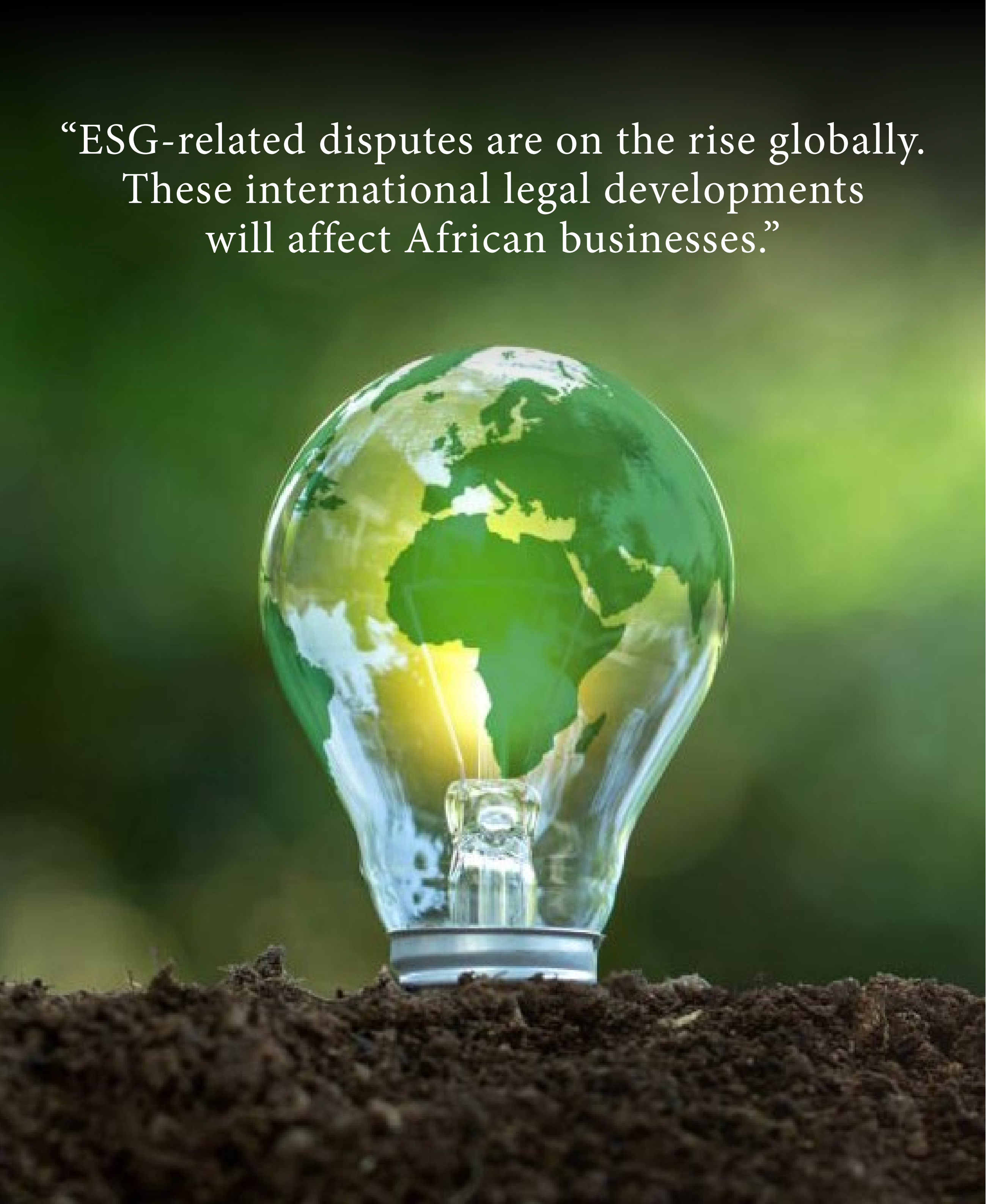

GLOBAL CONTEXT

In 2023, a wave of ESG backlash and anti-ESG sentiment emerged, primarily in the United States, which ultimately strengthened and entrenched ESG's importance globally. We anticipate continued international regulatory developments relating to supply chain due diligence, mandatory ESG reporting and disclosures, greenwashing, a carbon border adjustment mechanism, developments in transition disclosures and increased focus on biodiversity and nature. Many of the proposed regulatory measures that are being adopted will only become fully effective after 2024. However, as we have seen with other ESG developments, such as the Task Force on Climate-Related Financial Disclosures' recommendations, business leaders have taken proactive approaches. Several counsel opinions have also been published globally, advising that the scope of directors' fiduciary duties has expanded to include a duty to consider climate change impacts on and from the business. The International Sustainability Standards Board (ISSB) has published inaugural standards that aim to promote consistency and comparability in sustainability reporting and disclosure. These standards will have knock-on effects for South African companies. ESG-related disputes are on the rise globally. These international legal developments will affect African businesses.

Further resources:

- *ESG Legal Outlook 2024: key global trends*
- *Proposed amendments to the EU's Corporate Sustainability Due Diligence Directive will impact more South African businesses*
- *Game changer for sustainability disclosures in capital markets*

FROM 2023 TO 2024: EXAMINING ONGOING TRENDS IN SUSTAINABLE FINANCE

While COP28 saw additional financial pledges being made, it was still recognised that the funding gap to achieve global climate goals and targets, and to actual implement mitigation and adaptation plans, is a long way to go.

In 2023, South Africa (and Africa more broadly) saw many developments in the field of sustainable finance, from a regulatory, policy and transactional perspective. These were:

- Policies by financial sector regulators including:
  - The Financial Sector Conduct Authority issuing its Statement on Sustainable Finance and Programme of Work.
  - The Prudential Authority publishing its proposed guidance note on climate change disclosures and risk management specifically for banks and insurers.
