

Corporate & Commercial

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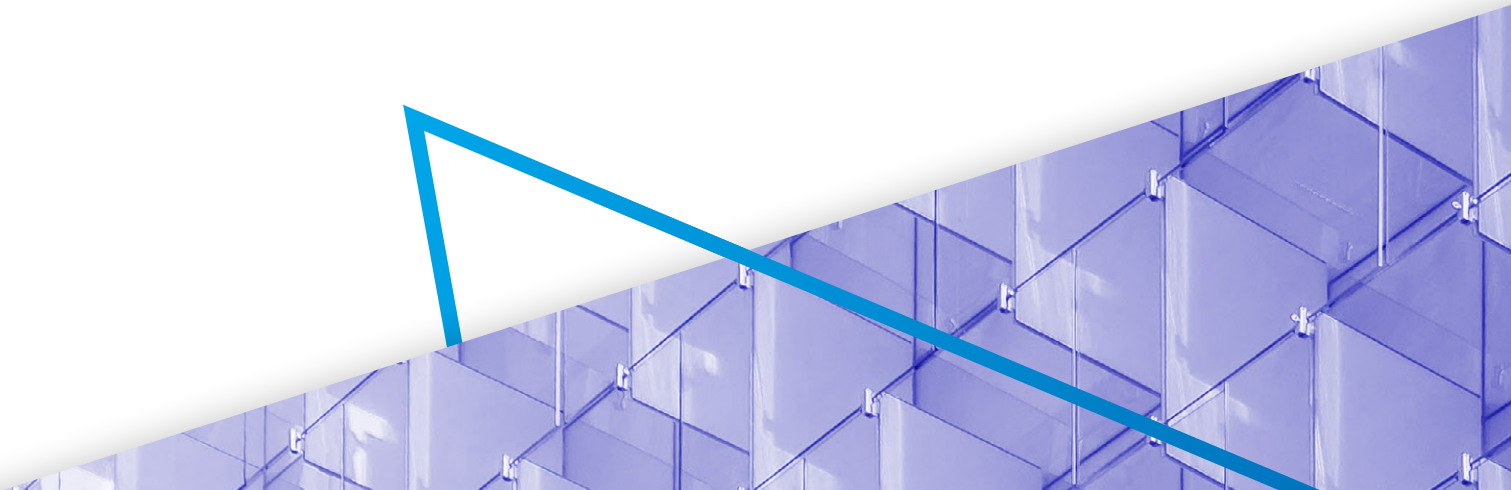
Environmental, social and governance (ESG) refers to a set of criteria used to evaluate a company's performance beyond financial metrics, focusing on its impact on the environment, its relationships with stakeholders, and the effectiveness of its governance structures. ESG considerations have become central to corporate decision-making, influencing policy frameworks, investment strategies and business operations globally.

As sustainability concerns, corporate ethics and risk management gain prominence, businesses are increasingly required to integrate ESG principles into their operations and reporting mechanisms. Regulators, investors and consumers are demanding greater transparency and accountability, making ESG compliance a critical factor in maintaining corporate legitimacy, financial resilience and long-term growth. With the rise of mandatory ESG disclosures, companies must adapt to evolving legal and regulatory requirements, ensuring alignment with global sustainability standards while mitigating risks associated with non-compliance.

South African perspective

Historically, the ESG regulatory framework in South Africa has been shaped by a combination of international standards of best practice and voluntary guidelines. There are currently no mandatory requirements for companies to make any ESG-related disclosures. However, following the implementation of the sustainability disclosure standards by the International Sustainability Standards Board (ISSB) in April 2024, specifically IFRS S1 (*General Requirements for Disclosure of Sustainability-related Financial Information*) and S2 (*Climate-related Disclosures*), there may be some key regulatory developments in the ESG compliance framework in South Africa worth noting.

As recently as May 2024, several regulatory bodies such as the Prudential Authority (PA), the Financial Sector Conduct Authority (FSCA), the Department of Trade, Industry and Competition (DTIC), and the Companies and Intellectual Property Commission (CIPC) undertook public consultation processes and established task teams with the view to enhancing the sustainability reporting landscape in South Africa.



