



DENTONS

Legal framework applicable to Greenwashing

Country focus: South Africa

Grow | Protect | Operate | Finance

South Africa	
Legal definition of greenwashing	X
Targeted greenwashing legislation	X
Direct regulation of greenwashing (through consumer protection, advertising standards, unfair competition or environmental law frameworks)	X
Soft law guidance or standards on greenwashing	✓
Applicability of existing national legal frameworks to greenwashing (depending on facts)	✓

Summary of relevant laws and provisions

In South Africa, greenwashing, or the use of misleading or deceptive environmental claims, is indirectly regulated by various legal frameworks for consumers and companies, such as the consumer protection law, the competition law, the South African common law, company law, and corporate governance best practice.

1. Consumer protection law prohibits false, misleading or deceptive representations of fact for all goods and services. The marketing of goods and services which are “reasonably likely to imply a false or misleading representation” may be reported to the Consumer Tribunal and violators may be issued with a complaint notice or be found guilty of an offence. The Consumer Commission is yet to provide any rules specifically relating to greenwashing.
2. While South African corporate governance rules do not legislate reporting on greenwashing, certain rules related to climate change are mandatory for companies listed on the Johannesburg Stock Exchange including the requirements of the King IV Report (Report). In terms of the Report, boards must address matters which could “significantly affect the organisation’s ability to create value”, which explicitly includes natural capital.
3. Company law partially codifies the fiduciary duties of company board members which include good faith and proper purpose. Should a board member be found to have breached their fiduciary duties, due to any sufficiently inappropriate act including greenwashing, the board member can be held liable for losses sustained by the company due to the breach.
5. Competition law allows for competing companies which have been impacted by misleading claims by a competitor, which can include greenwashing, to approach the Competition Commission to seek an investigation. Investigations carry significant reputational risk for companies and can lead to penalties or injunctions.
6. Unfair competition can also give rise to claims in the South African common law. The South African common law allows consumers and companies which have been harmed by false or misleading statements by companies to seek a claim for damages, or to prevent the statements from continuing with the South African courts.

Summary of guidance and soft law

In addition to the legal frameworks mentioned above, there is significant guidance and soft law instruments that aim to prevent or reduce greenwashing in South Africa through climate reporting. These include:

1. The National Climate Change Adaptation Strategy, which acts as binding guidance to various sectors in preparing for climate change in the country.
2. The National Treasury's technical paper on Financing a Sustainable Economy, which unpacks South Africa's approach to minimum disclosures of climate-related risks and opportunities. The paper develops approaches to implement the guidelines of the Task Force on Climate-related Disclosures (TCFD), which apply to greenwashing.
3. The National Green Finance Taxonomy (NGFT), which broadly reflects the European Union's Sustainable Finance Taxonomy and invites companies to report in a more systematic fashion on climate. While the NGFT is voluntary at present, the National Treasury is developing approaches for its implementation.

Claims & enforcement

Greenwashing claims can be brought by various actors and bodies, depending on the legal framework and the type of remedy sought. These include:

1. Consumers, who can refer misleading commercial practices to the South African Advertising Regulatory Board, the National Consumer Tribunal, or the South African courts, if they have suffered damages either individually or through a group or class action.

2. Competitors, who can submit applications to the Competition Commission regarding competitive practices, or approach civil courts for damages or interdicts.
3. Organisations acting in the public interest, who can bring civil actions in cases of false or misleading representations, or allegations regarding anti-competitive practices.

Sanctions & remedies

While there are no provisions unique to greenwashing, sanctions and remedies exist within the legal framework to address such practices. These can include:

1. Penalties: The Competition Commission and Consumer Tribunal may impose fines on individuals and legal entities for engaging in greenwashing practices. Fines can vary based on the nature and severity of the violation up to a maximum of ZAR 1 million or 10% of the respondent's turnover for the Consumer Tribunal, or 10% of a respondent's turnover for the Competition Commission.
2. Civil Damages: Victims of greenwashing may seek civil damages to compensate themselves for any harm suffered, such as loss of customers, damage to reputation, or moral prejudice. Such claims, if brought before the High Court, have no inherent financial claim limit.
3. Injunctions: various authorities have the power to issue injunctions to prevent the continuation of greenwashing practices, with penalties for non-compliance by some if necessary.

Evidence & substantiation

The evidence and substantiation requirements for greenwashing claims depend on the legal framework and the burden of proof. In general, the following principles apply:

1. For civil cases, the applicant will need to prove on a balance of probabilities that the wrongful, intentional conduct of the entity committing greenwashing caused damage to the applicant.
2. The Competition Commission has the powers to investigate all competition concerns within the ambit of the competition laws which would include the requirement for any document or information to be disclosed.
3. The Consumer Tribunal informally conducts proceedings and further evidence may be requested by the presiding member of the tribunal in resolving a judgement on the balance of probabilities.

Recent litigation

To date, our team is not aware of any litigation in South Africa focusing specifically on greenwashing.

Key contact



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