- The growth of carbon markets in Africa since the launch of the Africa Carbon Markets Initiative at COP27 in Egypt, including the launch of the JSE's voluntary carbon markets platform. There has also been skepticism regarding the quality and integrity of carbon credits, who profits from them, and their efficacy in fighting climate change. In 2023, the Voluntary Carbon Markets Integrity Initiative launched its Claims Code of Practice to enhance integrity in the use of carbon credits and associated claims. We are likely to see more measures being implemented to address concerns in 2024. A major failure of COP28 was the lack of agreement on the rules for international carbon trading pursuant to Article 6 of the Paris Agreement. This means that the operationalisation of Article 6.2 and Article 6.4 market, which enable countries to voluntarily co-operate to meet their climate targets by trading carbon credits from emission reductions and removals via bilateral agreements, will likely be delayed until COP29 which is set to take place in Baku, Azerbaijan.
- Increased focus on nature-related disclosures and risks to businesses, including the SA launch of the TNFD Recommendations. With SA being recognised as one of the most biodiverse countries in the world, the interconnection between climate change and biodiversity loss is increasingly being recognised, with co-oporate being encouraged to move beyond net zero to nature positive outcomes, and biodiversity conservation projects being on the rise.
- Growth in transactions spanning the African jurisdictions included a large-scale debt-for-nature swap (Gabon), the E3 Low Carbon Economy Fund for Africa, numerous carbon credit transactions, ESG impact and renewable energy projects. Climate finance and just energy transition funds are also emerging in sub-Saharan Africa, but not at the scale needed to meet climate ambitions and the SDGs.

Sustainable finance is a dynamic and evolving field. As more certainty emerges in the market as a result of taxonomies, policies and transaction precedents, we are optimistic that 2024 will be a year where ambition converts to action so that capital is directed to businesses and projects that create long term sustainable value. Minister of Finance Enoch Godongwana acknowledged in his Budget Speech in February 2024, the need to mainstream climate finance and National Treasury's role in mobilising resources, designing incentives, and influencing policy to mainstream climate change. These statements strongly imply that the trends in sustainable finance that were observed in 2023 will probably continue.