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Disclosure obligations for listed companies

Around June 2022, the Johannesburg Stock Exchange (JSE) launched enhanced sustainability and climate change disclosure guidelines for listed companies. These disclosure guidelines, while robust, are not mandatory or burdensome and will remain as such even with the move towards stricter compliance measures to align with global best practices.

The JSE will continue to monitor the regulatory developments with the PA, FSCA, DTIC and CIPC to ensure that it keeps pace with agreed sustainability reporting standards.

Disclosure obligations for private companies

On 31 January 2025, the CIPC published a notice (*Notice 6 of 2025*) about its public consultations process and deliberations with the DTIC, with the view to implementing mandatory sustainability reporting obligations.

The DTIC and CIPC have established a steering committee to oversee a regulatory impact assessment on adopting the sustainability disclosure standards by the ISSB in South Africa. The CIPC has also engaged the services of Alexforbes to conduct a market survey, which together with the research of the steering committee, will inform the policy and legislative position on sustainability-related disclosures in terms of the Companies Act 71 of 2008, as amended from time to time.

Companies that are subject to the mandatory audit requirements under Regulation 28 of the Companies Regulations, 2011, are encouraged to participate in the market survey available on the "XBRL Programme" under the CIPC's website.

Kenyan perspective

Kenya has made significant progress in integrating ESG principles into corporate governance, regulatory frameworks and business practices. ESG considerations are increasingly shaping boardroom discussions, investment strategies and corporate decision-making, moving beyond mere compliance to long-term sustainability. These efforts have been motivated by the collective understanding that corporations have a larger responsibility in reducing the negative social and environmental effects of their businesses. Kenya's commitment to ESG has been evident in the country's general legal framework, including its Constitution as well as environmental, climate and corporate laws. In addition, specific ESG frameworks have been developed, and these are discussed below.

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Disclosure obligations for listed companies

Kenya has developed the Capital Markets Authority Code of Corporate Governance Practices for Issuers of Securities to the Public (Code). The Code sets out the principles and specific recommendations on structures and processes that companies should adopt in making good corporate governance an integral part of their business dealings and culture. The Code outlines examples of material topics that boards of listed companies should prioritise. According to the Code, material information includes any information that could affect the price of a company's securities or influence investment decisions. Listed firms are encouraged to refer to the Code when determining which ESG topics to disclose in their reporting.

The Nairobi Securities Exchange (NSE) has developed an ESG Disclosure Manual (Manual) to guide listed companies in Kenya on ESG reporting. The Manual underscores the importance of materiality in ESG disclosures, ensuring that companies focus on the most significant sustainability issues. In financial reporting, materiality refers to the threshold at which information influences stakeholders' decisions regarding an organisation's financial statements. Similarly, in ESG reporting, materiality helps identify which sustainability-related topics are most relevant to a company, ensuring that reports highlight the most impactful areas. Given that ESG issues vary in importance

across organisations, conducting a materiality analysis is crucial. To enhance comparability and regulatory compliance, the Manual mandates specific ESG disclosures for NSE-listed firms, aligning them with the Code, relevant international agreements, ESG standards, and domestic regulations.

Disclosure obligations for banking institutions

The Central Bank of Kenya's Guidance on Climate-Related Risk Management (GCRRM) mandates that the board of directors and senior management of financial institutions must develop and implement strategies, policies, procedures and guidelines for climate-related financial risk management, while setting minimum standards. The board of directors and senior management are also required to assess and quantify their exposure to climate-related risks across various business lines and oversee the creation of a climate risk strategy. This includes defining and formally allocating roles and responsibilities within the organisational structure to ensure effective implementation of the climate-related risk management framework, in line with the institution's risk profile.

