DealMakers

ESG in dealmaking and financial markets

F E A T U R E

FOREWORD

ESG investing has become topical over the past few years, with primary emphasis on the E (environmental) and G (governance) elements. Since the impact of the pandemic, investor attention has been sharpened to focus on the S (Social) of the acronym. In the past, investments have, for the most part, been made in terms of risk and reward. Now a third dimension of oversight has been added – that of impact. Once largely the preserve of direct private-market investments, impact investing has moved from a niche approach to a significant market segment. Hand in hand with this has been the evolution of ESG related regulation, which has matured from soft law recommendations to, in some cases, hard law obligations.

Marylou Greig

ESG is not a new phenomenon; initiatives have been around for many years, but much of it was just lip service or what has been termed 'green washing'. More recently there has been an on-the-ground willingness to ensure that the ESG agenda is adhered to and, as such, ESG is becoming an important driver of deal activity, particularly with increasing evidence that a strong ESG proposition can create value for investors.

Locally, there has been an uptick in ESG reporting by exchange listed companies. In September, Mediclinic reported that it had secured a sustainability-linked loan, with the linking of ESG targets to the cost of debt, while Sasol announced that it had raised its emissions reduction targets for 2030 to 30% from 10%. Earlier this year, in response to increasing aversion to fossil fuels by investors, Anglo American divested its local coal interests to shareholders through a new entity, Thungela Resources.

ESG factors are likely to become an important part of the assessment and valuation of potential merger and acquisition opportunities, particularly in Africa. The lack of transparency in disclosure may impact on the relative valuation of the company, with ESG now also considered a risk factor, alongside reputational risk. Adhering to ESG is no longer just an option – if companies are to retain not only investors, but also suppliers and customers, they will have to ensure that they meet the necessary standards. The articles in this feature give insightful information on ESG in deal making and financial markets, and introduces some of the specialists in this space.

The dynamics of grouping the three ESG elements together has created interesting discussions, particularly where these elements do not necessarily align. As the feature was being finalised, the 2021 United Nations Climate Change Conference (COP26) was taking place in Glasgow. But the belief of some ESG investors that one plan fits all is, unfortunately, not realistic. For the African continent, the transition to renewable and clean energy sources will take longer, with government priorities focused on alleviating poverty and providing access to affordable energy. ●

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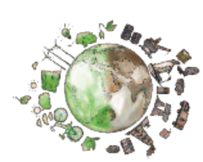

The mainstreaming of ESG investing through policymaking

THEA UTOFT HØJ JENSEN AND GABRIELLE MUHLBERG

ESG, Sustainable Finance and Green Investments have been some of the biggest buzz words in finance in the last few years. What used to be a niche topic has now taken centre stage. And investors' almost insatiable appetite and legislative innovation will keep it there for quite some time to come. Staying on top of local developments is not enough; reading the international trend 'tea leaves' will be the only way for investors to answer, "What next?".

On the global stage, the EU has positioned itself as the Sustainable Finance frontrunner. Boasting the world's first ever climate law, an action plan on sustainable finance in 2018, and its recent unparalleled green bond issuance, the EU green agenda has been travelling at a rate of knots. As seen with other high-profile initiatives, the EU is 'setting the standard'. EU data protection and privacy laws (the famous GDPR) are a prime example, and versions have appeared across the continent, with South Africa's Protection of Personal Information Act (POPIA) epitomising this trend.

Utoft Høj Jensen

With the green transition as a top priority, the EU is pushing even harder to drive the progress on Sustainable Finance, through numerous international fora and initiatives. With the EU's Green Taxonomy already disseminating, it appears to work. Local models of the Taxonomy are emerging in the US, UK, China and, of course, South Africa (which has relied heavily on EU legislation).

What is going on in the EU, and why we should care?

The EU ESG investing case study

A strong EU regulatory framework is the primary reason for the EU's global leadership in the ESG space. The EU laid the first brick in the Sustainable Finance foundation with its Green Taxonomy. It is a tool to determine whether activities are environmentally sustainable, based on clear science-based criteria. Investors and investee companies are subject to comprehensive and standardised disclosure rules on their activities and sustainability performance, building on the classifications. Standards and labels acting as a mark of quality – for example, an EU Green Bond Standard – will form the third pillar. Combined, these measures aim to prevent greenwashing, and remedy the acute ESG data shortage in the market.

Muhlberg

The next phase is already taking shape in the EU, aiming for inclusion of sustainability considerations in every aspect of finance. ESG integration in prudential frameworks and easier data access are high on the agenda. Two horizontal tracks are already active: firstly, an EU Social Taxonomy which, through classification, aims to direct capital to entities and activities which operate with respect for human rights, good corporate governance, and support social objectives. Secondly, an overhaul of directors' duties and due diligence is to come later this year, possibly integrating remuneration tied to ESG performance, and incorporation of ESG considerations and stakeholder interests (e.g. of workers and civil society) into business decisions and oversight.

Alongside EU legislative developments, private institutional investors are increasingly emerging as a key driving force for Sustainable Finance. Institutional investors will continue to probe companies on their ESG approach, as they see a positive correlation between ESG performance and company valuation. Investee companies, too, will need to swiftly demonstrate sustainability leadership, or at least, transition efforts. With increased scrutiny of governance and supply chain processes, transparency alone is not enough to guarantee long-term growth. With markets being global, these considerations are already having a significant spill-over effect on other jurisdictions, leading to tangible ESG business transformations to attract investors.

South Africa carving its own path

As more organisations recognise the need to integrate ESG at the heart of business strategies, industry is helping to lead the way. In SA, the industry's influential voluntary standards and innovative initiatives, such as the JSE's sustainability index, are and will continue to be indispensable in local standard setting.

Globally – and especially amongst emerging economies – SA has impressive Sustainable Finance credentials. Alongside the significant sector efforts, the Treasury's plans in 'Financing A Sustainable Economy' would likely increase work on classification, ESG integration and disclosures. In short, this will provide the building blocks for a more robust and comprehensive Sustainable Finance Framework.

With the immediate direction of travel more or less mapped out, naturally, the question for the industry is: what comes next? Here, upcoming EU initiatives on Directors' Duties and the development of a Social Taxonomy – classifying activities by social impact – could be particularly interesting as inspiration. SA already has socially-focused legislation in place – Broad-Based Black Economic Empowerment (B-BBEE), a key and unique example.

Nevertheless, the EU work could provide ideas and structures, with a tremendous potential for adaptation to a local context. With SA's unique socio-economic background and keen interest in Sustainable Finance, and in light of President Ramaphosa's recent comments indicating an upcoming B-BBEE Review, an increased focus on the Social and Governance elements of ESG appears to be a natural next policy step. A Social Taxonomy could be a strong starting place; a tool which redirects capital to reach social objectives would have the potential for tangible social transformation. As such, this could prove highly attractive to government, civil society and investors.

ESG will evidently only continue to grow in importance, with new industry and legislative initiatives continually emerging, and staying on top of these developments, with one eye on the global horizon, is the only way to remain competitive. ●

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ESG looms larger in dealmaking

WEBBER WENTZEL
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NOMSA MBERE AND BRUCE DICKINSON

For many years, shareholders and funders have expected that the companies in which they invest should demonstrate Environmental, Social and Governance (ESG) responsibility. But more recently, high standards of corporate behaviour in actively promoting and pursuing ESG goals have started to become integral to dealmaking.

Companies with a demonstrable commitment to ESG are favoured by socially-conscious customers; are more appealing to investors, both private and institutional; and are more attractive to financiers.

In a recent article, KPMG noted that "a strong ESG proposition can help create value and drive deal activity – and this will only increase in the coming years".

ESG principles have become central to measuring sustainability and societal impact. Implementing ESG standards into corporate strategy is recognised as integral to social trust, responsible business practices and decarbonisation, all of which align with the UN Sustainable Development Goals.

For example, global mining companies are focusing on internalising and embedding an integrated approach to ESG. We expect that this trend will continue and intensify. Webber Wentzel has advised on prominent ESG-related transactions in this sector, as well as others, for more than a decade. Most recently, we advised on the high-profile separate listing of Anglo American's South African coal assets in mid-2021. Our experience in ESG-driven transactions dates back even further, to Anglo American Platinum's (AAP) Alchemy transaction c. 2010.

Alchemy

Alchemy is Anglo American Platinum's community empowerment transaction, through which it invested c. R3,5bn to uplift communities around four of its mines, as well as labour-sending areas. The share ownership scheme which underlies Alchemy made the development trust the second-largest shareholder in AAP at the time. The purpose of the scheme was not only ownership, but ensuring the long-term sustainability of communities after mine closure.

Alchemy is fully paid up.

A particularly important aspect of Alchemy was that it was built from the "ground-up", based on a detailed stakeholder mapping exercise, followed by discussions about the proposals in relevant forums, and then the creation of the necessary community structures. The emphasis was on having proper governance structures to ensure proper accounting, transparency, and that trustees represent the broader community, rather than specific groupings, as in the past.


Mbere

Alchemy won, amongst others, the Project of the Year category in the 2014 regional Core Value Awards for Excellence in Public Participation, hosted by IAP2 Southern Africa (IAP2 SA), the local affiliate of the International Association for Public Participation.

Thungela

In response to the increasing aversion of leading sovereign wealth funds and other institutional investors to fossil fuels, Anglo American divested its South African coal interests to its shareholders through a new entity, Thungela Resources, which was listed in Johannesburg and London on 7 June 2021. Webber Wentzel advised Anglo American on the transaction.


Dickinson

The restructuring covered all aspects of ESG. The sustainability of Thungela as a coal miner is important to the South African power system, which will be heavily dependent on coal for several years, and to communities around the coal mines.

Anglo American has ensured that Thungela is fully capitalised and, on top of Thungela's existing black ownership holdings, has granted employees and communities each a near-immediate and unencumbered perpetual 5% interest in the group. Shareholder dividends will be distributed from 2021 – exceeding the requirements of the Mineral and Petroleum Resources Development Act (MPRDA).

From a governance perspective, Thungela has a management team with long experience in the Anglo American group. Both the CEO, July Ndlovu, and the CFO, Deon Smith, held the same roles in Anglo American's thermal coal business in SA. The Group's management team has an average of 20 years' experience in the mining industry.

Thungela also houses the eMalahleni Water Plant, which uses reverse osmosis to turn mining effluent into potable water, which helps to address a critical water shortage in the area. The availability of good-quality water in the area is critical for any future economic development in Mpumalanga.

Other projects

Beyond water and mining, Webber Wentzel is advising various project developers, lenders, sponsors and investors in the renewable energy bidding rounds. The firm is also actively involved in the private captive power market, which was recently given a boost through the 100MW exemption decision.