Further resources:

- *Prudential Authority publishes highly-anticipated draft guidance notes for banks and insurers on climate-related risks and disclosures*
- *Taskforce on Nature-related Financial Disclosures: Reporting evolving nature-related dependencies*
- *Podcast: Using sustainability-linked financing for impact, to achieve ESG goals*

"Critical policy measures are also being implemented in SA to support the Just Transition Framework and Investment Plan."

THE STATE OF SOUTH AFRICA'S JUST TRANSITION

To date, South Africa has secured approximately USD 9,3 billion from international partners for the Just Energy Transition (JET) but recently noted in the approved JET Implementation Plan that it requires just short of USD 80 billion to fund the JET.

The recommendations to decommission and repurpose the Eskom Komati power station were adopted by the Presidential Climate Commission in 2023. This follows cabinet's approval of SA's Just Transition Framework and Investment Plan for the Just Energy Transition Partnership formed at COP26.

Critical policy measures are also being implemented in SA to support the Just Transition Framework and Investment Plan. These include the new Renewable Energy Master Plan, amendments to the Electricity Regulation Act to remove the 100MW licensing threshold for embedded generation, and the introduction of renewable energy and biodiversity tax incentives.

In his 2023 Budget Speech, the Minister of Finance also unveiled a ZAR 9 billion tax-relief programme to support South Africa's clean-energy transition. In February 2024, the JET Project Management Unit in the Office of the Presidency announced that it has introduced a funding platform to facilitate R1.5 trillion from multiple sources and R224 billion in international pledges into clean energy projects. The funding platform aims to match available funds to projects working in the JET space.

The National Assembly recently passed the momentous Climate Change Bill (B9-2022), which focuses on establishing a strategy for addressing climate change and implementing a fair, long-term energy transition plan to ultimately foster a low-carbon, climate-resilient economy in South Africa. The Bill will introduce the concept of a "carbon budget" which limits the amount of greenhouse gases an entity is entitled to emit. The Bill will still face its final hurdles before it becomes an act of Parliament – it requires the concurrence of the National Council of Provinces and the President's signature, but we will likely see the Bill's final assent in 2024.

On 4 December 2023, a White Paper outlining an electric vehicle roadmap for South Africa was published. The White Paper's primary objective is to outline a plan for the auto industry to transition from primarily producing Internal Combustion Engine (ICE) vehicles to a dual platform by 2035 that includes ICE vehicles and Electric Vehicles in the mix of vehicles produced and consumed in South Africa.

Further resources:

- *COP28: South Africa's Climate Change Regime and Just Energy Transition "Stocktake*
  South Africa's Just Transition Energy Framework:
- *Transforming Agribusiness Sustainably*

SOCIAL ASPECTS ON THE RISE IN 2024

- Business and Human Rights (BHR) is on the rise in Africa, prompting companies to navigate an increasingly complex landscape. Positive developments are unfolding as African countries incorporate the United Nations Guiding Principles (UNGPs) into their legislative frameworks. Kenya stands out, leading with the development of a national action plan to integrate the UNGPs into its domestic legislative framework. The UNGPs, regional developments surrounding the proposed international BHR treaty, and the impending implementation of mandatory due diligence regulations, all of which are anticipated to take shape in 2024, make for an exciting future.
- A landmark judgment handed down on gender equality in parental leave legislation, which declared the sections of the Basic Conditions of Employment Act dealing with maternity and parental leave as unconstitutional, in that they unfairly discriminate between mothers and fathers, between birth-mothers and mothers through surrogacy and adoption in relation to the amount of parental leave afforded to them. The declaration of invalidity was suspended for two years to afford Parliament the opportunity to amend the sections by eliminating the inequalities, and set in place interim provisions to eliminate these inequalities.
- The Competition Commission published draft public interest guidelines which articulate the Commission's likely approach in imposing public interest considerations in merger approvals. Public interest considerations relate to the promotion of ownership by historically disadvantaged persons and workers, supporting the participation and expansion of small businesses, employment and others. In the past, public interest conditions featured prominently in high-profile transactions, but in recent years, firms seeking merger approval in South Africa have encountered a concerted regulatory drive to include a broader range of public interest-related conditions in routine merger approvals. The Draft Guidelines seek to contextualise and articulate the Competition Commission's likely approach in formulating and imposing these conditions.
- In 2024, we are likely to see developments with respect to the National Health Insurance Bill, which was passed by the National Assembly in June 2023. While the Bill has important implications for access to healthcare services, it has been closely scrutinised by various stakeholders in the healthcare sector, and concerns have been raised by medical schemes and insurers about the effect the Bill will have on their current businesses.