Last week, the Central Bank of Kenya (CBK) developed and launched the Climate Risk Disclosure Framework (CRDF) and Kenya Green Finance Taxonomy (KGFT) as part of its efforts to green the banking sector. The CRDF intends to assist commercial banks in collating

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and disclosing climate-related information in a relevant, useful, consistent and comparable manner. For investors, the CRDF provides the information needed to assess the financial implications of climate change on potential investments and identify companies well-positioned for the transition to a low-carbon economy. The CRDF also sets out a Climate Related Risk Reporting Template that can be used to take stock of existing capabilities and ambition levels vis-a-vis climate risk assessment in decision-making by financial institutions.

The KGFT provides a structured and consistent framework that helps institutions assess and classify their economic activities based on their contribution to national climate goals. By offering guidance on how to determine whether specific activities support or undermine climate objectives, the taxonomy promotes more informed decision-making and encourages a gradual shift toward low-carbon and climate-resilient development. Anchored in the country's Nationally Determined Contributions under the United Nations Framework Convention on Climate Change and other national climate policies, the KGFT serves as both a technical and strategic tool to operationalize climate ambition in the financial and business sectors.

In conclusion, the evolving ESG landscape in both South Africa and Kenya highlights the growing importance of sustainability, governance and social responsibility in corporate compliance. Both countries are adapting to international standards, ensuring that ESG principles are deeply embedded in corporate governance, risk management and decision-making processes. As the regulatory environment continues to evolve, companies in both regions must remain proactive in integrating ESG considerations, not just to comply with emerging laws, but to build long-term value and enhance their corporate reputation.

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Water infrastructure in South Africa: The promise and limitations of the new South African Water Resources Infrastructure Agency

South Africa's water infrastructure is under severe strain due to aging systems, inadequate maintenance and increasing demand driven by urbanisation, population growth and severe climate events. The deterioration of infrastructure has resulted in poor water quality, intermittent supply in some regions, and heightened vulnerability due to drought. Both Cape Town and Gqeberha have recently come close to "Day Zero", when dam levels reached extremely low levels resulting in the implementation of strict water rationing.

More recently, Johannesburg has struggled with water supply disruptions, leaving many residents without access to water. These crises highlight the urgent need for improved water management, infrastructure investment and conservation efforts to prevent possible future shortages.

In order to address the current water infrastructure concerns at a national level, the South African National Water Resources Infrastructure Agency SOC Limited Act 34 of 2024 (Water Resources Infrastructure Agency Act) was approved by President Cyril Ramaphosa on 7 August 2024, however the act only came into effect on 7 February 2025.

The purpose of the Water Resources Infrastructure Agency Act is to establish a state-owned company to efficiently develop, operate and manage national water resources infrastructure in line with constitutional mandates and national policy. It also ensures continuity of the functions currently being performed by the Trans-Caledon Tunnel Authority (TCTA) and supports Government's broader development and transformation objectives.

Given the significant water supply and water shortage issues which have been experienced in major metropolitan areas in South Africa recently, it is important to highlight the following pertinent provisions of the Water Resources Infrastructure Agency Act:

Establishment of the South African Water Resources Infrastructure Agency

The Water Resources Infrastructure Agency Act provides for the establishment of the South African Water Resources Infrastructure Agency (Agency) as a state-owned company, to be incorporated under the Companies Act 71 of 2008 and listed as a Schedule 2 major public entity under the Public Finance Management Act 1 of 1999 (PFMA). The Agency will be responsible for the development, operation, maintenance and funding of national water resources infrastructure. It is further mandated to act in the public interest, promote the efficient management of water infrastructure, and align its functions with national water and economic development objectives.

Water infrastructure in South Africa: The promise and limitations of the new South African Water Resources Infrastructure Agency

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Functions of the Agency

The Agency has several key functions outlined in section 6 of the Water Resources Infrastructure Agency Act, which include:

- **Strategic planning:** The Agency is required to develop a five-year strategic plan to ensure the sustainable, equitable and reliable management of national water resources infrastructure. This plan must align with national policies and be approved by the Minister of Water and Sanitation (Minister).
- **Water infrastructure management:** The Agency is responsible for the provision, operation and maintenance of national water resources infrastructure, ensuring that its operations align with national development goals, including addressing climate change risks.
- **Funding and finance:** The Agency must secure funding and manage water use charges in accordance with national water legislation.
- **Skills development:** The Agency must attract, retain and develop skilled personnel to effectively carry out its mandate.
- **Water supply:** It is tasked with ensuring the efficient supply of water to all users while creating job opportunities that align with the objectives of national development plans.
- **Asset management:** The Agency is responsible for managing an asset inventory system for national water infrastructure and ensuring the safety of dams.