Over many years, Webber Wentzel has advised, and is currently advising various mining companies, both in South Africa and elsewhere in Africa, on integrating, consolidating and transforming splintered community initiatives, community shareholding structures or socio-economic development schemes to make them more manageable and relevant. A central element of these projects will be to ensure that appropriate, fit-for-purpose legal and governance structures are in place to manage social projects effectively and transparently, for long-term sustainability post-mine closure. These strategic imperatives also drive policy development on mine closure from an environmental impact management perspective, to ensure that the transition of mining communities to more sustainable economies is justly implemented and does not leave ghost towns and stranded communities in its wake.

Conclusion

From the days of ensuring that a company had a "licence to operate", through sustainable development initiatives, and now ESG (in its various guises and standards), companies have had to evolve and engage proactively. Investors and stakeholders demand it and they, in turn, are demanding it of their suppliers and service providers. ESG is consequently becoming ever more important in M&A and capital markets, whether as a result of investor pressure, driving long-term shared value, to become an attractive target for investment and/or acquisition, or as an acquirer. ●

Mbere and Dickinson are Partners | Webber Wentzel.

Driving ESG and Sustainable Finance is core to RMB's solutionist thinking for clients

NIGEL BECK

The future of ESG

While ESG (Environmental, Social, and Corporate Governance) is not a new topic, the very definition and role that ESG plays in the dealmaking environment is shifting. Banks are accustomed to considering ESG criteria in their risk assessments, and institutional investors have incorporated ESG factors as a screening tool. Yet, as sustainability issues assume centre stage globally, so ESG and sustainability considerations are being integrated into companies' core strategic priorities, with board oversight and C-suite focus.


Beck

Gearing up for COP26

The UN Climate Change Conference (COP26) will bring parties together between 31 October and 12 November to accelerate action towards the goals of the Paris Agreement and the UN Framework Convention on Climate Change. In the run up to the event, we at RMB have seen a number of sovereigns, as well as a number of South African companies, making net zero commitments. This includes scope 1, 2 and 3 emissions (with scope 3 capturing indirect emissions like those from the supply chain). So, while many B2B companies may not be feeling the consumer pressure, those in large corporate supply chains are starting to experience increasing pressure from their customers, as well as shareholders and other stakeholders, to align to net zero and, therefore, need to start thinking about their own sustainability strategy and the financial solutions (including advisory and funding) available to support their journey.

The state of the sustainable finance market

Sustainable finance has transitioned to the mainstream. According to data from Bloomberg NEF, the global sustainable finance market (including loans and bonds) was valued at about US$983m YTD (to September 2021), already a 30% increase on 2020, and 73% up on 2020 on an annualised basis. The Sustainable Finance market in South Africa is relatively nascent, with limited issuances in the years up to 2018. The local market has, however, seen an explosion of activity in 2021, both in scale and diversity of issuers and instruments. As at September 2021, loan and bond issuances totalling over R25bn have been concluded in sectors as diverse as SOCs, real estate and healthcare – a three-fold increase on 2020, with close to a quarter of 2021 to go! It has become clear that investors are increasingly willing to support companies with a clear sustainability strategy.

Transition finance – a trend to note

Transition finance is a new "segment" of sustainable finance that we expect to deliver significant growth in the coming years, providing sustainable funding solutions to traditionally "brown" or fossil fuel intensive companies that have, to date, not materially benefited from the growth in the Sustainable Finance market. Companies that have committed to net zero by 2050 need to start delivering on their strategies to achieve short and medium term goals that demonstrate progress on this commitment, and identify organic and inorganic opportunities to improve their sustainability profile. Transition finance will be an important mechanism to enable them to achieve this. As part of the Paris Agreement of 2015, developed countries pledged to mobilise at least US$100bn a year in climate finance for emerging economies between 2020 and 2025. This funding hasn't fully materialised. However, in the run up to COP26, several developed countries have reaffirmed or even increased their commitments. We at RMB are hopeful that increasing flows from developed countries to support the "just transition" through transition finance mechanisms will be one of the outcomes of the conference.

A shift in ESG measurement

Many institutional investors have fully integrated ESG factors into their investment decision-making process, adjusting valuations for those factors that can be quantified, and modifying portfolio construction for more intangible ESG factors. Measurement is growing to encapsulate short, medium and long term targets. Environmental factors can be more easily measured, compared with social factors that are more complex, but increasingly focused on by debt and equity investors alike. While, traditionally, measurement has been used to quantify risk, the industry is fast evolving to a place in which companies with a clear sustainability strategy and a positive environmental and social impact will emerge as leaders.

Important ESG trends

To ensure companies benefit appropriately from their leadership in this space, we believe it is important that they consider some of the following key ESG trends:

- Expectation that sustainability is core to their overall company strategy, and that ownership of that strategy is driven by the non-executives and executive management team.
- Increasing transparency to demonstrate progress on their sustainability journey and the impact that it is expected to have on its broad set of stakeholders.
- Independent verification of key short, medium and long term key performance indicators (KPIs), with executive remuneration linked to the achievement of these KPIs.
- Greater standardisation of reporting to enable comparison between companies and across sectors, like reporting aligned to the Taskforce on Climate-Related Financial Disclosure ("TCFD"), with science-based targets.
- Integration of ESG and sustainability considerations throughout the investment process as a value creation opportunity.
- Pre-IPO candidates and publicly listed companies providing comprehensive ESG disclosure and adequately addressing ESG risks and opportunities as part of their strategies, to ensure that investors recognise their sustainability credentials, in order to access sustainability-focused investors.

In conclusion, ESG is fast assuming a central role for companies the world over. As regulatory, consumer, stakeholder and investor interest in sustainability intensifies, this is not a trend that companies can ignore. ●

Beck is Head: Sustainable Finance and ESG Advisory | RMB.

Is the climate of shareholder interests changing?

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LOGAN HUFKIE

World leaders have faced significant criticism in the run up to November's COP26 climate talks in Glasgow, for their lack of action to prevent climate change and to meet the targets set in the Paris Agreement. The Paris Agreement, which came into force in 2016 and has 191 signatories (including South Africa), sets long-term emission reduction goals aimed at limiting the rise in global temperatures.

In recent years, corporates have increasingly also made commitments towards meeting the goals enshrined in the Paris Agreement. While such commitments initially seemed to satisfy shareholders, a growing international trend towards more ambitious climate change proposals has since emerged, due in no small part to shareholder campaigns and activism.[1]

It is no wonder that mounting climate change concerns have also impacted on views of what constitutes shareholders' interests. While the notion that a company's overriding social responsibility is to increase its profits, (as propounded by Milton Friedman and others) has been challenged in the past as being too narrow, this subject has gained urgency in light of the growing climate emergency.[2] It is becoming more apparent that shareholders have diverse interests, which are not only economic, but also extend to environmental and social aspects. While profitability remains a key factor, it is no longer the case that shareholders are only interested in the profitability of companies.

Even if this change in the climate of shareholder interests ultimately proves to be overstated, it is clear that there will be an economic cost for companies that are unwilling to adapt to the emerging new reality, including the reduction in available financing avenues, as banks and other financial institutions come under increased public, shareholder and, possibly, regulatory pressure to limit funding for projects that would lead to carbon emissions. Financial institutions are starting to link climate change targets to the costs of debt, with one recent example being Mediclinic's refinancing of existing debt through a sustainability-linked facility, where the cost of finance is subject to Mediclinic meeting certain carbon and water usage targets.[3]

The pressure on banks is evident from shareholder resolutions proposed and approved at recent annual general meetings. By way of example, a recent 2021 shareholder resolution requiring the Investec group to take action to address its "financed emissions" (greenhouse gas emissions associated with its lending and investment portfolio) was supported by 99.95% of votes cast.[4] Various other South African banks have also included climate change-related resolutions, and there is clearly a greater recognition of these concerns by banks and, consequently, there will be a larger focus in future on sustainability-linked lending.

To date, proposals for climate change resolutions in the United States have focused mainly on "a say on climate change", which allow shareholders an annual vote on a company's publicly disclosed climate change plans.[5] This trend has been mirrored in South Africa, with climate change resolutions making headlines in 2021, and more shareholders demanding increased accountability and commitments from companies. This focus on expanded corporate responsibility is in keeping with the spirit of King IV, which requires companies to be responsible, ethical, and good corporate citizens, recognising their responsibility to a variety of stakeholders.

While some companies have resisted calls by shareholders for additional sustainability-linked resolutions to be tabled at annual general meetings, it should be borne in mind that, subject to certain thresholds being met and procedures being followed, shareholders are entitled, in terms of the South African Companies Act, to propose resolutions at general meetings or to require the board to convene meetings for such resolutions to be proposed. In future, disputes between companies and shareholders regarding such resolutions could result in litigation, which, while regrettable, would have the benefit of ultimately providing greater certainty on such resolutions, companies' obligations to propose them, and their enforceability, particularly in the context of climate change. While companies who resist this may be able to weather the ire of smaller activist shareholders, pressure will increase on them as large institutional shareholders become more assertive in this regard, with the latter wishing to display their sustainability credentials to their own clients.

It does not appear that the pressure for companies to make climate change commitments will decrease any time soon. As this goes to the root of shareholders' interests, it will be interesting to see whether, in future, legislatures or stock exchanges will codify requirements for compliance with the Paris Agreement or its successors. If not, the public perception of companies being viewed as "good" or "bad" corporate citizens may perhaps serve as informal regulation, with negative publicity, market perception, employee morale, and potentially even consumer boycotts or campaigns, pushing companies to adopt a more sustainable approach.


Hufkie

Given the rise in shareholder activism, the role played by shareholder activist groups and calls by institutional shareholders, we expect to see additional climate change resolutions proposed in future, and it will be interesting to evaluate companies' and the market's responsiveness to these and future changes in the climate of shareholder interests. Although not imminent, we believe that, in time, early adopters in specific sectors may benefit. ●

Hufkie is a Corporate Financier | PSG Capital.

1 https://corpgov.law.harvard.edu/2021/09/29/proxy-season-climate-related-voting-trends-report/

2 https://fortune.com/2020/09/13/milton-friedman-anniversary-business-purpose/

3 https://www.mediclinic.com/en/media-news/news-and-stories/new-sustainability-linked-banking-facility-at-mediclinic-souther.html

4 https://www.investec.com/en_za/welcome-to-investec/press/sa-shareholders-vote-overwhelmingly-in-favour-of-investecs-climate-risk-related-resolution.html

5 https://corpgov.law.harvard.edu/2021/09/29/proxy-season-climate-related-voting-trends-report/

ESG – no longer for show

CDH
CLIFFE DEKKER HOFMEYR
INCORPORATING
KIETI LAW LLP, KENYA

MARGO-ANN WERNER AND ALECIA PIENAAR

A vital custom to be maintained by corporate society to achieve sustainable economic development

Environmental impacts, together with the risks and opportunities associated therewith, have become fundamental to economic development, both internationally and in South Africa. This is especially in the light of the climate change crisis, and an appreciation for the need to urgently respond to the challenges arising from its impacts, which are far-reaching across environmental, social, economic and political spheres. This spotlight on environmental considerations is evidenced by the increasing prominence of Environmental, Social and Governance ("ESG") criteria in investment decisions, corporate conduct and general appreciation around the role of ESG in aiding the global transition to more sustainable economic practices.