Further resources:

- *Reflecting on 2023: Trends and Insights in Business and Human Rights Across Africa*
- *Podcast - Unpacking the anticipated legislative overhaul to existing maternity and parental leave provisions*
- *A closer look at the Competition Commission's draft Public Interest Guidelines*
- *Competition Commission's draft public interest guidelines for mergers published for public comment*

“Cases relating to all three pillars of ESG will continue to feature prominently in 2024.”

ESG-RELATED DISPUTES ARE ON THE RISE GLOBALLY

ESG disputes, which focus on a range of issues, including human rights, environmental justice, governance and accountability challenges, energy security, will continue to play a prominent role in 2024, given South Africa's socio-economic context. We saw a number of important ESG disputes in 2023, including:

- Updates in the Kabwe Lead Mine case, which has significant implications for ESG class actions in going forward. On 14 December 2023, the High Court dismissed an application for certification of a class action against Anglo American South Africa Limited. The applicants sought compensation for children and women of childbearing age from the Kabwe district in Zambia, who have been injured by lead exposure as a result of lead mining operations which took place at the Kabwe Lead Mine. The applicants indicated their intention to appeal the judgment.
- On 29 December 2023, SA applied to the International Court of Justice (ICJ) to institute proceedings against Israel, arguing that Israel has violated the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) by deliberately trying to destroy part of the Palestinian people. SA's application included a request for provisional measures and the ICJ awarded some of the measures that South Africa sought on 26 January 2024.
- There have been several instances where environmental concerns have been raised against gas power projects, particularly in relation to the Kawpowership project. These issues included concerns about biodiversity. Climate change also featured in a number of administrative law-based reviews to licences in respect of development projects.
- A High Court found that load shedding adversely impacts the constitutional rights to health, security and education.
- There have been some developments (not all positive) in corruption and fraud related cases. For example, charges against former Eskom boss Matshela Koko in the ZAR 2,2 billion corruption case were dropped due to unjustifiable delays, a former Impala Platinum Limited senior accountant was found guilty of fraud and money laundering, and a politician was arrested for money laundering after it was discovered that the politician was operating a loan shark business.

Cases relating to all three pillars of ESG will continue to feature prominently in 2024.

Further resources:

- *South Africa - ESG Disputes Update*
- *South Africa - ESG Dispute Update*
- *South Africa - ESG Disputes Bulletin*
- *ESG Dispute Resolution in Africa: Trends and Strategies.*
- *Greylisting: Unveiling South Africa's AML Efforts and the 2025 Delisting Ambition*
- *Podcast: Linklaters and Webber Wentzel unpack what the Financial Action Task Force's greylisting of South Africa means*