- **Legal functions:** The Agency is authorised to enter into agreements, perform legal acts, and acquire property as necessary to fulfil its mandate.
- **Additional functions:** The Agency may provide support services to water management institutions and authorities, subject to adequate financing arrangements.
- **International operations:** The Agency may operate outside South Africa, provided it fully recovers the costs associated with such activities.

The Agency's actions must align with national water policy, be customer-focused and meet constitutional and social responsibilities. It must also take over the functions of the TCTA, promote projects that address social needs, and facilitate financing for these projects.

Water infrastructure in South Africa: The promise and limitations of the new South African Water Resources Infrastructure Agency

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Transfer of national water resources infrastructure and disestablishment of TCTA

The Water Resources Infrastructure Agency Act sets out the legal framework for the transfer of national water resources infrastructure to the newly established Agency. It provides for the comprehensive transfer of assets, liabilities, water use agreements and related responsibilities from the Department of Water and Sanitation to the Agency. Critically, the Agency Act mandates the disestablishment of the TCTA, with all its functions and powers to be transferred to the Agency in a phased approach. This process will effectively consolidate the governance and management of national water infrastructure under a single state-owned entity to enhance efficiency and long-term sustainability.

The Minister is required to specify a date, published in the *Government Gazette*, within 12 months of the Agency's establishment, or within a longer period if an extension is granted, for the transfer of assets, liabilities, water use agreements and related responsibilities from the TCTA to the Agency.

Recent developments

The Minister intends to introduce to Parliament the proposed amendments to the Water Resources Infrastructure Agency Act and the PFMA, which seeks to provide for the listing of the Agency in terms of Schedule 2 of the PFMA and the delisting of the TCTA from Schedule 2 of the PFMA. These preliminary steps confirm the initial progress that has been achieved in establishing the Agency.

Conclusion

The establishment of the Agency is a critical step towards enhancing the management, operation and maintenance of national water resources infrastructure. By consolidating functions under a single state-owned entity and ensuring alignment with national development and policy objectives, the Agency is poised to play a key role in securing South Africa's water future at a national level. However, to truly secure South Africa's water future, the distribution of water by municipalities to end users must be significantly improved. While the Agency addresses one critical aspect, the ongoing challenges of aging municipal water infrastructure, inadequate maintenance and rising demand will continue to hinder water security unless municipalities also take responsibility for upgrading and maintaining the systems and infrastructure which they remain responsible for. While the establishment of the Agency is a positive step forward, it cannot be viewed as the sole solution to South Africa's water security challenges; the broader issues of municipal infrastructure and management must also be urgently addressed.

Anton Ackermann overseen by **Alistair Young**

Affirming the high standards for succeeding in bringing a derivative action under the Kenyan Companies Act

In Wilkins Lovega Chagadwa v Witteveen and Another; Medlink Africa Limited and Seven Others (Interested Parties) [2025] KEHC 368 (KLR) Wilkins Lovega Chagadwa (the plaintiff), a minority shareholder (25%) and former director of Medlink Africa Limited (the company) filed a notice of motion seeking leave to amend his plaint to continue the suit as a derivative action on behalf of the company against the defendants, who are its majority shareholders (75% collectively) and directors.

The plaintiff alleged that the defendants had breached the company's articles of association and their fiduciary duties and had malicious intent to defraud him. He further accused the defendants of oppressive and unfair conduct, conspiring to suspend and remove him as a director without justification; advancing themselves significant sums without approval; and unfairly resolving to terminate contracts and wind up the company.

Through a cross-application, the defendants requested the striking out of the suit, arguing that the plaintiff had been legitimately removed as a director and that the current suit raised similar issues to a prior suit where the company was suing the plaintiff for misappropriation of funds and acting against the company's interests. They contended that the plaintiff's application was redundant and that he could raise his concerns as a defence in the existing suit.