Whilst ESG, in its infancy, may have seemed somewhat abstract, it is becoming an increasingly tangible and vital custom in corporate society, capable of swaying investor appetite and developer innovations towards the "greener" and socially more responsible projects. The more investment capital is reserved for "greener" developments, the more developers will focus on developing projects that align accordingly.

Werner

Today, ESG criteria, and what should be the progressive development thereof, is underpinned and supported by several ESG-related frameworks, including international environmental principles (such as the principle of sustainable development); the blueprint provided by the Sustainable Development Goals; the standards prescribed by the IFC's Environmental and Social Performance Standards; and Equator Principles IV. In South Africa, which boasts an entrenched constitutional right to an environment that is not harmful to health or wellbeing, and a well-developed suite of environmental legislation, corporate ESG criteria and policies are encouraged to incorporate or align with the provisions and sentiments of this regulatory framework.

Although the application of ESG criteria appears to primarily feature at the investment decision level, it also plays a vital role in any company's day-to-day operations. Robust corporate ESG policies are a necessary foundation to influence a company's way of doing business, and to guarantee more sustainable outcomes. Offering a competitive advantage, ESG observance at business level will naturally also be more attractive to ESG-committed investors and lenders.

Pienaar

At the risk of simplifying ESG to the mere practice of "policy-adoption", the true value of ESG will only be realised off the back of actual commitment by all stakeholders to make a concerted effort to achieve defined environmental and social benefits. This is important to note as, although ESG may have reputational benefits, it also bears the risk of reputational harm if the ESG goals or outcomes are overstated or otherwise misrepresented. Thus, the commitment to incorporating and realising ESG should not be undervalued. Stakeholders, including environmental and community interest groups, are already holding investors and corporates accountable, scrutinising environmental and social monitoring reports, publicly critisising failures to provide transparent disclosures, and instituting ESG-related litigation. In South Africa, in particular, with its development needs and just-transition approach, these challenges are likely to arise irrespective of the robustness of an ESG-led investment decision.

The above realities, although daunting, should inform and be proactively incorporated into ESG policies, with investors and the broader corporate community in South Africa encouraged to supplement, revise or implement (if they have not already done so), an ESG policy or framework that takes these South African elements into consideration. It is also recommended that ESG-related covenants in transaction documents be amplified to hold parties more accountable to meeting specific KPIs in respect of ESG performance.

The observance of ESG in practice will not only achieve long-term returns for investors and contribute to actual sustainable development at a business level, but will likely also encourage innovation in environmental management, planning, project design and technology. With such potential for true sustainable growth, ESG can no longer be underplayed, but should be recognised and implemented as a vital custom to be maintained across corporate society. ●

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Increasingly competitive IPP sector set to catalyse M&A activity

NEDBANK CIB

ROY RICHARDSON

It's no secret that clean energy has become a global priority in recent years. And while the impetus for clean power is undoubtedly coming primarily from the global north, the achievement of green economies is now also a priority for the developing world.

However, across much of Africa, power generation of any sort remains a massive challenge due, primarily, to a combination of infrastructure backlogs, rapidly increasing populations, ongoing urbanisation, and extensive industrialisation.

As has been so painfully obvious in South Africa over the past 14 years, since rolling blackouts began, reliable power supply is a cornerstone of economic growth. What's more, this link between energy and economic sustainability is set to become even more significant as global trade pressure on emissions reduction and net zero commitments increases in the coming months and years.

Richardson

Given the abundance of supply and the significant cost effectiveness of renewable energy compared to fossil fuel-based generation, the potential for clean energy to be at the forefront of meeting Africa's growing demand is undeniable. And in South Africa's case, essential.

With a national energy provider that is almost half a trillion rand in debt, suffering from ailing and fast-deteriorating transmission and distribution infrastructure, and under pressure to exit 'dirty' fuels, South Africa has no option but to turn more deliberately to renewable energy sources to meet its future power requirements. Despite the lingering reticence in some political circles, this is no longer a negotiable transformation; if for no other reason than the achievement of its plan for a just transformation to a viable green economy, it could soon find itself once more on the sidelines of the international trade playing field.

Of course, fiscal constraints and rising debt to GDP remain just two of the massive speedbumps on the road to such a green South African economy, but, in some ways, these challenges are also blessings in disguise. That's because public sector budgetary shortcomings will effectively force a situation in which a significant amount of current and future energy supply capacity will have to be funded and produced by the private sector and Independent Power Producers (IPPs).

Increasing IPP momentum is a catalyst for M&A

The good news is that this move towards private sector involvement in ensuring a sustainable renewable energy sector appears to already be well underway. The appeal of the Renewable Energy Independent Power Producer Procurement programme (REIPPPP) continues to grow, both in national and international investment and development circles, with the most recent bid window 5 being massively oversubscribed, receiving 102 bids for the 2600MW of generation capacity on offer.

The relaxation of the self-generation license cap to 100MW is another significant step in the right direction, especially given that the regulatory easing provides a framework for energy wheeling and distribution to multiple offtakers, which has created immense interest for the development of self-generation facilities amongst municipalities, and in many corporate sectors.

Importantly, this clear emergence of a more competitive and sustainable IPP sector in South Africa will almost certainly be a catalyst for significant merger and acquisition interest and activity within renewables going forward.

For one, IPPs that established operations on the back of winning bids in the first few REIPPPP rounds are now in a situation where they need to find innovative ways of recycling their balance sheets in order to sustain their growth via the development, acquisition or operation of new projects.

As the renewables sector matures in South Africa, there is also a natural separation taking place between the ownership of projects and facilities and the ongoing development and operational functions. While ownership is typically high yielding, it is also capital intensive and delivers relatively low average returns. As a result, IPPs are likely to increasingly look to consolidate their market position through the acquisition of going concerns that provide them with greater operational control.

The sector has now also reached a point where investors in the very early projects may start looking for opportunities to take profits. And the prioritisation of black economic empowerment within the maturing sector is sure to be another contributing factor to increasing M&A activity levels, as the need to demonstrate ownership by historically disenfranchised individuals and entities becomes a core business sustainability and opportunity creation requirement.

Renewable deals are increasingly fetching higher valuations compared to traditional 'dirty' generation installations, as a result of their lower operational risks, coupled with government funding support and sustainability imperatives. Supported by South Africa's green economy vision, the burgeoning South African clean energy sector can only fuel the investment appeal and impetus for M&A, particularly in a country facing continued rolling blackouts and well-above-inflation price increases for the foreseeable future. ●

Richardson is a Principal | Nedbank Corporate and Investment Banking.

Green financing is an opportunity for Africa

SASHA COOK AND ANNEKE LUND

Over the past couple of years, we've seen a marked increase in ESG focus on deal making across Africa. This has led to more African banks, particularly in South Africa, establishing centres of excellence, with dedicated sustainable finance teams. This is a very exciting move, which will lead to further growth in the market.

Globally, we are seeing the volume of sustainable finance deals in the market growing fast. While African and other developing markets are still somewhat lagging developed markets, there is an increased focus on African markets due to the exposure to physical and transition climate risks, as well as social challenges, including the need to finance the infrastructure gap across the continent.

This has resulted in an increase in the number of syndicated loans being structured with sustainability-linked features. Some examples include the recently concluded transactions for Oceana Group and Greenlight Planet, where multiple funders participated in these structures.

In the debt capital markets, we have seen increased liquidity for sustainable finance deals through increased appetite from institutional investors and a widening of the investor base.

The investor community, and lenders alike, are applying increased scrutiny to these structures to promote standardisation and avoid greenwashing. The refinement of voluntary global principles, such as the International Capital Market Association (ICMA) and the Loan Market Association (LMA) principles covering the use of proceeds and sustainability-linked instruments, is helpful in guiding market best practice.

Trends moving forward

The COVID-19 pandemic has amplified the scale of global social challenges as countries grapple with the consequences of this crisis. As a result of this, together with the pre-existing social challenges faced by developing countries, we expect to see social key performance indicators (KPIs) emerge alongside the importance of environmental KPIs, and for these challenges to be addressed through the use of both proceeds instruments and performance-based instruments, such as sustainability-linked loans.

As the market continues to improve on reporting and transparency, we expect to see clearer and more detailed target setting. Tighter regulation is also expected over the coming months, with an increase in the establishment of taxonomies and policy making.

Cook

We may also see more activity at the sovereign, sub-sovereign, financial institution and corporate level in green bonds and loans, post-COP26, and funding the "energy leapfrog" for Africa.

Africa will require significant investment in energy projects and other basic infrastructure in the near future. This presents a great opportunity for sustainable finance, which can assist in unlocking these opportunities and support the mobilisation of development funds and other forms of capital towards these initiatives and projects.

Green financing is a foremost opportunity for Africa, both in the loan and capital markets. Currently, there is a wave of global funding ready to invest in renewables, but we lack bankable projects in scale. The solution lies in sector reform initiatives, and developing policy frameworks that enable rapid market growth in both centralised and decentralised energy.

Lund

Key challenges

Collaboration in the sector is key to achieving global goals, such as limiting global warming to within 1.5°C above pre-industrials levels. While the cost of a Just Transition for South Africa is estimated at R6bn[1], the broader cost of transitioning South Africa's power system to net zero by 2050 is estimated at R3trn. This is a mammoth sum, and clearly cannot be funded through our fiscus alone.

In many of our key markets, there is a short-term dependency on fossil fuel revenue streams, and funding of the energy transition will need to be prioritised over other crucial fiscal spend.

The importance of blended finance cannot be stressed enough. Private and public sector partnerships call for closer engagement and planning between these parties, and prioritising the application of these funds.

The next decade is going to be "the decade of blended finance", where significant energy transition funding is going to be needed, particularly in emerging markets. Public-private partnerships, with a significant pooling of capital from developed markets, will be required to unlock the transition pathway.

