

Tighten your Environmental, Social and Governance or face the consequences

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As ESG continues to grow in importance, the number of Environmental, Social and Governance (ESG) litigation matters will become self-perpetuating. In the mining and energy sector, the pressure on companies to report on ESG, and consider renewable energy, is immense.



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Recently, the South African state-owned power utility, Eskom, was named by the Centre for Research on Energy and Clean Air (CREA), as the world's biggest emitter of the pollutant sulphur dioxide (SO₂).

Eskom on its own now emits more sulphur dioxide than China, the US, and the European Union's power sectors combined.

According to the study by air pollution expert Mike Holland, these emissions contribute to high levels of ambient air pollution and to 2,200 air pollution-related deaths in South Africa every year.

Most of these deaths are due to SO₂ emissions, which form deadly PM_{2.5} particles once released into the air.

The study poses a legal threat to the power utility, as climate change litigation is gaining momentum in South Africa,

particularly in relation to air pollution.

ESG top of board agenda

Companies are increasingly aware that a failure to address these matters can be detrimental to the company's business purpose, reputation, corporate values, approach to risk management, and relationships with host communities, investors, suppliers, customers, employees, and other stakeholders.

Companies and state-owned power utilities globally are employing ESG policies and procedures in the energy sector.

Eskom, however, has lagged in this regard.

Litigation Risks

The consequences of falling behind can be severe and far reaching, for example by falling foul of climate change litigation (i.e. class actions).

There is increasing focus on whether a company is conducting its operations in a sustainable way, and without violating any human rights.

In some cases, internationally and locally, both the state and a company were taken to task for not acting appropriately to improve air quality and thus the health and well-being of citizens.

Sharma and others v. Minister for the Environment – Australia

On 8 September 2020, eight young people filed a putative class action in Australia's Federal Court to block a coal project. The lawsuit sought an injunction to stop the Australian Government from approving an extension of the Whitehaven Vickery coal mine.

The court found that a novel duty of care is owed by the Minister for the Environment to Australian children who might suffer potential "catastrophic harm" from the climate change implications of approving the extension to the Vickery coal mine in New South Wales. Ultimately, the court ordered the Minister to pay costs.

Milieudefensie et al. v. Royal Dutch Shell plc – Netherlands

The environmental group Milieudefensie/Friends of the Earth Netherlands and co-plaintiffs filed a case against Royal Dutch Shell plc. (RDS) requesting the court to rule that the Shell group's annual CO2 emissions and RDS's failure to reduce them constituted unlawful acts toward the claimants; and order RDS to reduce, by end-2030, the Shell group's CO2 emissions by 45% net, relative to 2019 levels.

In this ground-breaking decision, RDS was compelled to reduce its global group carbon emissions by 45% net (compared with its 2019 emissions) by 2030, with immediate effect.

In South Africa

In June 2019, the VEJMA and groundWork, represented by the Centre for Environmental Rights, launched landmark litigation against the state, asking the court to declare that the poor ambient air quality in the Highveld was a violation of Section 24 of the Constitution.

On 17 May 2021, the Pretoria High Court for the first-time heard arguments in what has become known as the "Deadly Air" case: a case about the toxic air pollution on the Mpumalanga Highveld.

Mitigating the risks of ESG litigation

To manage and mitigate some of the risks of ESG litigation – the key is to be proactive and to:

- Involve legal counsel at an early stage to ensure ESG compliance with reporting and disclosure requirements.
- Conduct due diligence and environmental legal compliance with the suite of environmental laws.
- Point out possible exposure to liability under a changing environmental regulatory landscape.
- Audit the suite of contracts individually and ensure that they contain indemnification and other contractual terms to protect against the impact of environmental liabilities.
- In the event of a breach, involve legal counsel to assist with crisis management.
- 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.
- Engage effectively with stakeholders, including regulators, investors, employees, consumers and communities.
- Move beyond treating ESG as a tick-the-box exercise to ensuring robust governance and accountability at board level and integrating material ESG factors into strategic decision-making.

Also, any company should seek specialist legal advice before responding to any ESG litigation issues that they may face.

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