ESG and employment: Key dispute risks in the EMI sector in 2024

New research from Baker McKenzie, *The Year Ahead: Global Disputes Forecast*, has shown that environmental, social and governance (ESG) factors are considered to be the greatest disputes risk to companies in the energy, mining and infrastructure (EMI) sector in 2024. The survey showed that 95% of respondents in the EMI sector cited ESG disputes as their biggest risk, compared to 69% last year. Employment risks are cited as the second greatest disputes risk to mining organisations in 2024, with 54% of EMI respondents noting this risk is weighing most heavily on their businesses, compared to just 14% last year.

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The breadth of ESG disputes is a growing challenge, as human rights and social issues are increasingly incorporated into the ESG agenda. Concerns about employment disputes are also significantly higher for 2024, with economic pressures forcing many organisations to restructure, growing pressure from unions, and expanding equal pay and pay transparency legislation.

ESG

Recent years have seen a flourishing of ESG laws and regulations, many with extraterritorial effect. Disputes can involve tricky issues of causation, significant reputational risks, and difficulties with remedies: money doesn't always solve the problem. Environmental disputes continue to evolve.

Baker McKenzie's survey asked what types of environmental disputes presented the most risk in 2024. Climate change litigation was the top response, with 72% of all respondents highlighting their concerns. Climate litigation is likely to evolve as claimants turn their attention beyond greenhouse gas emissions to the importance of the environment more broadly.

Litigation will increasingly encompass biodiversity loss as claims attempt to rely upon the climate-biodiversity nexus. Activists believe that this litigation affects corporate behaviour, even if claims do not succeed. It can also have a wider political impact. The current wave of climate litigation was cited in COP27 negotiations as a reason for establishing a damages fund for developing countries. For these reasons, the trend looks set to continue.

Compliance obligations

Kieran Whyte, partner and head of projects at Baker McKenzie in Johannesburg, noted, "The volume and remit of required ESG reporting in the mining sector are growing in many key jurisdictions, including Africa, generating greater compliance and reporting obligations and opening a window for purchasers, financiers, stakeholders and societies to hold companies to account for failing to adhere to generally required ESG standards and policies.

> *Further, investors are increasingly focusing on ESG factors in the African mining sector across the full mining supply chain, with companies with better ESG performance delivering substantially higher returns for shareholders than the wider market. To access funding, African mining companies are now almost always required to demonstrate a full commitment to ESG standards and requirements and must be able to detail how they are mitigating ESG risks and compliance requirements across African jurisdictions.*

"African mining sector investors are focusing on the environmental factors in ESG, with the global focus on climate change and the path to net zero spotlighting the 'E' aspect of ESG. This includes a focus on decarbonisation, a commitment to powering mines with renewable energy, waste and water management, air and noise pollution, and biodiversity loss. However, identifying the risks associated with the 'S' (social) and 'G' (governance) have also become essential, particularly in the context of a miner's relationship with regulators, investors, financiers, stakeholders, NGOs and local communities, as these factors underpin a mining company's 'license to operate' and ability to deliver," Whyte continued.

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Employment disputes

The heightened focus on ESG, proliferating legislation around worker pay, ongoing economic uncertainty and increasingly active unions are all key factors fuelling an increase in litigation risk for EMI sector employers in 2024.

Johan Botes, partner and head of employment at Baker McKenzie in Johannesburg, explained, "Labour unrest in the mining industry and those industries that support mining is increasing and giving rise to growing numbers of disputes in the process. The recent news in South Africa of mining employees being stuck underground due to a labour dispute is a case in point. In this case, production stopped as the mining company met with labour to quell the unrest and assist those employees injured in the dispute.

"Employers considering their employee relations strategy should contemplate the continued viability of the primary focus remaining on collective engagement versus exploring the benefits of catering to the needs of smaller interest groups or, where possible, individual employees. The traditional reliance on the collective relationship with trade unions as employee representatives is not the best default strategy in an era where trade union membership is dwindling and especially younger employees are demanding greater recognition of their individual needs," Botes noted.

"In a modern society where artificial intelligence (AI) and social media tailor our worlds around our individual needs, continuing to manage employees as homogenous groups with the same needs, demands and interests is unlikely to achieve optimal results. Employee engagement surveys, individual feedback sessions, career planning, performance management, employee goal and expectation setting, anonymised feedback channels, and exit interviews are useful tools in the arsenal of the modern people practitioner and line manager keen to explore ways of connecting with every employee and tapping into each person's full potential."

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Impact of restructuring

Botes said that restructuring and reorganisation in sectors such as mining and manufacturing in South Africa have led to significant redundancies. Challenges regarding electricity supply and other economic concerns have led many employers to effect staff reductions while also exploring various staffing solutions.

> *"Employers can avoid the economic and personal costs of retrenchment by securing reasonable alternative employment for in-scope staff. A detailed evaluation of the business requirement to reduce headcount, proper consideration of the future structure and howto populate it, and a humane and sensible approach to agreed exits will allow global, multinational and local companies to manage this process with the lowest possible impact."*

Addressing inequality

"Further, income inequality is a huge issue in South Africa, where Section 27 of the Employment Equity Act requires designated employers (employers who employ more than 50 employees or meet a certain annual turnover threshold specific to their threshold) to report income differentials across both race and gender groups. This is a confidential document submitted to the Department of Labour and it does not have to be made transparent."

Botes said that employers should set targets and measurable goals to address income equality. Employers also note a high correlation between income equality and diversity, and workforce productivity and business profits.

In future, there is also likely to be an increased use of artificial intelligence in the employment life cycle, which, together with regulatory scrutiny and existing legislation, will give rise to risks for employers around bias, discrimination, misuse of AI, data privacy and automated decision-making.

"This is already pertinent to the mining sector, where AI-operated machinery is beginning to be deployed to automate some of the riskier mining processes. This could be likely to give rise to employment disputes in the future, although this machinery is expected to substantially increase safety in mines," Botes added.