The momentum has really increased with regards to client interest and demand in sustainable finance and solutions that embed sustainability in their structuring. Standard Bank has been fortunate to close a number of market leading transactions in 2021, continuing our success of 2019 and 2020 in the sustainable finance space, where:

- We partnered with Woolworths to conclude the first sustainability linked loan in the retail sector. This highlights Woolworths' commitment to making a meaningful difference for the greater good of the planet and its people, with the funding embedding KPIs linked to reducing store electricity consumption, local sourcing in FBH and continued focus on sustainability attributes in Woolworths Food Products.
- Standard Bank South Africa's first social bond was arranged by Standard Bank in August. The R2bn issuance was significantly oversubscribed and cleared at a preferential price. Proceeds will be allocated to mortgage bonds in the affordable housing market, with a focus on female borrowers. It was apt that we closed this momentous transaction during Women's month!
- Green Light Planet – Standard Bank acted as sustainability coordinator on a deal that saw Stanbic Bank Kenya, Citibank, Norfund and CDC Group fund GLP facilitate expansion of access to off-grid solar solutions to low-income communities in Kenya. The deal embedded KPIs linked to financial inclusion, clean energy, and gender equality.

Given the heightened focus on ESG factors and sustainability, global investors continue to pursue opportunities that make a positive environmental and social impact.

Africa is well placed to become a major player in the global sustainable finance market. And given the continent's massive funding needs, sustainable finance will play an important role in bolstering capital for high-impact projects. ●

Cook and Lund are Executives, Sustainable Finance | Standard Bank.

1 https://www.tips.org.za/images/report_Estimating_the_cost_of_a_just_transition_in_South_Africas_coal_sector.pdf

ESG obligations leading to the risk of increased litigation for African businesses

DARRYL BERNSTEIN

As African businesses begin to recover and build the resilience needed to successfully navigate COVID-19 disruption, a focus on Environmental, Social and Governance (ESG) strategies is proving to be essential for long-term success. In order to stay competitive, organisations based in Africa are engaging meaningfully in ESG to build robust sustainability strategies that meet stakeholder expectations and enable compliance with global and domestic mandatory and voluntary ESG standards and codes.

ESG encompasses a broad range of issues across the spectrum of Environmental (climate change, biodiversity, waste, water and resource use, pollution), Social (human rights, labour practices, HSE, diversity); and Governance (corporate governance, ethics, compliance) matters.

As climate change impacts become clearer and nearer, there is an increasing emphasis on the Environment aspect of ESG. After the pandemic, initiatives in Africa are expected to have a heightened focus on green, low-carbon and sustainable development via, for example, clean energy production, community care initiatives, green transport and sustainable water projects, wildlife protection programmes and low-carbon development projects.

There is a major role for ESG policies to play in mitigating some of the effects of climate change, through planning and building for hotter temperatures, higher sea levels and more extreme weather conditions, for example. Organisations are adopting new strategies that address climate change risk and identify the sustainable opportunities that arise from addressing climate concerns. To regulate this, in the near future, there are likely to be developments from African regulators that address climate risk disclosure requirements for businesses operating on the continent.

Post-pandemic, the discussions around ESG are also resulting in an added emphasis on the Social aspect which, among other things, focuses on protecting an organisation's workers and the wider local populations in which these businesses are based. Organisations are looking at ways to build better social programmes that are more resilient to future pandemics and ensure good business practice. A focus on issues such as enhancing considerations around the health and safety of employees and communities, implementing diverse and inclusive workplace cultures, and building good management teams that can pull employees together in all kinds of remote, physical workplace and hybrid settings, puts companies in a strong position to move forward.

The Governance aspect has also been emphasised by the pandemic, with an increased focus on due diligence around compliance with regards to anti-bribery and corruption, data privacy and cyber security legislation, for example.

Some of the larger African jurisdictions have already implemented mandatory ESG and sustainability reporting frameworks and, going forward, more African regulators are expected to replace current voluntary frameworks with mandatory ones, or to adopt new mandatory frameworks. In turn, organisations operating in Africa will seek guidance and more detail from corporate regulators on how they want to see ESG reported, and the practices behind the reporting process.

Bernstein

In South Africa, there are many laws that govern ESG factors, including business and financial sector conduct, economic and social empowerment, and environmental protection. Voluntary codes such as the King IV Code on corporate governance and the Code for Responsible Investing in South Africa also serve as a guide to businesses on ESG considerations. Other examples include Kenya, where the Capital Markets Authority introduced Stewardship and Corporate Governance Codes in 2017, and Nigeria, where the Nigerian Code of Corporate Governance was introduced in 2019. Globally, in addition to numerous country-specific laws, there are a plethora of voluntary sustainability-focused codes and standards, including the UN Guiding Principles on Business and Human Rights, and the UN Guiding Principles Reporting Framework.

ESG risk management has become a mainstream component of corporate due diligence programmes, and corporate boards are being held accountable for their ESG practices by their shareholders, stakeholders and management teams. Risks for non-compliance with the multitude of global and local laws, voluntary codes and best practices governing ESG factors range from criminal prosecution and hefty fines to reputational risk and business failure as a result of not fulfilling ESG commitments.

Actual and perceived non-compliance with ESG regulations and best practices have engendered activist shareholder protests and action against the parent companies of global groups. A key challenge for businesses is navigating where the laws end, and where business strategy and market expectations begin. This is especially the case when navigating the major global issues of, for example, environmental standards and human rights responsibilities. Such issues often lead to activism, litigation and class actions if a business falls short of sustainability standards or appears to be breaking publicly made promises.

Contractual liabilities around ESG must be carefully considered, as contracts that stipulate compliance with certain standards can trigger a breach of contract claim if there is seen to be any violation of the terms. It would be better for businesses to ensure in advance that they can fulfil specific ESG obligations before agreeing to them contractually. Limitations of liability should also be agreed upon to mitigate the risks.

Further, if companies have made public promises regarding their ESG obligations and they are seen not to be fulfilling such obligations, they could be vulnerable to the threat of class actions brought by consumers and shareholder activists. Companies should identify which ESG goals can be properly measured and which goals should be clearly defined as being aspirational, and ensure that this is accurately communicated in the public domain. Reputational damage from ESG non-compliance escalates quickly and can be difficult to recover from.

For African organisations, maintaining a long-term sustainability strategy ensures sound financial performance, full compliance with local and global laws and frameworks, and substantially increased resilience in a challenging post-pandemic environment. In the current global environment, ESG is no longer just about doing the right thing – the dial has shifted; having a legally sound and comprehensive approach to ESG considerations is a prerequisite for business success. ●

Bernstein is a Partner and Head of the Dispute Resolution Practice at Baker McKenzie in Johannesburg.

Giving the green light to green deals in Africa

BOWMANS
THE VALUE OF KNOWING

JASON WILKINSON

Environmental, social and governance (ESG) initiatives are key market drivers for governments and corporate leaders, given the overwhelming need to advance sustainable investing. It is rewarding to see that such a key global initiative is being driven from a number of critical pressure points: from regulatory to investor and consumer. We think of this as the sandwich effect.

The regulatory regime

Regulatory requirements are a driving force behind sustainability in the lending market. It is expected that market practice will evolve as regulators enhance rules on disclosure and risk management, and develop green taxonomies. Key to this is the Paris Agreement, and one of its critical parameters is to reduce greenhouse gas emissions by 40% by 2030, to levels in the 1990s. This is only nine years away.

From a South African perspective, several foundational documents inform the domestic regulatory framework to achieve the country's ESG goals, including the Paris Agreement on Climate Change and the UN's 2030 Sustainable Development Goals.

However, in May 2020, National Treasury released a technical paper, entitled Financing a Sustainable Economy, that aimed to increase access to sustainable finance and stimulate the allocation of capital to support a development-focused and climate-resilient economy. Critically, it also recommended the enactment of a taxonomy similar to the EU Sustainable Finance Taxonomy (EU Taxonomy), in force since 12 July 2020.

In line with this recommendation, in June 2021, National Treasury published the Draft Green Finance Taxonomy (Draft Taxonomy), which sets out a more concrete regulatory framework for South Africa's ESG goals.

The Draft Taxonomy is an official classification document that defines a minimum set of assets, projects and sectors that are eligible to be defined as 'green', in line with international best practice and national priorities. It can be used by investors, issuers, asset owners and other financial sector participants (as 'users' of the Draft Taxonomy).

This project aims to adapt international best practice to South Africa's context and needs. In particular, South Africa's green economy should be viewed from two perspectives:

- economic activities that are intrinsically aligned to and/or are expected to make a substantial contribution to the future South African green economy; and
- economic activities that presently have significant detrimental environmental impact, but are needed as part of the future South African green economy and for which there are presently no known alternatives.

Investor appetite

Due to its role in capital distribution, the financial services sector is integral to achieving sustainable development. Generally speaking, institutional investors and asset managers in South Africa recognise the importance of ESG, and are taking steps to improve the integration of ESG into their operations.

Wilkinson

A revised draft Code for Responsible Investing in South Africa (CRISA) 2.0, a voluntary initiative that seeks to guide institutional investors in developing and implementing sustainable, responsible and long-term investment strategies, was published for comment in November 2020. It sets out various principles and practice recommendations with a clear emphasis on ESG and broader sustainable development issues. It also proposes a shift from an 'apply or explain' to an outcomes-based, 'apply and explain' application regime.

It is clear that investors are able to influence ESG conduct through their investment mandates and investment management agreements concluded with investment managers. The majority of investors and asset managers support CRISA and apply its principles, though the manner in which they do so varies considerably. Many institutional investors will regularly publish ESG policies and sustainability reports dealing with ESG issues. There are also a growing number of ESG-related products being provided by the various asset managers.

Consumer considerations

International lending markets have embraced green loans and sustainability linked loans (SLLs). Over the past four years alone, the volume of sustainable finance has grown 15 times. In South Africa, green and ESG initiatives and the related financings are no longer a theoretical aspiration, but are very much at the forefront for the Government, banks and corporates.

Ultimately, sustainable finance transactions depend on the nature (and the measure) of each key performance indicator or sustainable performance target, as agreed between the borrower and lenders. The finance providers will likely look at several factors when assessing potential financings, with reporting and verification being of primary importance.

ESG initiatives are being prioritised by the younger generation, both in terms of value-based investing and keen job satisfaction. The next few decades will see the largest generational wealth transfer in history, from the baby boomers to millennials. With this will come newly prioritised investment criteria, notably in where they choose to work, how they invest their funds, and who they select for business relations.

Conclusion

The main issue of concern for proponents of ESG is to move beyond virtue signalling and bare minimum compliance to a more proactive approach to ESG. Different approaches to ESG, both across a range of industries and within an industry, make it difficult to compare ESG performance. Added to this is a lack of capacity and expertise in ESG, requiring training on ESG integration.

However, ESG will become a core strategic concern for corporates, driven by exogenous and endogenous factors and pressures, including a shift towards a more stakeholder-inclusive capitalism.

Climate change is the key ESG challenge of the coming decades, which we expect will be a dominant theme as governments, investors, regulators and pressure groups increase engagements around climate change.

