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EDITOR'S LETTER

CONTENTS

Versatility of the Legal Regime of Insolvency and Recuperation of Commercial Entrepreneurs

Urgent proceedings in administrative litigation: A view over the ancillary procedural means

Dear Reader:

In this number you can read: "Versatility of the Legal Regime of Insolvency and Recuperation of Commercial Entrepreneurs" and "Urgent proceedings in administrative litigation: A view over the ancillary procedural means".

We wish you a Happy reading!

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As a corollary of the above principle, LALP has instituted special dispute resolution mechanisms which, by their nature, utility and interest, cannot be subject to normal and possibly time-consuming...Cont. Pág. 3

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VERSATILITY OF THE LEGAL REGIME OF INSOLVENCY AND RECUPERATION OF COMMERCIAL ENTREPRENEURS

The Legal Regime for Insolvency and Recuperation of Commercial Entrepreneurs that we propose to explore was approved by Decree-Law no. 1/2013, of 4 July and will be, for the purposes of this article, referred to as "LRIRCE".

The LRIRCE is nowadays, above all due to the current economic context of the country, an indispensable instrument for the pursuit of the following two objectives:

a) on the one hand, to allow the maintenance of the source of the workers' employment and the interests of creditors, ensuring that the economic activity and its social function are stimulated and preserved and,

b) on the other hand, to efficiently promote the settlement of the insolvent's asset and the distribution of the proceeds obtained by creditors where it is impossible to overcome the loss-making situation.

Now, after nearly three (3) years of entry into force of the LRIRCE, a growing number of judicial recuperation proceedings emerges, as well as the insolvency proceedings regulated by this law. It should be clarified that insolvency proceedings initiated prior to the entry into force of this law are regulated by Articles 1122 to 1324 of the CPC, as determined in Article 4 (1) of the LRIRCE, unless the application of LRIRCE to the previous proceedings imply the greater possibility of reaching the objectives indicated in the previous paragraph (Article 5 (5) LRIRCE).

Although the LRIRCE has entered into force in 2013, its current approach is still of particular interest, as this regime, in addition to achieving the above objectives, has the virtue of subsequently giving rise to the responsibility of the members of the corporate bodies.

It should be noted at the outset that such liability is incurred at the end of the insolvency proceedings, and cannot be in the process of recuperation (judicial), since the insolvency proceedings are aimed at winding up the assets of the company, paying its creditors and extinguishing the personality of the Commercial entrepreneur. In the process of judicial recuperation, although it is intended to obtain payment from creditors, there is no winding up of the assets and therefore there will be no extinction of the legal personality of the commercial entrepreneur; so after the closure of a judicial recuperation process, the commercial entrepreneurs still hold their legal personality, without prejudice to the fact that a lawsuit may commence as Judicial recuperation and terminate, due to the conversion, in Insolvency.

Now, who can, in the scope of the LRIRCE, demand the responsibility of the members of the corporate bodies? As we have had the opportunity to clarify above, this responsibility is only established in the insolvency proceedings, hence the answer can be given through the people to whom the law confers the legitimacy to institute insolvency proceedings. In effect, Article 93 of the LRIRCE gives legitimacy to the debtor himself, to the surviving spouse, any heir of the debtor or head of household, to the partner or shareholder of the debtor or to any creditor (provided that the latter produces the Certificate of Incorporation that proves the regularity of its activities).


The responsibility that has been addressed is criminal and civil, excluding disciplinary liability, since it is carried out at the internal level of the company and can be directly exercised by the employer or the employee's hierarchical superior (article 62(2) of Law no. 23/2007, of 1 August).

In cases where criminal liability is imposed on the members of the corporate bodies, those concerned will be held liable in a criminal division of the same court, since such liability should be imputed by the insolvency court (article 76 of LRIRCE), but in a Division (criminal) other than that which handled the insolvency proceedings (civil division). However, this is a deduction that has generated some discussion among the Justice Administration bodies, and the contrary view, based on article 174 of LRIRCE, argues that the judge (civil court) that processes the insolvency has jurisdiction to attribute criminal liability to those concerned. In addition, the latter understands that with LRIRCE, there was a progress, as in other legal systems, to a stage in which a single judge (civil) is empowered to decide on all matters arising or related to the insolvency proceedings. The debate around this understanding will be developed in a separate article.

In this perspective and in summary, the refusal or (willful) impossibility of a debtor to satisfy the claims of its creditors, confers the right to any creditor to initiate insolvency proceedings and as a consequence of this proceedings, may subsequently demand the civil and criminal liability of the holders of the corporate bodies for having fraudulently placed the company in the situation of being unable to honor its commitments.

Although an insolvency proceeding can be initiated by a creditor, throughout the process other creditors are called and must present evidence of their claims.

If there is evidence of a criminal offense through indications of commission of crimes of fraud against creditors or other offenses established in law (Article 167 et seq. of LRIRCE as well as in other criminal legislation), a further criminal proceeding shall follow (which shall be appended) for imputation of criminal liability and it may, by judicial order and fear of disturbance of the regular progress of the proceedings, be ordered the arrest of the agents responsible and they may respond to the terms of the criminal proceedings in custody. However, it is important to note that Article 97 of the LRIRCE states that if the insolvency application is intentional, the claimant is also ordered to indemnify the debtor and if the action has more than one author, both will have joint and several liability in the compensation.