Court's decision

The trial court ruled in favor of the defendants, concluding that the company had adhered to the proper procedures for director removal as set out in the articles of association and the Companies Act (Chapter 486) (Act). Additionally, the court found that the defendant had failed to present sufficient evidence of oppressive conduct that would warrant judicial intervention under section 780, which allows shareholders to seek relief in cases of unfairly prejudicial conduct. On appeal, the High Court took a similar stand, dismissing the plaintiff's application for leave to continue the suit as a derivative action and the defendants' cross-application to strike out the suit.

Affirming the high standards for succeeding in bringing a derivative action under the Kenyan Companies Act

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Derivative action

The foundational case of *Foss v Harbottle* [1843] 67 ER 189 provides that a wrong alleged to have been done to a company is primarily a matter for the company itself to address through its proper organs (board of directors or shareholders in a general meeting). However, the Act provides the statutory framework for derivative claims.

A derivative action is one in which a shareholder seeks to bring proceedings on behalf of the company in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty, or breach of trust by a director of the company or any other person. It is immaterial if the cause of action arose before or after the applicant became a shareholder of the company.

In determining such an application, the court will consider factors such as the applicant's good faith, the importance a dutiful director would place on the claim, the likelihood of future authorisation or ratification, whether the company has decided against pursuing the claim, and if the shareholder has a direct personal cause of action. The court will also consider the views of shareholders who have no personal interest in the derivative claim. These legal provisions ensure derivative actions are reserved for genuine cases of misconduct by directors or other persons and to prevent frivolous or self-serving suits.

The High Court applied these principles when determining whether to grant the plaintiff leave to continue his suit as a derivative action. The court found that the plaintiff's claims were not substantiated and did not present a demonstrable *prima facie* case against the defendants.

Specifically, the court held that the defendants' decision to wind up the company and terminate employment contracts could not, in itself, be termed unfair or oppressive conduct, as it is within the ordinary duties of directors to make such decisions. Furthermore, in dismissing the claim, the court noted that the plaintiff had not demonstrated any effort to bring the alleged breaches to the attention of the defendants or made a demand for action.

In contrast, the court in *Isaiah Waweru Ngumi and Two Others v Muturi Ndung'u KBU HCCC No. 6 of 2016* [2016] eKLR permitted the minority shareholders to file a derivative claim. The applicants were able to prove that they had raised specific concerns with the company's directors and management, which went unresolved, and that they had raised concerns about the mismanagement of the company, waste of corporate assets and failure to recover company funds. The court found these claims to disclose a plausible cause of action, sufficient to establish a *prima facie* case warranting judicial scrutiny. It also found no evidence of bad faith or improper motive, concluding that the applicants fairly represented the company's interests and were therefore entitled to proceed with the derivative action.

Affirming the high standards for succeeding in bringing a derivative action under the Kenyan Companies Act

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Conclusion

The High Court's dismissal of the plaintiff's application in the *Medlink* case underscores the high standards for succeeding in bringing a derivative action under the Kenyan Companies Act. A shareholder must establish a *prima facie* case of misconduct by directors, or any other persons causing demonstrable harm to the company and show that the derivative action serves the company's best interests. The plaintiff failed to meet this threshold due to unsubstantiated claims and a lack of prior efforts for internal resolution. While in this instance the applicant was unsuccessful, companies should note that shareholders can take action against board members on behalf of the company where decisions are not made in the best interest of the company.

Directors should always act in good faith, adhere to the articles of the company and the Act, and ensure transparency and open communication with shareholders to minimise the risk of derivative claims. Directors should also maintain detailed records of all decisions made and approvals received from shareholders to protect themselves against misconduct allegations. Conversely, a shareholder seeking to bring a derivative action should show a clear and credible claim of misconduct causing harm to the company. They must act in good faith, represent the company's interests and demonstrate that internal remedies have been exhausted.

Martha Mbugua and Stefani Wanjeri



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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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