The trend of increasing pressure on companies and institutional investors to tackle ESG issues is likely to continue. Stakeholders are becoming increasingly proactive in engaging with institutional investors and asset managers on the integration of ESG factors into their decision-making, and companies are facing increasing scrutiny of their investment activities and AGM voting records. They, in turn, are taking a more proactive stance on ESG, and in holding management to account on ESG issues.

Wilkinson is a Partner | Bowmans South Africa.

D is for Disclosure

SAMMY NDOLO AND CLARICE WAMBUA

CLIFFE DEKKER HOFMEYR
INCORPORATING
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A Review of Corporate Sustainability Reporting Requirements for Listed Companies in Kenya

Companies in Kenya have made sound progress on the disclosure of information relating to sustainability, often referred to as environmental, social, and governance (ESG) concerns, and many of the larger companies have been publishing annual sustainability reports and other ESG-relevant content. This is largely attributable to changes in the law following the enactment of the Code of Corporate Governance for Issuers of Securities to the Public, 2015, the Capital Markets (Securities) (Public Offers, Listing and Disclosures) (Amendment) Regulations, 2016, and the Companies Act, 2015, in which greater attention is paid to corporate sustainability disclosure, as well as company efforts to keep in line with global sustainability trends.

What the law says

Under the Companies Act, 2015, directors of a company (whether public or private) are required to have regard for the impact of the operations of the company on the community and the environment. This is an improvement on the previous and now repealed Companies Act, 1948, which did not make provision for environmental concerns. However, although the Companies Act, 2015 recognises impacts to the environment, its provisions do not go far enough to provide clarity on the director duties and standards to be applied in this regard.


Ndolo

The Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 (the Code), contains more far-reaching provisions on ESG issues and the duty for corporate disclosure. The Code repealed the Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya, 2002. The Code applies to, among others, listed companies in Kenya (Issuers).

The Code defines "sustainability" to mean conducting operations in a manner that meets existing needs without compromising future needs, and calls for company strategy to promote sustainability. It also recommends actions to be taken by the Board to enhance the well-being of the economy, society and the environment. The Code contains provisions that are mandatory minimum standards, as well as those upon which the 'apply or explain' standard is imposed.

Mandatory duties of the board of a listed company (the Board) that require full compliance include a duty on the Board to ensure that:

- The Board protects, enhances and invests in the well-being of the economy, society and the environment.
- The Issuer, with shareholder approval, develops formal and transparent policies and procedures on corporate disclosure, including disclosure on ESG concerns.
- The Board develops a Code of Ethics and Conduct (which includes sustainability) and promotes its application by all directors, management and employees.
- The Board, in accounting, considers not only the financial performance but also the impact of the company's operations on society and the environment.

For other duties, Issuers are to explain instances of non-application of the recommendations set out in the Code, and set out the steps being taken towards full application of the relevant requirements. These include duties on the Board to:

- Provide disclosures on compliance with laws, regulations and standards; ethical leadership, conflict of interest, corporate social responsibility and citizenship.
- Promote integrated reporting that provides material information on the commercial, social and environmental context within which the organisation operates.
- Incorporate ethical and sustainability risks and opportunities in the risk management process, and establish an effective risk management framework which is inclusive of key risks, foreseeable risks, and environmental and social risks and issues.

To provide bite and an avenue for enforcement of the Code, the Capital Markets (Securities) (Public Offers, Listing and Disclosures) (Amendment) Regulations, 2016 (the CMA 2016 Regulations) now make it mandatory for every Issuer to disclose in its annual report whether it is applying the recommended corporate governance practices, and where it is not, to indicate the steps being taken to achieve the application of such practices.

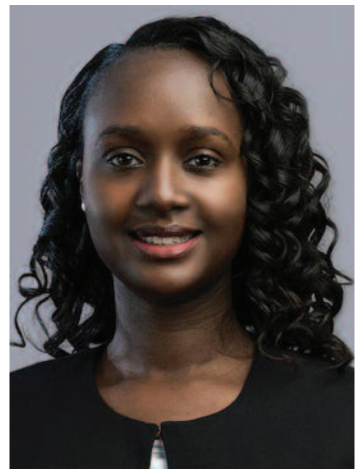
The CMA 2016 Regulations enhance the requirement for corporate governance by prescribing the composition of Boards, including the establishment of committees and the number of appointments applicable to a chief executive officer or chairperson of a listed company. The Board of a listed company must consist of executive and majority non-executive directors (who, together with the independent directors, constitute at least one third of the board), and the chairperson must be independent. The performance of the Board (including its chairperson, chief executive officer and company secretary) and committees of the Board must be evaluated on an annual basis. Any person appointed as a chairperson or executive director cannot serve in that capacity in more than two listed companies at the same time. The Regulations also prohibit the appointment of a body corporate as an alternative director. To ensure that shareholder participation is encouraged, and to protect their interests, the Board is required to facilitate the effective exercise of the rights of shareholders and to ensure that there is equitable treatment for all holders of the same class of issued shares.

Mid this year, the Nairobi Securities Exchange (the NSE) published its draft ESG Disclosures Guidance Manual (NSE Guidance Manual) for NSE listed companies, which provides direction to listed companies on how to collect, analyse and publicly disclose and report ESG performance consistently, transparently and based on a principled approach that satisfies the expectations of stakeholders. The NSE Guidance Manual recommends the application of the Global Reporting Initiative (GRI) Sustainability Reporting Standards, 2018 as the common framework for ESG reporting by Kenyan-listed companies. The NSE Guidance Manual is aimed at assisting listed companies to meet the reporting requirements of the Code.

The NSE Guidance Manual also identifies the integration of sustainability into business strategies as a core component of good corporate governance practices, and the Board is expected to ensure that the long-term sustainability of the organisation is assured. Recommendations are made for the appointment of a focal point for sustainability within the listed company (the sustainability manager), although the Board retains overall accountability for ESG performance and disclosure to stakeholders.

To enhance the credibility of the publicly disclosed ESG information, the NSE Guidance Manual identifies the International Standards on Assurance Engagements (ISAE) 3000 as the suitable standard, but recommends that a listed company must first pass its own self-assessment before procuring external assurance services.

There are also sector-level differences emerging with regards to ESG reporting requirements. This is, for example, in the case of institutions licensed under the Banking Act, such as commercial banks and mortgage finance companies (Institutions). The Central Bank of Kenya (the CBK) has more recently (in October of this year), published guidance on climate-related risk management (the Guidance). The Guidance requires Institutions (whether publicly listed or not), to monitor and report (both internally as well as externally, to the CBK), exposures to climate-related risks. These Institutions are also to develop an appropriate approach to disclosing, climate-related information to stakeholders to enhance transparency. The Guidance highlights the Task Force on Climate related Financial Disclosures' recommendations as a desirable framework for institutions to benchmark their disclosure frameworks.


Wambua

Putting it all together

Any Issuer must understand these transparency and disclosure requirements of the Code, as read with the CMA 2016 Regulations, as they relate to sustainability and ESG concerns, and put in place policies, procedures and controls that enable it to establish and regularly review compliance with the Code and the CMA 2016 Regulations. The prescriptions on the compositions of the Board, attempts to limit instances of conflict of interest, and the requirements for ESG transparency and disclosure are expected to enhance the protection of the interests of shareholders and those of other stakeholders that are impacted by the operations and activities of the Issuer.

In addition, an Issuer must also be cognisant of the sector-specific requirements on climate and sustainability-related reporting set out by other regulators, such as the CBK, as highlighted above.

There are overlaps and elements of duplication between the Corporate Governance Reporting Template published by the CMA and the NSE Guidance Manual (should it be approved for use), and Issuers will likely have difficulty addressing these inconsistencies, although compliance with the Code has been anchored by the CMA 2016 Regulations and is likely to prevail in the event of doubt.

Developments in Kenya so far indicate that, as far as ESG is concerned, D is for disclosure. Requirements on both public and private entities are bound to become increasingly detailed as the legal and regulatory framework continues to rapidly take shape. ●

Ndolo is Managing Partner and Wambua a Partner, Environmental Law | CDH Kenya.

Labels - Green is the new Black

CARLYN FRITTELLI DAVIES AND NJABULO MCHUNU

"Sustainability" is used as the foundation for motivating positive change in aged industries, and inspiring the establishment of new ones. The focus on Environmental, Social and Governance (ESG) imperatives for the clothing, textile, apparel and footwear industry can lead to investment in the ailing local fashion industry. "Sustainable development" is defined as "integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations". The elements clearly include humans, the economy and the environment to achieve a harmony of sorts, to ensure longevity of all three elements in a developing country. While the global fashion industry wrestles with the definition of "sustainable fashion", the unregulated use of environmental jargon could lead to greenwashing. Greenwashing is a term used to describe an instance where an entity provides misleading information to deceive its customers into believing that their products are more environmentally-friendly than they actually are. Voluntary initiatives through factual labelling may be needed to unify the fashion industry and its embodiment of sustainability.

What's in a label?

Brand Identity. Often a second label is found hidden inside and towards the bottom of a garment. It indicates the fabric content, origin of manufacture and care instructions. The information enables a consumer to make informed decisions. This is a basic requirement for transparency and authenticity in an age where greenwashing is likely to entice, rather than impede, sales.

How to label?

In terms of the Merchandise Marks Act, 1941 (the Act), an item of clothing is required to indicate the country of origin where the item was manufactured. This basic requirement, if contravened, will be met with a fine and/or imprisonment. In either instance, the court is also empowered by section 20(2) of the Act to order the confiscation of the goods to which the offence relates, in addition to any other penalty that may be imposed. The South African National Standards additionally require the fibre content and care labelling of the garment to be indicated. Experience has shown that there are often no secondary labels, or the information is insufficient, particularly in e-commerce. It is unclear whether this relates to indifference, cost-cutting or an inability by the merchant to obtain this information from its supply chain. The fashion industry would be wise to remove this supply chain gap, since the South African Sustainable Finance Initiative often follows the movement of the European Union. Recently, the European Parliament received recommendations to adopt legislation to prescribe due diligences for responsible supply chains in, among others, the garment and footwear sector.

Frittelli Davies

Why do we need labels?

Originally, union labels were used by labour groups in the United States of America to show their strength and, in 1874, cigar-makers used the origin to indicate higher product quality. Later, legislation was introduced to compel manufacturers to indicate care instructions, due to the creation of new synthetic fabrics, to ensure consumers could wash items without damaging them. Today, the care instructions are as important as ever with new fabrics being designed at a rapid rate. As for origin, it is required for import tax purposes and, as initially used, to promote support for local economies.

