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ESG & Governance With Fidi.

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ESG LITIGATION TRENDS GLOBALLY.

Introduction:

As corporate stakeholders increasingly demand transparency in ESG due diligence, risk management, and reporting, businesses are facing new challenges within their operational frameworks and contractual obligations. ESG litigation is on the rise. Consequently, these emerging risks are leading to disputes, necessitating a closer examination of ESG litigation trends and enforcement worldwide.

THE UNITED STATES OF AMERICA

In the financial sector, one notable ESG-related litigation risk involves inaccurate or deceptive ESG reporting and disclosures, often termed as "Greenwashing." The United States has seen a rise in litigation in this area, exemplified by cases like Ramirez v. ExxonMobil Corp. In this derivative suit, ExxonMobil shareholders took legal action against its directors, alleging breaches of fiduciary duty and failure to disclose the effects of climate change on the company's assets and reserves. This legal battle lasted over three years, culminating in a 12-day trial. Additionally, in the SEC v. BNY Mellon case the U.S Securities and Exchange Commission (the SEC) charged BNY Mellon, an investment advisor for omitting or making misleading statements concerning ESG investment considerations of its managed mutual funds.

THE EUROPEAN UNION

Deutsche Bank faced allegations of "Greenwashing" in May 2022, leading to a raid by German law enforcement officials on suspicion of misleading statements in its 2020 annual report. This incident underscored the strict regulatory scrutiny surrounding ESG disclosures.

The fossil fuel industry is no stranger to ESG related litigation. A significant case is Milieudefensie v. Royal Dutch Shell plc, where a Dutch court ordered Shell to reduce its CO_2 emissions by 45% by 2030 compared to 2019 levels. This ruling garnered considerable media attention, signalling a crucial moment in ESG litigation jurisprudence.

SOUTH AFRICA

South Africa's judiciary has taken a firm stance in ensuring that regulatory approvals align with constitutional and human rights standards. Recent judicial rulings on EarthLife Africa Johannesburg v Minister of Environmental Affairs and Others, and the High Court's rejection and setting aside of the environmental approval for the Khanyisa coal-fired power station, demonstrate South African courts' commitment to upholding ESG principles such as the requirement for regulatory approvals to meet the requirements of the Constitution and the Bill of Rights.

KENYA

ESG-related disputes have also emerged in Kenyan courts, particularly concerning environmental impact assessments (EIAs), such as cases involving the construction of coal-fired plants. An example is Save Lamu et al v National Environmental Management Authority & Amu Power Co Ltd, where Kenya's National Environmental Tribunal revoked the license issued to Amu Power Company for the construction of the Lamu Coal-fired Power Plant. The Tribunal's ruling highlighted deficiencies in the EIA process, stressing the importance of comprehensive and inclusive public participation in such projects.

CONCLUSION

The growing landscape of ESG litigation emphasizes the need for businesses to maintain transparency and integrity in their ESG practices to mitigate legal risks and uphold stakeholder trust in a changing regulatory environment. There has been no direct or explicit greenwashing litigation in Botswana or ESG-related enforcement action by Botswana regulators, but Botswana legal and regulatory laws create the platform and cater for the possibility of greenwashing claims and litigation.

For example, in terms of the Consumer Protection Act [42:07] there is a prohibition of false or misleading representations in relation to the marketing of goods or services. There are similar provisions in the Competition Act [CAP 46:09] and the Code of Advertising for Broadcasting administered by the Botswana Communications Regulatory Authority (BOCRA).

The Botswana market should pay attention to international developments and increased scrutiny from global regulators as a warning to ensure the accuracy of ESG-related statements issued by companies. Executives, directors, and fund managers must prioritize the accuracy of ESG disclosures and establish robust policies and procedures for evaluating ESG-related matters. By doing so, companies can mitigate legal risks and enhance stakeholder confidence in their commitment to sustainable and responsible business practices.

If you have interest in an in-depth discussion on this subject matter or any ESG and Governance issues, feel free to contact us at **info@gobhozalegalpractice.co.bw**
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