With regard to civil liability, there is not much room for debate on the competent jurisdiction, with the particularity that their action must be brought before the insolvency court within two (2) years of the final decision on the insolvency judgment, under penalty of prescription (Article 76 (2) of the LRIRCE), while criminal proceedings must be instituted within the limitation periods laid down in criminal law. 



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URGENT PROCEEDINGS IN ADMINISTRATIVE LITIGATION: A VIEW OVER THE ANCILLARY PROCEDURAL MEANS

Article 70 of the Constitution of the Republic of Mozambique enshrines the right to appeal to the courts against acts that violate rights and interests recognized by the Constitution and by law.

In administrative jurisdiction, the right to apply to the courts is embodied in Article 4 of Law No. 7/2014, of 28 February- Law on Administrative Litigation Proceedings (hereinafter referred to as LALP), which sets out the principle of effective judicial protection.

The principle of effective judicial protection includes the right to obtain, within a reasonable period, a judicial decision that appraises, with force of *res judicata*, each claim regularly deduced in court, as well as the possibility of having it executed and obtaining the precautionary measures, anticipatory or protective, aimed at ensuring the effectiveness of the decision. As a corollary of the above principle, LALP has instituted special dispute resolution mechanisms which, by their nature, utility and interest, cannot be subject to normal and possibly time-consuming processing.

These are the urgent proceedings provided for in Article 11 (1) of the LALP, namely, administrative acts relating to the formation of public works contracts, continuous supply and service provision for immediate public use, subpoena for information, process consultation or issuance of certificate and ancillary procedural means.

The aim of this article is to discuss the ancillary procedural means to the LALP, as urgent proceedings, identifying the characteristics, requirements, processing and other aspects inherent to it.

The ancillary procedural means are regulated in Chapter VI of the LALP, namely: suspension of effectiveness of administrative acts, summons to the administrative body, individual or concessionaire to adopt or refrain from certain conduct, early production of evidence and unspecified interim measures.

The ancillary procedural means have three essential characteristics, namely their instrumentality, temporariness and urgency.

As regards the instrumental nature, the ancillary procedural means lack functional autonomy. They are dependent on main proceedings, pending or to be initiated, losing their effectiveness with the delivery of the judgment in the main proceedings (and in other cases provided for by the law).

The temporariness of ancillary procedural means lies in the fact that, once decided, they will remain in force until the final decision of the main proceedings has been reached and may, however, be replaced, maintained or repealed in the event of a change in the factual circumstances which gave rise to them.

Its procedure is in accordance with the terms of the LALP (in cases not covered by the Code of Civil Procedure, pursuant to Article 2 of the LALP) and is of an urgent nature, which may have proceedings pending during judicial holidays, where secretarial acts related to it are performed as soon as possible and with precedence over any others.

There are four accessory procedural means provided in LALP, as described below:

1. Suspension of effectiveness of the administrative act (Article 132 et seq. Of the LALP)

It is an ancillary procedural means, generally linked to the judicial appeal for annulment and has the following requirements:

- The performance of the act is liable to cause irreparable damage or difficult reparation for the applicant or for the interests which the action seeks to safeguard;
- The suspension does not represent a serious breach of the public interest specifically pursued by the act; and
- There is no strong evidence that the action is unlawful.

Its procedure follows the terms set forth in articles 137 et seq. of the LALP. It should be noted that, when requested before the lodging of the relevant judicial appeal, the suspension of effectiveness expires with the expiry of the period for bringing an action for annulment.

2. Summons to an administrative body, individual or concessionaire to adopt or refrain from certain conduct (articles 144 et seq. of the LALP)

It is an ancillary procedural means which can be used when administrative bodies, individuals or concessionaires violate rules of administrative law or duties arising from an administrative act or contract or when the activity of the former and the latter violates a fundamental right or even when, in both cases, there is a fear of violation.

Are entitled to use this procedural means, the Public Prosecutors or any interested person to whom the violation of interests causes an offense worthy of judicial protection.

Its procedure follows the terms laid down in Article 145 et seq. of the LALP, and particular emphasis is given to the possibility of convolvement, in other words, in view of the complexity of the matter at issue, the rapporteur may, at any stage in the proceedings, determine to follow the terms of the judicial appeal of administrative acts, maintaining the urgency of the proceedings.

3. Anticipated production of evidence (articles 150 et seq. of the LALP)


The anticipated production of evidence is intended for, prior to the initiation of the process (or in the process already instituted), testimony, arbitration or inspection, when there is a fair fear that the testimony of certain persons or verification of certain facts by means of expert evidence or inspection will be impossible or very difficult. Its processing follows the terms set forth in Article 145 et seq. Of the LALP and the decision is rendered within three days.

4. Unspecified interim measures (Articles 154 et seq. of the LALP)

Interim measures have as assumptions:

- There is a well-founded fear that an administrative activity would cause damage to a legally protected right or interest; and
- That there is no prior administrative decision or a specific procedural means capable of ensuring effective protection in the light of the circumstances of the case.

As regards the procedure, in the Plenary and in the First Division of the Administrative Court, only documentary and testimonial evidence is accepted, the testimonies are given before the rapporteur and in writing. The interim measures issued cannot be replaced by a security deposit.

In view of the foregoing, it is safe to conclude that effective protection of legally protected rights and interests, as well as the effectiveness of judgments issued by the administrative courts, may be prejudiced by the passing of time, as such the ancillary procedural means are important, which, as they are not specifically aimed at definitively resolving the situation involving the dispute, ensure that the passing of time has no negative repercussions on the legal sphere of the persons involved. 



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