Labels of support

Additional labels are also used to support campaigns and initiatives. The well-known South African flag in the shape of a tick, Proudly South African, was established in 2001, resulting from the 1998 Presidential Job Summit assembled by the late former President Nelson Mandela. Its purpose is to work to combat the triple chal-

Mchunu

lenges of poverty, inequality and, above all, unemployment, by encouraging local investment and consumption of local products. The global pandemic has increased these triple challenges. Additional labels have been developed such as: "Made in South Africa", "Local is Lekker", "Cotton SA" and "Better Cotton South Africa." These words on labels aim to strengthen an industry that, in turn, creates and sustains employment, thereby addressing poverty, inequality and unemployment. However, consumer awareness and buy-in is required for the success of these initiatives on a large scale.

The future of labels

While the focus of labels has been based on those who make the clothes and how to care for clothes, the conscious aspects of purchasing clothes and the impacts on the environment are coming to the fore. South Africa does not have eco-label legislation yet, but the extended producer responsibility has recently been implemented in the electronic and packaging industries, indicating a shift of responsibility from consumers to producers, which aligns with eco-labels. The global clothing industry is designing various labelling systems, indicating the true cost of the industry on the environment through eco-labelling, such as the Nordic Swan Eco-label. Larger corporates tend to look to technology and technological measuring systems in order to determine their impacts. More examples emerge each year, including the Fair Trade Movement, Global Organic Textile Standard (GOTS) and OEKO-TEX® certification, to name a few. Smaller, slow fashion brands look to include information such as the carbon footprint of an item, or the true production cost thereof. The traditional label is too small to include sufficient detail to communicate cost and impact transparency, but technological developments such as QR codes will aid this endeavour. The ingenuity required in the label industry is being led by consumers' needs. As a result, the global label industry is forecasted to grow from $1,9170bn in 2020 to $3,1857bn by 2028.

So, look for the labels, consider and question their content and make a choice that will support the local economy, increase employment and, if you like, protect our environment for those who will one day walk in our shoes. ●

Frittelli Davies is a Consultant and Mchunu a Candidate Legal Practitioner, Natural Resources and Environment | ENSafrica.

Nigel Beck
Head of Sustainable Finance and ESG Advisory at Rand Merchant Bank

RMB

The route I have followed to become the Head of RMB's Sustainable Finance and ESG Advisory business was undoubtably an unconventional one – falconer, personal assistant, game ranger, banker. But one that originated from a lifelong passion for society and conservation. A passion I have followed long before sustainability was at the forefront of everyone's mind.

While at school I was a member of the Gaia Society and at university I studied a master's in environmental technology. But the first step in my sustainability journey began in high school with birds - where I was trained as a falconer and began rehabilitating injured raptors. Falconry taught me to understand ecosystems and the fine balance of nature, but it also opened new experiences and opportunities. In the late 1990's while I was based in the UK working for the UK Government as a Consultant leading on Sustainability Appraisal and Strategic Environmental Assessment, I came across an opportunity at the British School of Falconry in Scotland. I jumped at the opportunity and moved in 1999 to GlenEagles, Scotland, to become the Head of the British School of Falconry.

But when finally trying to get into the "real" workforce after achieving my MSc from Imperial College in the UK, I landed up taking a job as a personal assistant just to get into Environmental Consulting. After that I worked for the Countryside Agency in the UK and contributed to the development and implementation of the National Park policy. I was also part of the team that designated the New Forest as a National Park in the UK.

In 2001, I moved back to South Africa and started to work more with the amazing wildlife and people we have on the continent. I became a Contract Ecologist in the Kalahari, on the private game reserve Tsawalu. I was responsible for modelling wildlife populations, looking at the optimum mix for financial and ecological viability.

I had some incredible experiences in the Kalahari that have shaped who I am. We would track black rhino on foot, resulting in the occasional charge by the rhino, and we would have to run for the nearest tree (very scarce in the Kalahari) and often land up in a bush not much taller than the rhino itself. We also captured game for relocation to other reserves, which was a real logistical challenge. At the time I lived in a small house more than 50km from any other sign of civilisation, so I got to know myself very well. During that stage of my journey I soon realised that to get traction and make a real impact, I needed to add the financial overlay to my qualification. This inspired me to do my MBA in 2007 to develop and mainstream the financial aspect of ESG.

I have questioned my career decisions many times over the years. ESG was not popular prior to 2015, and it was always a challenge to convince companies and society of its relevance. Once I was in the Financial Services sector, I pushed hard to establish an ESG capability in 2008, but it was only in 2015, after the Paris Agreement, that ESG entered mainstream corporate conversation, which justified my career path to that point.

It's been tough swimming upstream for most of my life, but I stuck with it, even when those close to me were achieving success in their chosen fields while I was still chasing animals around the Kalahari! But my passion will always be in sustainability and it is satisfying that I can now see the tide turning in the right direction globally.

All of this experience has equipped me for my current role as Head of RMB's Sustainable Finance and ESG Advisory business. My team and I, partner with clients to advise on sustainable products and services solving for access to financial capital, to provide support on developing a sustainability funding strategy, identifying strategic opportunities and to keep clients abreast of the latest developments in the local and offshore sustainable financial markets.

I have a reputation for building strategic business partnerships that maximise emerging market opportunities in the ESG space. This includes in-

The route I have followed to become the Head of RMB's Sustainable Finance and ESG Advisory business was undoubtably an unconventional one – falconer, personal assistant, game ranger, banker. But one that originated from a lifelong passion for society and conservation. A passion I have followed long before sustainability was at the forefront of everyone's mind.

novating award-winning sustainable growth and green product solutions that align with internationally recognised standards, corporate due diligence and client requirements.

Over the years I have pioneered the development of sustainable finance on the continent, executing several innovative and award-winning products including:

- the first Sustainability Linked Loans in Africa (bi-lateral and syndicated),
- the first Green Bond in East Africa,
- the first Green Bond in South Africa,
- the first Social Bond in South Africa,
- the first Sustainability Linked Bond in Africa,
- the first Green Infrastructure Bond issued by a corporate in Nigeria, and
- Africa's Largest Offshore Green Bond.

Within the last six months I have a concluded a sustainability-linked bond for Rand Water (the first for a state-owned entity), and the first syndicated sustainability-linked loan in Africa for Mediclinic.

My passion for sustainability has led me to many professional bodies. I am a Member of the Institute of Environmental Management and Assessment (MIEMA) and a Chartered Environmentalist (UK). I was previously the lead at the International Chamber of Commerce (Sustainable Trade Finance) and member of the Impact Investing National Task Force. I have held the longest Chairmanship of the Global Equator Principles steering committee.

My education included a BSc from the University of Cape Town, a BSc (Hons) from the University of Pretoria, MSc & DIC (Environmental Technology) from Imperial College, London, an MBA (Finance) from Wits Business School and Executive Leadership Programme from Duke Fuqua School of Business.

Prior to working at RMB, I was the Global Managing Director of Sustainable Finance & ESG Advisory at Standard Bank, and before that, I was a consultant on large and small infrastructure and resource transactions and worked within the British Public sector.

My experience has shown me that there a few primary challenges we need to overcome to accelerate ESG in this country:

Lack of awareness

There is a lack of awareness of sustainable finance opportunities in Africa. Corporates are not aware of all the products like Green Bonds, Sustainability-linked bonds and loans amongst others. Supporting funding of corporate transition strategies by committing companies to work towards attaining various ESG benchmarks. It's a great opportunity, but not many treasurers are up to speed yet. That's where ESG Advisory comes in – we are working hard to educate our clients. We can show a client all the options they have at their disposal, based on their business and transition strategy, sector and available investor interest in the market.

Lack of technical understanding

In South Africa we have a skill deficit when it comes to technical expertise in structuring Sustainable Finance transactions. We spend a lot of time guiding our clients, providing advisory services through the structuring of these deals around strategies aimed at reaching Net Zero. For example, if a client is exploring a green bond, we can provide support in asset mapping, developing the framework and facilitating the independent verification.

There is a lack of awareness of sustainable finance opportunities in Africa. Corporates are not aware of all the products like Green Bonds, Sustainability-linked bonds and loans amongst others. Supporting funding of corporate transition strategies by committing companies to work towards attaining various ESG benchmarks. It's a great opportunity, but not many treasurers are up to speed yet.

It's often difficult to reconcile the costs

Independent ESG rating agencies are based in Europe, the UK and US this results in additional costs in rand terms, which can be difficult to justify. We can overcome this challenge in the longer term by creating local capacity and capability to undertake ESG ratings and verification, so that the costs are more aligned to the local market.

In closing, there is massive opportunity for sustainable finance in South Africa. However, we are tracking behind the global market. We have raised significant awareness over the past two years and are seeing increasing interest from investors. If we can collaborate as a private and public sector to address the challenges above and seize the opportunity, we can make a significant impact in the years to come. ●

A responsible business | committed to make an impact

WEBBER WENTZEL
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Demonstrable compliance with Environmental, Social and Governance (ESG) principles is no longer a nice-to-have for businesses - it is a must-have. Despite the exponential growth in the mainstream interest in ESG, where there is now an integrated focus on the triple bottom line of 'E', 'S' and 'G', as far as Webber Wentzel is concerned, we have been advising clients on the core themes of 'risk', 'opportunity' and 'impact' for decades.

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, policy drivers and international benchmarks in pursuit of sustainable development and shared value in the long term.

We guide clients on the relevant industry standards and risks, and bring a laser focus on supporting our clients to know their business, their supply chain, and the broader ecosystem.

At Webber Wentzel, we are committed to making a transformative and sustainable impact through our work and actions, in accordance with the UN's Sustainable Development Goals. We are equally committed to good corporate citizenship across the core ESG principles. We understand that our clients expect us to walk the walk and talk the talk on ESG alongside them. Being a responsible and contributing corporate citizen is a key component of our overall business strategy.

Find out more about our ESG offering and read some of our recent ESG related insights.

Webber Wentzel ESG related accolades

ESG Initiative of the Year
- African Legal Awards 2021

Women Empowerment in the Workplace Award
(Overall Winner: Southern Africa)
– Gender Mainstreaming Awards 2021

Ranked in Band 1 for Environment: South Africa
- Chambers Global 2021

Environmental & Renewables Team of the Year: highly commended
- African Legal Awards 2020

CSR, Diversity, Transformation and Economic Empowerment Award
- African Legal Awards 2018

Pro Bono Lawyer of the Year
- IBA Pro Bono Award 2016 (a first ever for a lawyer from the African continent- Odette Geldenhuys)

Diversity Initiative of the Year
– African Legal Awards 2016

Project of the Year - Africa Renewables: Kathu Solar Project
- IJ Global Awards 2016

Project of the Year: Alchemy: Anglo American Platinum's ZAR3.5 billion social development framework for shared ownership
- IAP2 Core Value Awards for Excellence in Public Participation 2014

Adam Ismail
Partner

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Area of speciality
M&A and BEE. I focus on the consumer sector, financial services and real estate.