GOVERNANCE TRENDS TO WATCH IN 2024

- Almost exactly a year ago, SA was 'greylisted' by the Financial Action Task Force (FATF), as the FATF identified serious deficiencies in SA's regulatory systems and the effectiveness of its anti-money laundering, proliferated financing and counter-terrorism regime. The FATF identified eight areas that SA needs to focus on to get itself off the greylist which include improving SA's risk-based supervision of identified risks. Practically, greylisting means that SA will be subject to increased monitoring and held to a timeframe (January 2025) to address the identified deficiencies. SA has made progress in addressing some of the deficiencies and a range of measures are being implemented, including legislative, financial and enforcement measures, some of which were already underway prior to the greylisting, such as the enactment of the General Laws (Anti-Money Laundering and Combatting Terrorism Financing Amendment Act) (General Laws Amendment Act). Remedying the deficiencies to ultimately have SA removed from the greylist requires addressing systemic corruption and governance issues, as well as commitment and cooperation from various government departments and stakeholders in the private and public sectors.
- Following significant changes that were introduced by the General Laws Amendment Act in relation to 'beneficial ownership', in November 2023, the Financial Intelligence Centre published a *Draft Public Compliance Communication 121 Relating to Beneficial Ownership and the Application of Section 21B of the Financial Intelligence Centre Act, 2001* for public comment, which sets out guidance on accountable institutions' obligations to establish the beneficial ownership of their clients. Concerns have been raised about the onerous requirements outlined in the guidance, emphasising the importance of striking the correct balance between addressing the social and societal concerns underlying greylisting and the need for practical governance measures. Given the imminent January 2025 deadline, we expect these and other greylisting measures will be implemented at a rapid rate, with the emphasis shifting from legislative amendments to enforcement in 2024.
- Another significant anti-corruption legislative measure which will likely be finalised in 2024, is the introduction of a penalty for the failure to prevent a corruption offence, that would significantly alter SA's anti-corruption legislation. The offence is contained in the Judicial Matters Amendment Bill, which was passed by the National Council of Provinces on 6 December 2023 and will amend the Prevention and Combatting of Corrupt Activities Act, 2004. The offence being contemplated is similar to the offence contained in section 7 of the United Kingdom Bribery Act, 2010.
- The Companies Amendment Bill and Companies Second Amendment Bill, which were introduced in Parliament in the second half of 2023, propose important amendments to the Companies Act relating to the remuneration report, social and ethics committee, applications for director delinquency and proceedings to recover loss due to director liability. These Bills will continue to make their way through the Parliamentary process in 2024.

“We anticipate that 2024 will be a critical moment for the “G” in ESG.”

- 2023 saw increased shareholder activism against mining and global energy companies, as well as banks and other listed entities, raising proposals regarding governance and climate change matters. These require boards to stay on top of these crucial matters. We expect to see more instances of shareholder activism in 2024 against financial institutions and listed companies in respect of a wider range of issues. Given international developments in human rights due diligence laws, for example, a multitude of transactions are starting to incorporate HRDD in their scope.

SA’s approach to tackling money laundering, terrorism, proliferated financing, corruption and bribery is currently under scrutiny by the FATF and global investors. The measures being implemented to remedy deficiencies and improve governance at a systemic level will have major implications for both the public and private sectors. We anticipate that 2024 will be a critical moment for the “G” in ESG.

Further resources:

- *Greylisting: Unveiling South Africa’s AML Efforts and the 2025 Delisting Ambition*
- *Financial Intelligence Centre (FIC) published Draft Public Compliance Communication 121 on Beneficial Ownership*
- *Podcast: Linklaters and Webber Wentzel unpack what the Financial Action Task Force’s greylisting of South Africa means*
- *Podcast: Greylisting of South Africa - Unpacking the economic impact, legislative interventions and its implementation*

2024 OUTLOOK

In 2024, we are likely to see the continuation of ESG developments in South Africa having a strong focus on sustainable finance and the people-centric focus of securing a just transition to a lower carbon economy. The growth in carbon markets, climate finance, just energy transition financing and assent of dedicated climate change legislation will go a long way towards bringing South Africa closer towards realising its climate change ambitions and Nationally Determined Contributions under the Paris Agreement.
We anticipate that 2024 will be a critical moment for the “G” in ESG, in terms of both policy and enforcement, given the January 2025 deadline to address deficiencies noted by the FATF in relation to SA’s anti-money laundering and counter-terrorism regime.

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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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