Experience in ESG (focus being within SA and especially in the deal making / financial market space)
I led the Webber Wentzel team that advised PepsiCo Inc and its South African subsidiaries, Simba and Pioneer Foods, on the implementation of two conditions imposed on them by the Competition Tribunal. These were to establish a trust for the benefit of their 12 000+ South African employees, holding ZAR1.655 billion worth of shares in PepsiCo Inc (listed on Nasdaq); and to create a fund to which PepsiCo/Simba and Pioneer Foods would contribute ZAR600 million for the development of emerging farmers and black SMMEs and to advance education and skills development in the sector. This was a unique and first of its kind B-BBEE transaction, where the South African employees received shares in a foreign listed holding company on such a scale. In addition, the shares were gifted to the employees, there were no funding arrangements.

I also advise listed and unlisted companies on matters of governance, particularly the roles, duties and responsibilities of social and ethics committees. I have also served on one of those committees.

Thoughts on ESG as a whole in the context of SA
In a couple of areas SA is ahead of the game, especially in relation to the rights and protection of employees. The recent amendment to the Competition Act gives the Minister of Trade, Industry and Competition certain legal rights to protect the public interest when approving mergers. The Minister uses that authority to approach a merger approval in a constructive way: firstly to minimise harm and secondly in seeking proactive steps by the merger parties to contributing to SA Inc. The PepsiCo deal was a stand-out example of this approach.

Where I am seeing ESG the most is in a consciousness by boards of directors, probably in keeping with King IV, that their companies' stakeholder base is wider than initially thought. It extends beyond shareholders and customers to other interest groups, both specific and non-specific. A lot of multinationals already have this level of sophistication and are bringing it to SA.

Hurdles | challenges within this sector
There is always the risk of over-regulating a sector and compliance becoming prohibitive from a cost perspective. It is best to target the big players, because even though small South African businesses also have a significant impact on ESG on an aggregated basis, it is unwise to squeeze small business too hard. SA is a unique economy, given its high unemployment rate - people can only earn a living through entrepreneurship and those small businesses help to keep the economy growing.

Some personal information, eg how did you get into this speciality
I trained as an M&A lawyer and entered the market when there was an M&A boom, in the early 2000s. Through that experience, I got access to boards of many significant companies. With the advent of the King Codes on Corporate Governance, I evolved as a practitioner with ESG experience garnered in the trenches. This sector has over the last couple of year become a lot more sophisticated, including new disciplines like environmental compliance.

I feel strongly about inequality in SA, and decided to use my M&A skillset to assist with BEE structuring, to ensure that deals are structured on a responsible and sustainable basis and to advise clients how to structure these types of transactions properly. It is not only about getting maximum points for as little effort as possible, no matter the consequences. It should be tackled rather as creating a structure that is sustainable.

A related passion and skillset for me was being a client representative in discussions with labour unions. I have had a number of really good experiences over the years.

Interesting fact(s) about yourself / your achievements
I love hiking in the mountains around Cape Town as often as I can and serving community-based organisations based on the Cape Flats. ●

Bruce Dickinson
Partner

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Area of speciality

Mergers and acquisitions, particularly in the mining industry, as well as the structuring/restructuring of companies, mining transactions and projects, as well as the development and operational aspects thereof, including sustainable development.

Experience in ESG (focus being within SA and especially in the deal making / financial market space)

I have over 20 years' experience working with both mining companies and communities on the development and implementation of ownership and sustainability structures, which has included, for example, the corporatisation of the Royal Bafokeng Nation's mineral assets and the renegotiation of their royalty arrangements with Impala Platinum in the 1990s. Another early deal was the establishment of Eyesizwe Coal and working with the Eyesizwe team on several transactions over the years culminating in the creation of Exxaro. I have been involved in many like transactions over the years, including transactions such as Project Alchemy: Anglo Platinum's (AAP) community empowerment transaction, through which it invested c. ZAR3.5 billion to uplift communities around four of its mines, as well as labour-sending areas. The share ownership scheme which underlies Alchemy made the development trusts the second-largest shareholder in AAP at the time. The purpose of the scheme was not only ownership but ensuring the long-term sustainability of the communities post mine closure. Most recently, I lead the team advising Anglo American on the divestment of its SA coal interests to its shareholders through a new entity, Thungela Resources, which was listed in Johannesburg and London on 7 June 2021. The transaction was largely in response to the increasing aversion of leading sovereign wealth funds and other institutional investors to fossil fuels. As part of the transaction an additional 10% was devolved to employees and communities. A current interesting project that we are working on is the tailoring of company's in-house standard commercial contracts, or ad hoc transaction documents, to limit environmental risk and to reduce the company's as well as their business partners' environmental impact. We believe that the updating of supply-chain and other standard form agreements could be critical in terms of assisting companies to reduce Scope 2 and 3 emissions and to ultimately assist in achieving GHG reduction, climate change and net zero targets.

Thoughts on ESG as a whole in the context of SA

Companies' ESG performance and commitments are under the spotlight like never before. ESG is no longer a nice-to-have - it has become a prerequisite to diminishing the social trust deficit; to guaranteeing the responsible sourcing of metals and minerals; to driving policy reform; and, ultimately, to decarbonising the economy. Companies need to navigate, understand, report against and identify opportunities within the many frameworks which inform the fundamental principles and obligations underpinning ESG performance. The metals and mining industry will experience an even more pronounced acceleration in ESG adoption in the coming years, with the social and governance pillars fast becoming as significant as the environmental pillar - especially in the context of SA. In addition, with the risk of punitive tariffs looming large, access to international markets may well be heavily constrained if SA is unable to decarbonise its economy quickly. This poses a significant risk both to the companies seeking to export, but also to the SA economy, with its heavy reliance on export earnings, particularly its mineral exports.

Where SA is a different from many other countries is the elevated importance of the S and the G, particularly having regard to inter alia the country's inequality and unemployment levels - it is essential that we create a more sustainable society that uplifts as many people as possible as quickly as possible.

Hurdles/challenges in this sector

The many legal frameworks underpinning ESG remain a minefield – increased global standardisation of ESG requirements and reporting will assist companies navigate, understand and report against the requisite ESG standards. The lack of standardisation and certainty as to which frameworks and standards to adopt and report against has led to a relatively muted uptake of solutions and structures seeking to address ESG, although we are seeing larger corporates starting to take important steps in driving ESG initiatives. Mining companies and banks are amongst the most prominent players leading the charge. This will lead to a trickle-down effect throughout the economy, particularly as companies seek to reduce Scope 2 and 3 emissions.

Another important challenge is how companies engage in a constructive and meaningful manner with their local communities – involving them in the conceptualisation, development and implementation of proposed projects and ensuring broad support will certainly go a long way in ensuring the legitimacy and success of such projects. We have over many years developed best practice methodologies to assist companies successfully navigate these engagements.

Some personal information, eg how did you get into this speciality

I have been fortunate to work with both mining companies and communities for over two decades in seeking to achieve win-wins – from ensuring a license to operate, to broader ambitions under the SDGs and through to our current ESG initiatives.

Interesting fact(s) about yourself / your achievements

As a young lawyer I worked with a team of lawyers in assisting the Khulumani support group to gather witness statements from victims and relatives of victims of apartheid atrocities, which were subsequently presented at the TRC hearings. Much of what is in those statements is incorporated into Jacques Pauw's book, *"Into The Heart of Darkness"* (Jonathan Ball, 1997). The experience had a profound effect on me as a person and on what I have sought to achieve throughout my career.

Khurshid Fazel
Partner

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Area of speciality

Banking and finance, and within that, debt funding and hybrid funding, i.e. hybrid debt with equity-like features.

Experience in ESG (focus being within SA and especially in the deal making / financial market space)

I recently started becoming involved in matters which have sustainability-linked loans. A new spin on financing and an area I have just had to skill up on.

I was involved in advising a syndicate of banks and financial institutions that advanced sustainability-linked facilities to Mediclinic Southern Africa. The funders and Mediclinic agreed upon certain environmental and social key performance indicators (KPIs) and annual targets in respect of the KPIs. The relevant targets are independently verified every year, and if they are met, the margins applicable to these facilities will be reduced.

Each sustainability-linked loan has bespoke KPIs and targets and the interest rate adjustments are equally bespoke and as such these provisions need to be formulated on a deal by deal basis. In addition, the extent of the sustainability agent's role is constantly evolving (including in the global market) which makes these provisions quite heavily negotiated.

This was a great matter to be involved in and landmark within the SA context. What was interesting to me on this matter as well was that when discussing it with our global alliance partner, Linklaters – they hadn't done an akin deal. It was quite gratifying to see that this SA led deal was a bit ahead of what is happening in global markets in this instance.

Thoughts on ESG as a whole in the context of SA

I am very impressed with the strides that have been made on ESG particularly in the financial services sector in SA, with banks putting a lot of emphasis on it. One of my biggest clients is RMB, which has been building its ESG capacity and hiring people with expertise in this area. They have an internal drive to build knowledge and skills.

In global M&A, ESG is very much on board agendas. While banks are very aware of these issues, larger and smaller corporations are also following the global trends. It's all quite new but gathering lots of momentum.

Hurdles | challenges within this sector

There is a shortage of knowledge and experience in the market in some areas, although we are all learning fast. We have to learn a new language, new concepts and principles. Some of the challenges include how to verify information to ensure companies are meeting their sustainability targets.

Auditing compliance is an issue, as we have found there is really a shortage of experts in SA who are qualified to audit ESG compliance. But the auditing firms are also ramping up their capabilities in this area.

There is a shortage of knowledge and experience in the market in some areas, although we are all learning fast. We have to learn a new language, new concepts and principles.

Some personal information, eg how did you get into this speciality

It wasn't my plan to become a corporate lawyer. I had started my early career wanting to be a human rights lawyer. But the path was diverted, and I found myself at a large corporate law firm specialising in banking and finance. It's very different from where I started, but it has been a fulfilling career and an interesting area of law. I'm also finding the big drive on ESG within the area to be exciting – the social and environmental impact aspects resonate with my early career aspirations – and desire to make a meaningful impact through my work.

Interesting fact(s) about yourself / your achievements

I previously worked with orphaned children, through the international organisation War Child, and spent time in Jordan in the refugee camps. I also walked for six days in the desert to help raise awareness for War Child.

I love to be in nature and to walk. I have done lots of multi-day walks in the Kruger National Park and completed the Otter trail. ●

Michael Denenga
Partner

Area of speciality

I am an investment funds and finance specialist, working in the financial services sector and specifically in the fund formation team. Most of my work is in establishing private equity fund vehicles.

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Experience in ESG (focus being within SA and especially in the deal making / financial market space)

ESG has become top of mind for our clients. I advise them on their ESG policies, reporting requirements and compliance frameworks. This also involves having to negotiate ESG policies with investors. There may be numerous investors in a fund, each with their own reporting timelines and requirements. It is important to try to streamline these requirements, to make sure clients do not face onerous obligations on ESG reporting. We are currently compiling a checklist of compliance requirements and reporting formats to help clients to comply.

Thoughts on ESG as a whole in the context of SA

I believe SA is reasonably advanced in ESG adoption . Fund managers realise it is not "a nice to have", it is a competitive issue. Clients are taking it seriously at both fund level and portfolio company level and South Africa has incorporated the governance aspect into the King IV on Corporate Governance. The "G" in ESG has been fuelled by South Africa's adoption of various transformation agendas designed to advance inclusivity across all sectors including employment equity, black economic empowerment and historically disadvantaged groups. Investors are allocating more funding to managers that are female-owned or that invest in portfolio companies that are female owned. There is still a lot that we need to do but I think most people realise by now that an investment that is impactful does not have to be unprofitable.

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Hurdles | challenges within this sector

ESG regulations are still evolving and many different reporting standards are applied by different regulators. Although there are initiatives under way to standardise them, at the moment, clients have to consider various different requirements and thresholds. Some of the ESG metrics are not easily measurable, making it very challenging, especially at portfolio company level, to comply.

Some personal information, eg how did you get into this speciality

As a fund formation specialist . I am regularly called upon to advise clients on ESG. I have seen ESG gathering momentum and realised that as lawyers we must understand ESG better to help our clients to navigate through it. I am improving my skills mostly through one-day workshops, run by some of our investors and general partners. The South African Venture Capital Association has also been quite active in promoting classes on ESG.

ESG regulations are still evolving and many different reporting standards are applied by different regulators. Some of the ESG metrics are not easily measurable, making it very challenging, especially at portfolio company level, to comply.

Interesting fact(s) about yourself / your achievements

In my previous life I was a professional soccer player, and part of me feels I should have pursued that career. Perhaps I would have had a more glamorous life. ●

Nomsa Mbere
Partner

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Area of speciality

Mining corporate and commercial. The corporate aspect covers M&A, transaction structuring and related transactions. I have expertise in the mining sector.

Experience in ESG (focus being within SA and especially in the deal making / financial market space)

I do a lot of work with mining clients, where there is now a pressing need to include sustainability goals as an integral part of the mining company strategy. This includes, among other things, promoting thriving communities, protecting the natural world and promoting equal opportunities. These goals all lead to a sustainable future, through and beyond mining, for host communities. We are now having to include more clauses in agreements to comply with certain compliance laws and ESG requirements imposed upon the entities by their international customers, for example clauses on compliance with the applicable laws on (i) the protection of women and children, (ii) equal treatment and prohibition of discrimination, abuse and harassment; and (iii) prohibition of hard labour and forced labour practices. In this regard, my focus is on social and governance areas.

Thoughts on ESG as a whole in the context of SA

SA has quite a way to go on ESG. It is still seen as a separate item, and not being fully integrated into companies' key strategic objectives or into all the various business unit activities. People tend to still work in silos, each concerned with their areas of expertise, resulting in ESG principles being implemented in various splintered initiatives. As a result, money and resources are not efficiently utilised. This could be avoided if a single, holistic approach throughout a group of companies was adopted.

I look forward to a time when it would become the norm for mining companies to create a community umbrella structure (HoldCo) holding several different subsidiaries with their own investments. Over time, HoldCo could generate enough capital through collecting dividends for its subsidiaries and develop enough competency that ultimately the whole structure could become self-sustaining, comparable to a fully mature investment company. This could then be used as a tool by the mining company to invest in various initiatives for the benefit of the community. As the investments continue to pay dividends, HoldCo would grow its investment portfolio and, at the same time, be able to finance community development projects– rather like the role that the Public Investment Corporation (PIC) plays as a government investment body. The problem tends to be that companies often have a limited view of the community trust rather than looking at the bigger picture and thinking how they can grow the community trust to become a self-sustaining investment vehicle, with the necessary competencies and strong corporate governance structures to enable it to make its own investment decisions. Granted this will require commitment on all sides.

Hurdles | challenges within this sector

There is a lack of innovative ideas on empowering and growing community trusts. Rehabilitation guarantees or funds are often put aside for mine rehabilitation, which is good, however we need to start creating long-term, sustainable community industries such as large agricultural concerns, or enable local communities to participate effectively and in their own right as independent power producers (IPPS) in the renewable energy sector. What tends to happen is that some mining companies wait for the mine closure to be imminent before starting to plan waysin which they can help the community left behind. The regulatory environment also does not necessarily support innovative ideas, as the DMRE continues to require sizeable rehabilitation guarantees instead of enabling alternative ways to use the funds much earlier to create sustainable industries and projects to prepare in advance for mine closures.

Some personal information, eg how did you get into this speciality?

I have always been concerned about the sustainability of host communities in Africa. Companies have in the past come and mined and then departed, having made a small contribution to host communities thus leaving ghost communities behind. Many of us do not have the option to emigrate abroad, so we are left to deal the consequences of social instability in our communities when the mining companies move elsewhere.

Interesting fact(s) about yourself / your achievements

Rather than just seeing my work as a series of transactions, I have always worked casting one eye on the community. Therefore in giving legal advice, that passion for economic development of our communities is strong.

Before I became a lawyer, I was a dentist. What attracted me to law was that during the height of the HIV pandemic, academics from Harvard came to Botswana (where I lived) to conduct patient trials for ARVs and at that time we had no patient codes. I decided to study law, aiming to assist in protecting patients' rights by developing patient codes. Later, I became involved in charity work, including for the Botswana Red Cross, and it made me realise that without capital we will always be beholden to the person with the money. I started a foundation to raise funds to support communities in areas where my friends and I thought would make most sense. ●

Robert Appelbaum
Partner

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Area of speciality

I started my career as a M&A and healthcare lawyer. I did pretty much everything that one could do within healthcare, including healthcare regulation, and after 30 years I transitioned into oil, gas and energy. With the advent of Covid-19, my love for healthcare was rekindled and I now head up the healthcare team at Webber Wentzel.

Experience in ESG (focus being within SA and especially in the deal making / financial market space)

I led the team that advised Business for South Africa, the Department of Trade, Industry and Competition and the South African Radio Astronomy Observatory on a pro bono basis on the National Ventilator Programme. We helped procure non-invasive ventilators from foreign manufacturers and then advised on the choice of outside experts, drafting, negotiation and settlement of the prototype and manufacturing agreements required for the NVP. Webber Wentzel helped to ensure the non-invasive ventilators were registered by the South African Health Products Regulatory Authority.

Shortly afterwards, I also led the Webber Wentzel team that advised the National Department of Health in drafting all the vaccine-related agreements, including those between the NDOH and the African Union where the AstraZeneca/Serum Institute vaccines were sold to the African Union, the agreement with Jansen (Johnson and Johnson) and that with Pfizer.

On the dealmaking side, I am currently helping a major international client to set up their oncology, vaccine and pharmaceutical business in SA. I also have extensive involvement in deal making in mine tailings and retreatment technology. These new technologies will substantially lessen pollutants in the mining industry.

Thoughts on ESG as a whole in the context of SA

I think in general businesses are paying lipservice to ESG in SA, but it will happen where there is money to be made from it. For example, companies are finding it makes more sense to rework mine tailings rather than starting new mines – this is both positive for the environment and hugely profitable, as some of those dumps are very old and contain high grade ores.

In SA - and it seems in other countries as well – companies don't seem to fully understand what ESG means.

Hurdles | challenges within this sector

In SA - and it seems in other countries as well – companies don't seem to fully understand what ESG means. They are only doing it because their shareholders require it.

Some personal information, eg how did you get into this speciality?

I wanted to train as a doctor. For me, returning to the healthcare sector, which I never thought I would, is wonderful. It is my first love, and I am enthusiastic about cutting edge, lifesaving work, especially where it is not necessarily profit-driven.

... in general businesses are paying lipservice to ESG in SA, but it will happen where there is money to be made from it. They are only doing it because their shareholders require it.

Interesting fact(s) about yourself / your achievements

I was very involved in starting the cultural boycott of SA. I was counsel and spokesman for Artists United Against Apartheid and their founders, Steven van Zandt and Arthur Baker. ●

Safiyya Patel
Partner

WEBBER WENTZEL
in alliance with Linklaters

Area of speciality

Social impact and governance in the corporate sector, with a focus on BEE and employee trusts. I work with a range of companies, including financial services, telecoms, renewables, multinationals, listed and unlisted entities.

Experience in ESG (focus being within SA and especially in the deal making / financial market space)

ESG is still quite nascent in SA. Advising corporates on governance policies has always been an integral part of corporate work, and ESG, in different forms, has been part of corporate policy for many years. But ESG as a holistic approach is still relatively new. We are particularly conscious of how important it is becoming in the M&A space, and particular for inward investors, who scrutinise a company's ESG closely before they make an acquisition.

For example, we are involved in a potential acquisition of a South African company, acting for the foreign buyer. A key qualification to their decision is whether the practices of the target company, in terms of the fees they are charging to underprivileged clients, could be considered unfair or excessive. They do not want to be seen to be investing in a company that is treating customers unfairly.

There are some good examples of South African companies that are very aware of ESG and put it at the forefront of their decisions. One in the retails space is Woolworths, which is very careful in its supply chain to ensure that the materials its suppliers use are sustainable and that their suppliers have empowerment policies in place.

Thoughts on ESG as a whole in the context of SA

SA cannot turn a blind eye to the concept of ESG. There is a need for partnership and collaboration between public and private sectors and this is an opportunity for everyone to achieve a win-win solution.

Hurdles/challenges within this sector

There is a great need for educating South African companies to understand the benefits of ESG and take a forward-looking approach. We need to do a lot more work in getting companies to understand how their actions impact communities, rather than having a selfish, profits-first approach.

South African businesses need to move away from the traditional, top-down way of decision making and become more inclusive. This entails, for example, consulting more with employees and communities and thinking beyond factors like age, gender and race.

One of the biggest problems that SA faces is youth unemployment – it has so many knock on effects, including increased levels of crime. A company like Woolworths has the understanding that if it doesn't contribute to job creation, its business suffers too because its market is not growing. Forward-looking companies appreciate that issues like this affect the success of their businesses. They know they must think harder about how to create opportunities for the youth by listening to them and understanding the hurdles they face.

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Some personal information, eg how did you get into this speciality?

I feel very passionate about social impact. I have advised on a lot of BEE regulatory work and impact work and that is how I moved in this direction. There is a lot of overlap between those two areas. I couldn't do this work if I were not passionate about it. It gives me purpose and fulfilment, and keeps me interested in what I do.

Interesting fact(s) about yourself / your achievements

If I wasn't a lawyer I might have done something in the creative arts, probably become a comedienne. ●